

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

Decision Notice

Date: 19 March 2008

Public Authority: Sutton and East Surrey Water Plc
Address: London Road
Redhill
Surrey
RH1 1LJ

Summary

The complainant requested information in relation to works carried out by the public authority. The public authority initially responded by stating that it did not believe the EIR applied. Following the Commissioner's intervention, the public authority accepted that the EIR did apply to this request and released most of the information to the complainant. The public authority also informed the complainant that some of the information was not held and that it was withholding other information by applying regulation 13 (personal data). The Commissioner upheld the application of Regulation 13 but found that the public authority had responded later than 20 working days after receipt of the request. The Commissioner also found that the public authority had breached the EIR by failing to offer the complainant an internal review of the request.

The Commissioner's Role

1. The Environmental Information Regulations (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 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The complainant has made various requests relating to works carried out by the public authority in Harrow Road West. The request, which is the subject of this Decision Notice, was made on 11 April 2006, when the complainant asked for the following information:

- A) "The Codes of Practice you are working to
 - B) The CDM Statement, programme and HSE check
 - C) The Form of Tender (less prices)
 - D) The Conditions of Contract (if published then please simply state full title, Edition and date)
 - E) The material utilities notice to the Highway Authority and any formal consent response from them to you in answer
 - F) The Plan or Plans (only for Harrow Road West and the "tie" ends of Coldharbour Lane and the Horsham Road) accompanying the notice
 - G) Plans and correspondence identifying that you took all effective and professional steps before the works commenced to find, identify and categorise suitable land for contractor's use, plant and materials storage and safe traffic, etc., working in a competent and professional manner and in accordance with standard industry good standards/ codes/ practices/ specification"
3. The complainant alleged that the public authority's external solicitor responded to the request on 12 April 2006, stating that their client was not prepared to release the documents. However, the complainant has not forwarded a copy of that response to the Commissioner.
 4. On 24 April 2006, the complainant wrote to the public authority expressing his dissatisfaction with the solicitor's response of 12 April 2006.
 5. On 8 May 2006, the public authority responded by stating that it did not believe that the EIR apply to the matter in question.

The Investigation

Scope of the case

6. On 4 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant raised various issues and quoted various separate regulations in the EIR. On 11 May 2006, the complainant wrote to the Commissioner to complain about the response he had just received from the public authority dated 8 May (referred to at paragraph 5 above).
7. The Commissioner understood that there were two main issues of complaint, which he could consider. He therefore wrote to the complainant on 16 May 2007 seeking confirmation that his complaint concerned the following aspects:
 - the public authority's response of 8 May 2006 did not provide the complainant with the requested information
 - the public authority did not offer the complainant the chance to have his request reviewed

8. The Commissioner informed the complainant that he had seen a copy of the complainant's letter sent to the public authority on 20 April 2006. In that letter, the complainant clearly informed the public authority that element E of the request of 11 April 2006 was no longer outstanding. Therefore, the Commissioner informed the complainant that he would not investigate element E.
9. The complainant wrote to the Commissioner on 17 May 2007 stating that he reserved his position in all respects and wished to make no observations whatever, beyond what he had already said. The Commissioner therefore had no alternative other than to proceed with his investigation on the basis of his understanding of the complaint as set out at paragraph 7 above.
10. It was also necessary for the Commissioner to consider whether Sutton and East Surrey Water was a public authority for the purposes of the EIR and whether the requested information fell within the definition of environmental information in the EIR.

Chronology

10. On 31 May 2007, the Commissioner wrote to the public authority asking it to:
 - a) Confirm whether it accepts that the request is for environmental information and, if not, explain why
 - b)
 - i) Confirm whether it holds the environmental information requested, and,
 - ii) if the information is held, confirm whether it will provide the information to the complainant or cite an exception in the EIR considered relevant to withhold the information.
11. On 29 June 2007, the public authority wrote to the Commissioner providing the following information:
 - a) confirmation that it accepted that the requested information was environmental
 - b) confirmation that it held information in relation to elements A, B, C, D and G of the request, and would disclose most of it. However, it was unable to disclose some of the information as it referred to third parties and would therefore breach regulation 12(3) – personal data -of the EIR.
12. In relation to element F of the request, the public authority confirmed that there were no plans attached to the material utilities notice and covering the specific areas requested.
13. On 4 July 2007, the Commissioner asked the public authority to issue a response to the complainant, which the public authority did on 30 July 2007, reiterating the points conveyed at paragraphs 11 and 12 above and disclosing the information. Whilst it confirmed that it held no specific plans as requested at element F, it did provide the complainant with a plan outlining the route of the entire works.

14. On 9 August 2007, the Commissioner wrote to the complainant asking him whether his complaint now concerned the fact that some information had been withheld under regulation 12(3). The complainant responded to the Commissioner in a fax of 8 August 2007, stating that he required a Decision Notice to be issued. The Commissioner therefore had no alternative other than to proceed with his investigation on the basis of his understanding of the complaint as set out at paragraph 7 above.
15. On 28 August 2007, the Commissioner wrote to the public authority requesting the following information:
 - a) Whether the plans at element F of the request were incorporated in other plans provided in response to element G of the request.
 - b) An explanation of which principle of the Data Protection Act 1998 (the 1998 Act) would be breached by disclosure of some of the information.
 - c) A copy of the withheld information.
16. On 10 September 2007, the public authority wrote to the Commissioner providing the following information:
 - a) There is no plan of the specific areas as requested at element F. It clarified that the plan of the entire route of the works included the part of the route for which the complainant requested a plan at element F.
 - b) No principle of the 1998 Act was cited nor any explanation of why it would be breached.
 - c) The withheld information was provided.
17. On 12 September 2007, the Commissioner wrote to the public authority repeating his request for an explanation of which principle of the 1998 Act would be breached.
18. On 19 September 2007, the public authority wrote to the Commissioner confirming that the first principle of the 1998 Act would be breached by disclosure of the withheld information and provided some reasons for this.
19. On 2 October 2007, the Commissioner wrote to the public authority requesting further explanation of how the first principle of the 1998 Act would be breached. On 17 October 2007, the public authority responded to the Commissioner with such a further explanation.

Analysis

Is the organisation a public authority under the EIR?

20. The Water Industry Act 1991 provides that water undertakers are appointed either directly by the Secretary of State or indirectly by the Director General of Water services, who is instructed to do so by the Secretary of State. The water undertakers, of which Sutton and East Surrey Water is one, can have their

appointment terminated or have conditions attached by those same people. Therefore they can be said to be appointed to administer the public water supply on behalf of the government and fall within the definition of a public authority set out in regulation 2(2)(c) of the EIR. This regulation states that -

“2(2)(c) public authority means...any other body or other person, that carries out functions of public administration.”

21. Water undertakers are appointed and regulated by a government department and, under the Water Industry Act 1991, have public responsibilities relating to the environment. As such, Sutton and East Surrey Water could also fall within the definition of a public authority set out in regulation 2(2)(d)(i) of the EIR. This regulation states that -

“2(2)(d) public authority means...any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –

(i) has public responsibilities relating to the environment.”

22. The Commissioner considers that OFWAT, as regulator of the water industry, is the body which ensures companies are able to carry out their responsibilities under the Water Industry Act 1991 as updated by the Water Act 2003. These responsibilities include a wide range of specific duties (contained within sections 3 & 4 of the Water Industry Act 1991) that are designed to help protect the environment.
23. In view of this, the Commissioner has concluded that Sutton and East Surrey Water fall within the definition of a public authority for the purposes of the EIR.

Is the information environmental?

24. The public authority has not disputed that the information requested at elements A, B, C, D, F and G is environmental and the Commissioner is satisfied that it constitutes in its entirety information on measures which shape how the public authority carries out its work and, more specifically in this case, its works in Harrow Road West. The measures will inevitably affect or be likely to affect the land, water, soil and air; four of the elements of the environment listed in 2(1)(a) of the EIR. The information would therefore fall within the definition of environmental information provided by 2(1)(c) of the EIR, as the measure will be likely to affect several of the elements listed in 2(1)(a) of the EIR. This extract of the EIR can be found in the legal annex to this Decision Notice.

Procedural matters

Whether the response of 8 May 2006 provided the information

25. In the public authority's response of 8 May 2006, it stated that it did not believe the EIR applied to the request. However, following correspondence with the Commissioner, the public authority then accepted that the request was for environmental information and provided a response to the complainant on 30 July

2007. The public authority provided information in response to elements A, B, C, and D and confirmed that it did not hold information in relation to element F. The Commissioner accepts that the public authority does not hold the information in relation to element F. It provided some information in relation to element G of the request, but confirmed that it was applying regulation 12(3) of the EIR to withhold other information in relation to that element. The application of that regulation is discussed below, but the Commissioner has concluded that the regulation was correctly applied.

26. It is clear that the response of 8 May 2006 did not provide the complainant with the information requested.. The Commissioner finds that the response issued on 30 July 2007 was much later than the 20 working day limit provided by regulation 14(2) of the EIR and therefore the public authority was in breach of that regulation. The Commissioner does not require the public authority to take any action in this regard since the information has been provided. However, the Commissioner would remind the public authority to ensure that it responds to requests for information within the 20 working day limit. Such future breaches may lead the Commissioner to take enforcement action. The public authority also breached regulation 14(3) in that it did not provide a refusal notice that specified the reasons not to disclose the information.

Whether the public authority was obliged to offer a review

27. As the public authority had received a valid request for environmental information, it should have informed the complainant that he may request a review of its decision as required by regulation 14(5) of the EIR. The Commissioner does not require the public authority to take any action in this regard as the information has been provided. However, the Commissioner would remind the public authority to ensure that it offers complainants the opportunity to have their requests reviewed in the future. Such future breaches may lead the Commissioner to take enforcement action.

Exception

Regulation 12(3)

28. Regulation 12(3) of the EIR refers directly to regulation 13, which applies if any of the principles of the 1998 Act would be breached. The Commissioner is satisfied that the first principle would be breached and sets out his reasons below.
29. The Commissioner has viewed a copy of the withheld information and is satisfied that it is personal data as defined by the 1998 Act.
30. The public authority has informed the Commissioner that the third party, to whom the personal data belongs, is one of its customers. That customer did not ask the public authority to keep their information confidential and the public authority did not give the customer an explicit assurance that the information would be kept confidential. However, it is generally expected that information a customer provides to their utility company will not be shared with a third party.

31. Under the first principle disclosure of personal data must be fair and lawful. In addition, information can only be disclosed if one of the conditions in schedule 2 of the 1998 Act is met. The relevant condition to be considered is condition 6:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

The Commissioner considered that there may be a public interest in releasing the personal data if the third party had some influence on the workings of the public authority. However, the public authority informed the Commissioner that the third party had no involvement with the operation of the organisation at any level. The Commissioner there finds that the disclosure is not necessary for the purposes legitimate interests perused by the public and the disclosure would prejudice the rights and legitimate interests of the data subject.

32. In conclusion, the Commissioner considers that it would be unfair to disclose the information and the First Principle of the 1998 Act would be breached.

The Decision

33. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the EIR:

- The public authority was correct to withhold some of the information by applying Regulation 12(3).

34. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The public authority issued a response to the complainant later than 20 working days after the date of the request, which was not in accordance with regulations 5(2) and 14(2).
- The public authority did not offer the complainant a review of its decision, which was not in accordance with Regulation 14(5).

35. The public authority did not hold the information in relation to element F of the complaint's request.

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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.

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 19th day of March 2008

Signed

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal annex

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 2(2) Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
 - (i) has public responsibilities relating to the environment;

- (ii) exercises functions of a public nature relating to the environment; or
- (iii) provides public services relating to the environment.

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11;
and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Data Protection Act 1998

Schedule 1: Data Protection Principles

First principle:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2: Conditions relevant for purposes of the first principle: processing of any personal data

- 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
- (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.