

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date 5 February 2008**

**Public Authority:** Lake District National Park Authority  
**Address:** Murley Moss  
Oxenholme Road  
Kendal  
Cumbria  
LA9 7RL

### **Summary**

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The complainant requested information surrounding a query/complaint made to the public authority regarding scaffolding erected at their property. The authority refused to supply the information, later relying on sections 31 and 40 of the Act. Following the Commissioner's intervention, the authority accepted that the Environmental Information Regulations 2004 were the correct access regime under which to consider the request and agreed to supply all the information requested save that information which constituted the personal information of the author(s) of the original query/complaint. The authority did not comply with regulation 14 as it issued an inadequate refusal notice. The Commissioner is satisfied that during the course of his investigation, the complainant was supplied with all the information to which they are entitled and therefore, does not require the authority to take any further action.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Parts 2 and 3 of the Environmental Information Regulations 2004. This Notice sets out his decision.
2. The Environmental Information Regulations (the "EIR") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part IV of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## The Request

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3. The complainant was informed that a complaint had been made to the Lake District National Park Authority (the "LDNPA") regarding scaffolding that had been erected for the duration of works that were being undertaken on the complainant's house. The complainant wrote to the LDNPA on 22 July 2005 and made the following request.
  - '...under the Freedom of Information Act, I request full disclosure of the complaint including name and address of complainant and any correspondence or notes of action that relate to this matter.'
4. The LDNPA responded by letter on 27 July 2005 explaining that the investigation file attracts the qualified exemption from the Freedom of Information Act relating to investigations and proceedings. Therefore, the information was exempt as it relates to an investigation conducted for the purpose of ascertaining whether circumstances which would justify regulatory action exist. The LDNPA had failed to mention the specific exemption.
5. The complainant wrote back to the LDNPA on 29 August 2005. Amongst other things, the complainant referred to the information request. The complainant had made a connection between investigations and proceedings and section 30 of the Act and asked for clarification as to why the information attracted a section 30 exemption and why the LDNPA had not mentioned the procedure for internal review of the decision, as it was required to do so by the legislation. The complainant went on to explain why they believed the decision to be incorrect, pointing out that the LDNPA had not explained the legal basis of any investigation or prosecution and that the LDNPA had not conducted a public interest test, again as it was required to do. The complainant also put forward reasons as to why the public interest lay in disclosure of the information requested. Namely, that disclosure promotes accountability and transparency in the spending of public money, as the investigation was now closed there should be no detriment to future investigations, and that those who complain seem to be afforded more protection than the accused even after a complaint is proven unfounded.
6. The LDNPA replied on 29 September 2005. It explained to the complainant that it tries to protect the privacy of individuals and this is why it is not able to release the name and address of the 'informants' and that the Data Protection Act protects those details. In respect of the legal basis for the application of the exemption, the LDNPA stated that, 'There are circumstances in which the erection of scaffolding can constitute a building or engineering operation or other like operation, requiring planning consent. I believe your building is a Listed Building and so particularly sensitive in planning terms. Failure to obtain planning consent, as I am sure you know, can render development unlawful and an enforcement notice may be served by the Planning Authority requiring the breach of planning control to cease. Failure to comply with the terms of the enforcement notice can amount to a criminal offence. For these reasons, the planning enforcement process is a legal process which does attract exemption from the Freedom of Information Act as the process may result in proceedings being

issued in the Magistrates' Court. Furthermore, if we were to reveal the identity of those who lodge complaints with the Authority, members of the public could be discouraged from coming forward with information. This could hamper our enforcement work and could result in unlawful development taking place without our knowledge.' The complainant was also told to contact the Corporate Development Director to request an internal review.

7. The complainant replied in a letter dated 2 October 2005, in which the following reasons were put forward as to why the LDNPA had failed to comply with the Act. That the authority had not issued a refusal notice within the required time limit of 20 working days, that it had failed to apply the public interest test, that it failed to correctly apply the exemption, and that it failed to provide the information.
8. In response, the LDNPA wrote back to the complainant on 14 October 2005. In this letter, the Authority claimed that the complainant's information request was received on 7 September 2005 and the response sent on 29 September 2005. It also stated that the public interest test had been applied and was 'alluded to' in that response, and that letter also explained about the Data Protection Act and 'it is clearly not in the public interest to breach the provisions of that Act'.
9. The complainant duly wrote to the Corporate Development Director on 15 October 2005 requesting an internal review of the decision. The reply was sent on 27 October 2005 and stated that the letter sent to the complainant on 14 October was an accurate account and that none of the reasons the complainant had put forward as to why the LDNPA had failed to comply with the Act were valid.

## The Investigation

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### Scope of the case

10. On 13 February 2006, the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the following points. That LDNPA had failed to comply with the Freedom of Information Act for the following reasons.
  - Failure to issue a refusal notice within 20 working days
  - Failure to correctly apply the exemption under the Act
  - Failure to correctly apply the public interest test required by applying a qualified exemption
  - Failure to provide the information requested
11. The complainant also raised other issues that are not addressed in this notice because they are not requirements of Parts 2 and 3 of the Regulations.

## Chronology

12. The Commissioner wrote to the LDNPA on 29 March 2007 asking for clarification on how it had handled the request. Having reviewed the correspondence, it was not clear to the Commissioner which exemption the authority was relying upon to withhold the requested information. Section 30 had been mentioned, however, this appeared to be an assumption on the part of the complainant as no specific exemption had been cited by the authority in any of the correspondence supplied to the Commissioner. It was also unclear to the Commissioner exactly what information was being withheld from the complainant and so he asked the LDNPA to forward to him copies of all the information, released and withheld.
13. The Commissioner's letter was acknowledged by the authority in a letter dated 11 April 2007 indicating that a response would be forthcoming by 27 April 2007. As the expected response was not received, the Commissioner contacted the authority again by email on 9 May 2007. An emailed reply the same day apologised for the delay and informed the Commissioner that the response would be sent the next day.
14. Subsequently, the Commissioner received a letter from the authority dated 10 May 2007, which clarified that the exemption relied upon was actually that set out in section 31(1)(g) with reference to the purpose as outlined in 31(2)(c). This exemption allows a public authority to withhold information if its release would, or would be likely to, prejudice the exercise of its functions (31(1)(g)), for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. The authority also explained that it had carried out the public interest test (as required following the application of a qualified exemption). It stated that identification of those making complaints would deter legitimate complaints being made and 'would contribute to a breakdown in confidence in the authority's ability to investigate complaints and react appropriately.'
15. The Commissioner telephoned the authority on 15 May 2007. It was put to the LDNPA that the information in question fell within the definition of environmental information as set out in regulation 2(1) and therefore, that the correct access regime to apply would be the Environmental Information Regulations 2004, rather than the Freedom of Information Act 2000. It was also pointed out to the authority that much of the information could be released without prejudice if redacted. It was acknowledged that the documents contained a certain amount of personal data in respect of the identity of the original complainant, but if that were exempted with reference to regulation 13, then the remaining information could be released and supplied to the complainant. The authority's representative was amenable to this suggestion and agreed to consult with colleagues and inform the Commissioner of its decision.
16. On 25 May 2007, the authority telephoned and confirmed that it was willing to release the information, redacted as discussed, and supply it to the complainant.
17. On 4 June 2007, the Commissioner received a telephone call from the complainant to say that a letter had arrived, but that they were still not satisfied

because they had not been able to identify the nature of the complaint. That is, what the initial complaint to the authority against the complainant was regarding. In addition, the complainant was concerned about the fact that the Environmental Information Regulations had been mentioned, as they did not want to begin the process again from the start. The Commissioner's representative was able to reassure the complainant that the switch to the Regulations would not affect the progression of the complaint and that there was no need for the complainant to repeat the request or complaint. The complainant was informed of the likely outcome to the complaint, namely that only personal data would be withheld and all other information supplied. It was pointed out to the complainant that release of information under FoI and EIR is release to the public not the requestor and that authorities had a duty under the Data Protection Act 1998 to protect personal data in their possession.

18. On 4 June 2007, the Commissioner received a copy of a letter sent from the complainant to the LDNPA. Much of the letter was concerned with issues beyond the Commissioner's remit, but part of the letter questioned the authority's reliance on exception 12(5)(f) where information can be withheld if its release would adversely affect the interests of the person who supplied the information voluntarily. This concerned the Commissioner, as originally it been agreed with the authority that the most appropriate exception with which to withhold the personal information was regulation 13.
19. On 5 June 2007, the Commissioner received a copy of the letter from the LDNPA to the complainant in which 12(5)(f) had been relied upon to withhold the identity of the original complainant. Copies of the redacted information that had been supplied to the complainant were enclosed.
20. The Commissioner's representative telephoned the LDNPA on 14 June 2007 to enquire as to the reason for its departure from the agreed solution that had been reached. The LDNPA admitted its error and assured the Commissioner that it would write again to the complainant to set the record straight. It was also suggested to the LDNPA that as the main concern of the complainant (apart from wanting to know the identity of the person who complained to the authority) was to know what the original complaint was about, the authority might consider offering a summary or précis of the complaint rather than the actual letter that was sent. The authority was reminded that the Act and the Regulations give the right to access information rather than documents and that this could go some way to offering a solution. The authority agreed to consider this course of action.
21. Following emails to the authority requesting an update on the situation dated 11 July and 2 August 2007 that had received no response the Commissioner telephoned the authority on 16 August and eventually spoke to the LDNPA on 17 August 2007. The authority indicated that the letter to the complainant would be sent immediately.
22. The LDNPA duly wrote to the complainant on 21 August 2007 and supplied the Commissioner with a copy of the letter. In the letter, the authority referred to the application of regulation 13 to withhold the personal information of the original complainant. It explained that disclosure would cause unnecessary distress to

the person(s) making the complaint, likely deter others from raising concerns relating to development control matters and that as the complainant had already been supplied with information that set out the nature of the query, disclosing the identity of the data subject would not assist understanding of the issues involved. The authority had also taken the advice of the Commissioner and had given the complainant a summary of the original letter of complaint written by the data subject. Therefore, the only outstanding information not supplied to the complainant was the identity of the author.

23. On 23 August 2007, the Commissioner wrote to the complainant explaining that he was now satisfied that the authority had released all the information that it was appropriate to release in relation to this matter. He informed the complainant that the only information still being withheld was the personal data of a third party, release of which would breach the Data Protection Act. He asked that now the majority of the information requested had been supplied and the only information still withheld was the identity of the original complainant, whether the complainant would consider withdrawing the complaint.
24. In an email sent on 16 September 2007, the complainant informed the Commissioner that they were not content to withdraw the complaint. They stated that the LDNPA had still not provided all the information, and specifically mentioned the planning regulation that it was alleged had been breached and on which the enforcement investigation was started, they therefore wished to proceed to a formal conclusion.

## Analysis

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### Procedural matters

### Legislation

25. The Commissioner is satisfied that, on the whole, much of the information held for the purposes of the planning process will constitute environmental information, including information held in relation to planning enforcement. These matters are considered to be administrative measures likely to affect the elements and factors listed in paragraphs (a) and (b) of the definition of environmental information as set out in regulation 2(1). For example, planning is likely to affect land use, landscape, waste generation and disposal, water provision and drainage, energy use and noise, amongst others. The Commissioner is satisfied that most planning information will therefore, fall within the broad definition set out in regulation 2(1)(c). Indeed, the Information Tribunal also accepts that documents relating to planning fall within the definition of environmental information (see [Mr David Markinson v Information Commissioner](#) (28th March 2006) Appeal Number: EA/2005/0014 (FER0061168)).



## Regulation 14 – refusal to disclose information

26. Under the Regulations (and the Act), the authority is obliged by regulation 14 to inform the applicant within 20 working days if it is refusing to supply the information requested. It is also obliged to specify the reasons not to disclose the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner. The full texts of all relevant regulations are included in the legal annex to this notice.
27. It is not necessary for the authority to indicate that it is sending an official 'refusal notice'. It simply has to refuse the request in writing. Following the complainant's request dated 22 July 2005, the authority wrote refusing to supply the information in a letter dated 27 July 2005. This letter therefore, constitutes the authority's refusal notice, well within the 20 working day time limit.
28. However, the authority failed to state clearly the exemption it was relying upon, simply referring to a qualified exemption relating to investigations and proceedings. It also failed to inform the complainant of the matters it took into consideration with respect to the public interest test. It also failed to inform the complainant of their rights of appeal.
29. The complainant made representations to the authority in a letter dated 29 August 2005. The authority responded to this in a letter dated 29 September 2005. The response was therefore, sent within the 40 working days allowed under regulation 11. The authority's response however, informed the applicant that if they wished it to perform an internal review, they should write to the Corporate Development Director. There is nothing to stop the authority offering to review its decision as many times as it likes within the 40 working days prescribed by regulation 11, although the complainant was at this point entitled to make a complaint to the Commissioner. In fact, the authority did not inform the complainant of their right to contact the Commissioner until its letter dated 27 October 2005. The authority's confusion and its consequential failure to inform the complainant of their rights at the appropriate time, contributed to making the complainant's request a lengthier and more inconvenient process than was necessary under the law.

## Exception

30. As all parties are content that the EIR apply, the Commissioner has not found it necessary to consider the application of section 31 of the Act.
31. Following the intervention of the Commissioner, the LDNPA was happy to agree that there would be no adverse affect if it released the majority of the information requested. The only information it still sought to withhold was the personal information of a third party, the identity of the person(s) who made the original complaint to the authority that initiated the investigation as to whether a breach of planning law was taking place.

32. Regulation 13 allows an authority to exempt information from public release if that information constitutes personal information, release of which would breach one of the data protection principles. The equivalent exemption in the Freedom of Information Act is section 40. The Commissioner accepts that to release the identity of the author(s) of the original complaint letter would breach the first data protection principle, that personal data should be processed fairly and lawfully.
33. In this case, part of the information relevant to the request consisted of the identity and contact details of the person or persons who contacted the authority with the initial query/complaint regarding the property and the scaffolding. This personal data was redacted from the information supplied. When a person submits a complaint to the local authority it is usually done so with the expectation that their identity will not be revealed. The one document exempted in its entirety, is believed by the authority to comprise wholly the personal data of the author(s). Personal data is not only the name and address of a person but also any information that could identify a living individual. The authority believes that it is not possible to redact the personal data from the letter and the Commissioner accepts this.
34. It is worth reiterating two important aspects of both the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. Firstly, both sets of legislation establish the right to access *information*, as opposed to specific documents. Furthermore, the Act and the Regulations oblige public authorities to release information to the *public* upon request. In practice, this means that the authority has to assess a request for information on the basis that its release will be release to the public rather than the individual requestor.
35. As redaction of the personal information from the exempted letter would have resulted in the authority supplying a meaningless document, the Commissioner asked the LDNPA to consider offering a summary of the contents which it agreed to do and which it included within a letter to the complainant. The Commissioner is satisfied that the summary covers the non-exempt information and that the only information not supplied was that personal data of the original complainant(s). Therefore, the Commissioner is satisfied that the only information that the authority has not released and supplied is the identity of the complainant(s), regulation 13 applies, and the authority is entitled to withhold that information.

### **Commissioner's remit**

36. During the course of the investigation, the complainant expressed their dissatisfaction because they still had not been informed of the planning regulation that it was alleged had been breached. However, the Commissioner's remit is to investigate whether a request for information has been dealt with in accordance with the legislation. The LDNPA need only supply information it holds that it relevant to the request. The Commissioner is satisfied that the authority has now supplied all the information relevant to the original request.



## The Decision

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37. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Regulations:
- The LDNPA have correctly withheld the personal information of a third party under regulation 13.
38. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:
- Initially, the LDNPA did not identify the correct access regime; consequently, this led to further breaches of the legislation.
  - The LDNPA issued an inadequate refusal notice. The refusal notice did not specify the exception being relied upon, did not detail the public interest test considerations, and did not inform the complainant of their appeal rights. These are all requirements under both the Regulations and the Act. The LDNPA therefore, did not comply with regulation 14.
  - By withholding information inappropriately, the LDNPA did not comply with regulation 5(1), which requires that a public authority make environmental information available on request.

## Steps Required

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39. As the information to which the complainant is entitled has now been supplied by the authority, the Commissioner requires no steps to be taken.

## Other Matters

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40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following.
41. The Commissioner reminds the LDNPA of its duties under Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004, issued by Defra under regulation 16. The Code sets out the authority's obligations in respect of both the refusal of the request (section XI of the Code, relating to paragraph's 56-57 of this notice) and the failure to conduct an appropriate internal review (section XII of the Code, relating to paragraphs 48-67 of this notice).
42. The LDNPA should also reemphasise to its staff the importance of identifying the correct access regime for information requests.

43. The Commissioner would also point out to the LDNPA that guidance is available on the ICO website to assist in handling information requests under both the Act and the Regulations and the ICO's Good Practice Team would be happy to provide more detailed advice if requested.

### **Failure to comply**

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44. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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45. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 5<sup>th</sup> day of February 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
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SK9 5AF**