

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

Decision Notice

Date: 21 June 2010

Public Authority: Office of the First Minister and
deputy First Minister
Address: Castle Buildings
Stormont Estate
Belfast
BT4 3SR

Summary

The complainant requested a copy of the Adjustments to the Regional Development Strategy (RDS) for N Ireland 2025 – First Five Year Review which was approved by the Executive Committee of the NI Assembly (the Executive) in April 2008, or a list of the 157 changes which were made to the document when it was published in June 2008. The public authority confirmed that whilst it did not hold a list of the changes, it did hold a copy of the RDS document approved by the Executive but refused to provide it citing section 35(1)(b) of the Act. The Commissioner indicated to the public authority that the withheld information fell within the definition of environmental information under the EIR. However whilst the public authority appreciated the environmental nature of the information contained within the RDS document, it did not regard the focus of the complainant's request to be environmental. The public authority was therefore content to continue to rely upon the exemption under s35 of the Act to refuse the information. The Commissioner found that the information requested was environmental information and should have been considered under the Environmental Information Regulations 2004 (EIR) and, in failing to do so the public authority has breached regulation 5(2) of the EIR. The Commissioner requires the public authority to either provide the information or issue a valid refusal notice that complies with regulation 14 of the EIR within 35 days of the date of this notice.

The Commissioner's Role

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 Part 1 of the Freedom of Information Act 2000 (the "Act").
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 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR. This Notice sets out his decision.

Background

3. Section 3(1) of The Strategic Planning (Northern Ireland) Order 1999 states that the Department of Regional Development in Northern Ireland (the DRD)

"shall formulate, in consultation with other Northern Ireland departments, a regional development strategy for Northern Ireland, that is to say a strategy for the long-term development of Northern Ireland."
4. 'Shaping our Future' is the Regional Development Strategy (RDS) for Northern Ireland up until the year 2025 and was published in September 2001. The RDS sets strategic guidance on a range of social, economic and environmental matters and all NI Government Departments are required to have regard to the RDS in the exercise of any development function¹ eg urban/rural planning, property, social need, infrastructure, energy or economic development
5. The RDS is subject to ongoing five year reviews and in June 2008 the DRD, following public consultation, published adjustments to the RDS following its first five year review.

¹ The Strategic Planning (Northern Ireland) Order 1999

6. The RDS document was cleared by the NI Executive (the Executive Committee of the NI Assembly) at its meeting on 10 April 2008. Changes to the document were subsequently made prior to its publication and this was reported in the media.

The Request

7. On 1 September 2008 the complainant requested the following information from the Office of the First Minister and deputy First Minister (OFMdfM):

“Further to the revelation that Minister Murphy made over 150 unauthorised changes to the RDS document (Regional Development Strategy), I write to seek either a copy of the documentation as approved by the Executive, or a list of the 157 changes which were made.”
8. On 27 October 2008 OFMdfM provided a substantive response to the complainant. OFMdfM advised that it held the document that was agreed by the Executive (the original RDS document). OFMdfM advised that it did not hold a list of any subsequent changes that were made to this document. Furthermore OFMdfM refused to disclose the original RDS document, citing the exemption in section 35(1)(b) of the Act, as it related to ‘proceedings of the Executive Committee of the Northern Ireland Assembly’.
9. OFMdfM argued that disclosure of the original RDS document would undermine the convention of collective cabinet responsibility, which allows for the maintenance of space to formulate, develop and refine policy and facilitates the consideration of potentially a wide range of options. OFMdfM was of the view that, if the original RDS document was to be disclosed the ability of Ministers to represent their views and departmental interests with candour could be undermined. OFMdfM considered that this would be detrimental to the process of collective government and the quality of decisions made at the highest level.
10. On 7 November 2008 the complainant requested an internal review of OFMdfM’s decision not to disclose the original RDS document.

11. On 4 December 2008 OFMdfM provided its internal review response which upheld the original decision.

The Investigation

Scope of the case

12. On 10 December 2008 the complainant contacted the Commissioner to complain about the way his request had been handled.
13. The complainant specifically asked the Commissioner to consider the following points:
 - there was an “incongruity and unsustainability” in claiming reliance on section 35(1)(b) to withhold the original RDS document when it had already been publicised that it had been altered to the extent of 157 changes, and
 - access was being denied to the original RDS document on the basis of maintaining and protecting the principle of collective cabinet/ministerial responsibility yet it was a breach of this doctrine by a Minister that gave rise to the alteration of the document.
14. The Commissioner notes that the complainant had requested ‘a copy of the original RDS document as approved by the Executive or a list of the 157 changes which were made’. In his complaint to the Commissioner the complainant did not dispute OFMdfM’s indication that it did not hold a list of changes.
15. Therefore the Commissioner is of the view that the withheld information in this case is the original RDS document. On this basis the Commissioner’s investigation focused on and the Commissioner’s decision relates to the original RDS document approved by the Executive in April 2008. However the Commissioner has also considered the handling of the request by OFMdfM.
16. The Commissioner notes that the version of the RDS document published on the DRD website differs from the original RDS document only in respect of some changes in terminology. The Commissioner also notes that the fact that the document had been altered after receiving Executive

approval had been reported in the media. However the Commissioner is aware that the nature of the alterations is not in the public domain.

Chronology

17. On 1 March 2010 the Commissioner wrote to OFMdFM regarding the way in which it had handled the complainant's request. The Commissioner also asked for OFMdFM's representations regarding its application of section 35 of the Act.
18. On 26 March 2010 OFMdFM responded to the Commissioner, providing a copy of the original RDS document. OFMdFM also provided a copy of the amended RDS document which appears as the final version on the DRD website.
19. OFMdFM argued that the original RDS document should be withheld under s35(1)(b) of the Act because it related to 'proceedings of the Executive Committee of the NI Assembly' and more specifically to a paper tabled to the Executive Committee.
20. OFMdFM also contended that the public interest arguments in favour of withholding the requested information outweighed the arguments in favour of disclosure.
21. On 12 April 2010 OFMdFM advised the Commissioner that discussions had taken place with DRD with a view to informally resolving the complaint by releasing the requested information. Accordingly the Commissioner asked for written confirmation of OFMdFM's intention to release the information to the complainant.
22. On 16 April 2010 OFMdFM advised the Commissioner that it had reconsidered the possibility of informal resolution in conjunction with the DRD and at that point in time it was not content to release the original copy of the RDS document approved by the Executive. OFMdFM also confirmed that its arguments for non-disclosure remained as stated in the refusal notice to the complainant, notably the need to maintain the principle of collective Ministerial responsibility.
23. The Commissioner considered the original RDS document in detail, and reached the view that in the context of the whole document the information was in fact environmental

information. Therefore the Commissioner was of the view that the complainant's request ought also to have been considered under the EIR.

24. Accordingly on 26 April 2010 the Commissioner contacted OFMdfM to set out this view and to seek any additional representations OFMdfM might wish to make regarding the engagement of exceptions under the EIR.
25. On 27 April 2010 OFMdfM responded to the Commissioner. OFMdfM advised that it appreciated the environmental nature of the information contained within the original RDS document, but it did not regard this information to be the focus of the complainant's request. Rather, OFMdfM reminded the Commissioner that the complainant had asked specifically for the changes made to the document.
26. Therefore OFMdfM stated that there was little to be gained in providing further representation in relation to any exceptions it would wish to apply in respect of the EIR.

Analysis

Substantive Procedural Matters

Is it environmental information?

27. OFMdfM regarded the focus of the complainant's request as the list of the 157 changes made to the original RDS document after it was agreed by the Executive. In OFMdfM's view, the changes themselves did not constitute 'environmental information'.
28. Accordingly OFMdfM handled the request under the Act rather than the EIR.
29. Whilst the Commissioner notes OFMdfM's interpretation of the focus of the request, the complainant has nonetheless asked for a copy of the original RDS document in its entirety. Since this document relates to the regional development of Northern Ireland, the Commissioner has considered to what extent the withheld information is environmental information. As referenced in para 15, the Commissioner clarified the

scope of the request as being the original RDS document and thus has considered the whole document in its entirety.

30. Regulation 2(1) provides that:

“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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)‘.

31. The Commissioner does not believe that it is necessary for information to have a direct effect on the environment for it to be environmental, only that it needs to be linked to the relevant parts of regulation 2(1). He considers that the phrase “any information...on” should be interpreted widely and in line

with the purpose expressed in the first recital of Council Directive 2003/4/EC, which the EIR enact.²

32. The Commissioner's view, in line with the purpose expressed in the first recital of Council Directive 2003/4/EC, is that "any information ...on..." will usually include information concerning, about or relating to the element of the environment in question. In other words, information that would inform the public about the element under consideration, and would therefore facilitate effective participation by the public in environmental decision making, is likely to be environmental information.
33. The Commissioner has inspected the original RDS document as requested by the complainant. It comprises a copy of the adjustments made to the RDS as a result of its first five year review which was passed to the Executive for approval. The original RDS document includes information on urban and rural land development and planning, environmental protection, housing and transportation measures. It does not include any communications between Ministers, internal briefings for Ministers, submissions etc.
34. The Commissioner believes that this information variously falls within regulation 2(1)(a), (c), (e) and (f) of the EIR. However, since he is also satisfied that all of it falls within regulation 2(1)(c) he has restricted his analysis to that paragraph.
35. The Commissioner takes the view that, to be environmental information under regulation 2(1)(c), the requested information must, first, be 'on' a measure or an activity, and secondly, the measure or activity (not the information itself) must affect, or be likely to affect, the elements and factors in regulation 2(1)(a) and (b), or be designed to protect the elements in regulation 2(1)(a).
36. In this case, the Commissioner has concluded that, since the requested information relates to past and future regional development strategy and policy, it falls within the definition of 'policies, legislation, plans, programmes [etc]' referred to in

² Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

regulation 2(1)(c). Accordingly, it does indeed constitute information on a relevant 'measure' for the purposes of regulation 2(1)(c). The Commissioner is also satisfied that the information also relates to relevant 'activities' for the purposes of regulation 2(1)(c).

Exemptions or exceptions claimed

37. OFMdfM considered the complainant's request under the Act and relied solely upon s35(1)(b) of the Act to withhold the requested information.
38. The EIR stipulates that information about a measure is not environmental information unless the measure is affecting (or likely to affect) or protecting the elements of the environment cited in regulation 2(1)(a). The Commissioner takes the view that there must be some evidence that the factor would have the supposed effect. In this case, the Commissioner is satisfied that the measures and activities which the withheld information bears on were indeed likely to affect the state of elements of the environment falling within regulation 2(1)(a), particularly by way of the impact of future regional development on planning policy, gas energy infrastructure, coastal and waterway management, urban renewal and housing allocation and environmental protection.
39. As the information is environmental the Commissioner does not consider that exemptions under the Act can be relied upon. There is no direct equivalent of section 35(1)(b) of the Act in the EIR. OFMdfM declined to provide arguments under the EIR, despite the Commissioner explaining his clear view that the EIR apply to this request. In the circumstances he could simply decide that the requested information was wrongly withheld and order its disclosure. However, his preferred approach, in all the circumstances of the case, is to require the OFMdfM, to discharge its responsibilities under the EIR and either disclose the information or justify its refusal to do so by reference to the provisions of the EIR.

Procedural requirements

Regulation 5(2) – timeframe for response

40. The complainant made his initial request to OFMdfM on 1 September 2008. However, he did not receive a substantive response until 27 October 2008, 41 working days after the date of the receipt of the request. In failing to disclose the information requested within 20 working days of receipt of the request, OFMdfM breached regulation 5(2) of the EIR.

The Decision

41. The Commissioner's decision is that the public authority has breached regulation 5(2) by failing to provide a response compliant with regulation 5 or regulation 14 of the EIR within twenty working days of the receipt of the request.

Steps Required

42. As the Commissioner has determined that the information requested, if held, would be environmental information he now requires the OFMdfM to either provide the information or issue a valid refusal notice that complies with regulation 14 of the EIR within 35 calendar days of the date of this Notice.

Failure to comply

43. 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

44. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 21st day of June 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General right of access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Formulation of government policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office."

Environmental Information Regulations 2004

Definition of environmental information

Regulation 2(1) provides that:

"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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

Duty to make available environmental information on request

Regulation 5

- 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.
- (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.
- (3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.