

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

Decision Notice

Date: 6 June 2011

Public Authority: Rhondda Cynon Taf County Borough Council
Address: The Pavilions
Cambrian Park
Clydach Vale
Tonypany
CF40 2XX

Summary

The complainant requested information relating to the Church Village Bypass. The Council provided some information relevant to the request but in relation to one piece of information, it initially agreed to provide the information, and subsequently stated that the information was not held. The Commissioner considers that the information requested, if held, would be environmental information and should have been considered under the EIR. The Commissioner requires the Council to reconsider the request under the EIR and either disclose the information requested or issue a valid refusal notice in accordance with regulation 14 of the EIR.

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"). This Notice sets out his decision.
2. 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.

Background

3. The request in this case relates to the building of a new bypass road to ease traffic congestion in the villages of Llantwit Fardre, Church Village and Tonteg in South Wales. The scheme is known as the Church Village Bypass, and the road was officially opened on 7 September 2010. Specifically, the complainant requested access to view the COBA11 report relating to the Church Village Bypass.
4. Transport projects are appraised against five objectives (Environment, Safety, Economy, Accessibility and Integration). The COBA (Cost Benefit Analysis) is a Department for Transport sponsored computer program which compares the costs of providing road schemes with the benefits derived by road users (in terms of time, vehicle operating costs and accidents), and expresses the results in terms of a monetary valuation. The output contributes to the appraisal process in the following ways:
 - 'Economy' Objective: Time and Vehicle Operating Cost (VOC) changes;
 - 'Safety' Objective: Changes in Accident Costs and Casualties;
 - 'Environment' Objective: Changes in the amount of fuel used to assist in determining environmental changes.
5. COBA is used in the appraisal of Trunk Road schemes in England, Wales and Northern Ireland. In addition COBA is used by many Local Authorities to appraise a wide range of highway schemes. COBA11 is the latest version of the COBA program and was released in March 2001 and should be used on all schemes where a COBA is appropriate for the appraisal of trunk road, including motorways¹.

The Request

6. On 12 October 2008, the complainant wrote to Rhondda Cynon Taf County Borough Council ('the Council') and requested:

"the full COBA assessment input and output data, the Stage 2 Safety Audit, and the Departures from Standards Report. All these can be copied to disc".

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<http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/pgr/economics/software/coba11usermanual/part0theappofthecoba3152.pdf>

The complainant pointed out that he lived near to the relevant site office and he would be prepared to inspect the requested information at the site office in order to limit any potential costs to the Council.

7. The Council responded to the request on 27 November 2008 but it is not clear whether the request was formally treated as a request under the Act. The Council's response advised that certain documentation could be viewed on site and provided the complainant with contact details in order to arrange inspection of the documents.
8. The Commissioner understands that further correspondence between the complainant and the Council took place between 2008 and 2010 and the Council confirmed on 3 December 2008 that it was treating the request(s) under the provisions of the Act. During this period, the Commissioner understands that some additional information relating to the Church Village Bypass scheme was provided to the complainant.
9. On 20 July 2010 the complainant wrote to the Council to appeal against its decision not to allow him access to view the specific information he had requested on 12 October 2008.
10. On 3 September 2010, the Council wrote to the complainant asking him to clarify what information relevant to his request he considered to be outstanding as it understood that a copy of the COBA report had already been provided.
11. On 7 September 2010, the complainant wrote to the Council to confirm that he required access to view:

"the input and output data from which this report was derived. In particular the user benefits resulting from the standards adopted and also I want to see a copy of the Stage 2 Safety Audit which is required prior to the opening of the road".
12. The Council provided the outcome of its internal review on 14 January 2011. It confirmed that the input and output data requested was no longer produced in paper format as it was voluminous. The Council advised the complainant to refer his request to the relevant contractor and provided relevant contact details. The Council also provided the complainant with a copy of the Stage 2 Safety Audit Report.
13. Following a telephone discussion with the complainant, the Council wrote to the complainant on 22 February 2011 stating that "the disc that provides the input/output data is not held by the Council". The Council advised the complainant to write to the relevant engineering and design consultancy firm, W S Atkins, in order to obtain the information.

The Investigation

Scope of the case

14. On 4 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether he should be provided with access to the information requested.
15. The Commissioner spoke to the complainant on 28 March 2011 and he confirmed that the outstanding information he had not been provided with, or permitted to view in situ was the COBA report, and in particular the input and output data. The Commissioner's investigation has therefore focussed on the complainant's request for access to the COBA report.

Chronology

16. In his initial complaint to the Commissioner, the complainant provided copies of some items of correspondence and described the information he had requested but he did not provide a copy of his initial information request or the Council's response. On 6 January 2011 the Commissioner wrote to the complainant to request copies of his initial request and the Council's response. On the same day the Commissioner wrote to the Council asking for clarification in relation to its handling of the request.
17. The complainant responded to the Commissioner on 9 January 2011 and provided copies of the relevant correspondence.
18. On 4 February 2011, the Council responded to the Commissioner. The Council confirmed that, since the original request of 12 October 2008, it had received a number of additional requests from the complainant which had been dealt with. The Council confirmed that it was in the process of preparing electronic copies of the information requested, to be provided on a CD. The Council stated that it understood the complainant was satisfied that all requests had now been dealt with.
19. On 4 February 2011 the complainant contacted the Commissioner and provided a copy of the Council's internal review response dated 14 January 2011. Details of the content of the internal review response are provided in paragraph 13 of this notice. The complainant confirmed receipt of the Stage 2 Safety Audit Report, but advised that, he had still not been provided with a copy of, or access to inspect the COBA11 report. He stated that he had contacted WS Atkins, as advised by the Council. W S Atkins had agreed to respond to any questions about the

COBA11 report, but refused to provide him with access to view the information.

20. On 15 February 2011 the Commissioner wrote to the complainant and the Council to confirm that the complaint had been deemed eligible for formal consideration.
21. The complainant contacted the Commissioner on 17 February 2011. He advised that he had contacted W S Atkins to whom he had been referred by the Council in order to access the COBA11 report. W S Atkins refused to allow him access to inspect the information unless directly instructed to do so by the Council.
22. On 18 February 2011 the Council wrote to the Commissioner stating that, following a further review of the request, the Council's position was that it did not hold the COBA11 report. The Council stated that "the information, if available, would actually [be] held by W S Atkins, the engineering and design consultancy firm".
23. On 28 March 2011 the Commissioner spoke to the complainant who confirmed that the outstanding information he had sought access to was the COBA11 report, and in particular the input/output data. The complainant stated that, on the advice of the Council he had contacted W S Atkins to obtain this information and been refused access.
24. On 28 March 2011 the Commissioner telephoned the Council to confirm that the outstanding information comprised access to the COBA report. The Council confirmed its position was that it did not hold this information.
25. On 5 April 2011 the Commissioner wrote to the Council to confirm that, in his view, the withheld information, if held, constituted environmental information. He asked the Council whether there was any prospect of an informal resolution to the complaint by way of the Council instructing W S Atkins to allow the complainant to view the information requested on site. The Commissioner stated that, if there was no prospect of an informal resolution, he would proceed to issue a Decision Notice which would require the Council to reconsider the request under the EIR. The Commissioner also sought clarification on some issues relating to the Council's handling of the request.
26. The Council responded to the Commissioner on 8 April 2011. It clarified some points relating to its handling of the request, and provided copies of relevant correspondence. In terms of a possible informal resolution, the Council stated that it had not fully concluded whether or not the COBA11 report was held by WS Atkins on its behalf. The Council stated that it would await the Commissioner's Decision Notice.

Analysis

Correct Access Regime

27. The Council originally processed the complainant's request as a business as usual request, and subsequently as a request for information under the Act. However, the Commissioner considers that the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR. His reasons for reaching this conclusion are set out below.

28. The definition of "environmental information" is set out in regulation 2(1) of the EIR. This states 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).....”

29. The Commissioner considers that the phrase “any informationon” should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
30. The requested information, ie the COBA11 report, relates to a cost benefit analysis of the Church Village Bypass. As stated in paragraph 5 of this notice, COBA11 is a program used in the appraisal of Trunk Road schemes in England, Wales and Northern Ireland and compares the costs of providing road schemes with the benefits derived by road users. As the Council’s position is that it does not hold the COBA11 report, the Commissioner has not had sight of the information. However, the Commissioner is satisfied that, the COBA11 report falls within regulation 2(1)(e) of the EIR.
31. Where information falls within regulation 2(1)(e) it must be used within the framework of the measures and activities referred to in 2(1)(c). A measure or an activity referred to in regulation 2(1)(c) (not the information in question) must affect or be likely to affect the elements in 2(1)(a) directly or via the factors set out in 2(1)(b), or be designed to protect the elements in (a).
32. The Commissioner is satisfied that, in this case, the relevant measure is the Church Village Bypass scheme. As mentioned above, the relevant measure in regulation 2(1)(c) must affect or be likely to affect the elements in 2(1)(a) directly or via the factors in 2(1)(b). The Commissioner is satisfied that the building of a new road, is a measure or activity, affecting or likely to affect the elements of the environment and factors likely to affect those elements referred to in regulations 2(1)(a) and (b) of the EIR, including land and landscape, air and atmosphere, noise and the level of CO² emissions.
33. In conclusion, the Commissioner has concluded that the requested information, ie the COBA11 report would fall within the definition of environmental information as set out at regulation 2(1)(e) of the EIR.

The Decision

34. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR in that it did not apply the correct legislation when handling the request

Steps Required

35. As the Commissioner has determined that the information requested, if held, would be environmental information he requires the Council to either provide the information requested or issue a valid refusal notice that complies with regulation 14 of the EIR. Unless the exception from the duty to confirm or deny under 12(5)(a) is claimed, then any refusal notice should explicitly confirm or deny whether the information is held.
36. As the Commissioner considers that the correct access regime in this particular case is the EIR, regulation 12(4)(a) provides that a public authority may refuse to disclose environmental information to the extent that it does not hold that information when an applicant's request is received. Therefore, if the Council did not hold information relevant to the request at the time the request was received it should claim the exception at regulation 12(4)(a) and issue a refusal notice in accordance with the requirements of regulation 14.
37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. 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.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
40. Although the request to the Council of 12 October 2008 did not specify it had been made under the provisions of the Act the Commissioner is concerned that the Council initially failed to treat it as a valid request

under either the Act or the EIR. Further, despite subsequently treating the request as a request under the Act it took the Council until 22 February 2011 to advise the complainant that it considered it did not hold the requested information. The Commissioner would expect public authorities to be able to recognise requests for information and handle them in accordance with the relevant legislation. He would therefore like to remind the Council of its obligations under the Act and the EIR.

Right of Appeal

41. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

42. 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.
43. 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 6th day of June 2011

Signed

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

Legal Annex

Environmental Information Regulations 2004

Regulation 2 - Interpretation

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 3 - Application

Regulation 3(1) Subject to paragraph (3) and (4), these Regulations apply to public authorities.

Regulation 3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority's possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

Regulation 5 - Duty to make available environmental information on request

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 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

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 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 14 - Refusal to disclose information

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(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).