

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 03 May 2012

Public Authority: Southwark Council
Address: 2nd Floor
PO Box 64529
London
SE1P 2QH

Decision (including any steps ordered)

The complainant has requested;

All papers related to the Greenland dock future options, item 81 in Southwark Council's Forward Plan for December 2011 to March 2012.

The Commissioner's decision is that Southwark Council (the council) incorrectly applied section 22 of the Act in relation to the requested information and therefore requires the council to disclose this information to ensure compliance with the legislation. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

1. On 14 December 2011 the complainant wrote to Southwark Council (the council) and requested information in the following terms:

'Please will you provide me with all papers related to the Greenland dock future options item 81 in the Forward Plan for December 2011 to March 2012¹. For convenience I attach the link to your website describing the

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<http://modern.gov.southwark.gov.uk/mgListPlanItems.aspx?XXR=0&PlanId=164&RP=153&PID=153&>

item:

<http://modern.gov.southwarksites.com/mglssueHistoryHome.aspx?lId=17407>

2. The council responded on 28 December 2011 and confirmed that it held the requested information. However, it said it was withholding it under section 22 of the Act as it would be published at some stage in the future once further work had been carried out. Having engaged the exemption in section 22 it said that the public interest was balanced in favour of maintaining it.
3. On 28 December 2011 the complainant requested an internal review as he was unhappy with the council's response. In particular, he said the council had failed to specify which information would be published in the future and also the likely date. Specifically, he referred to the Information Commissioner's Office's Specialist Guidance on section 22 of the Act which stated that;

'In order to engage s22 (information intended for future publication) a (Public Authority) PA must be able to show clearly which information within the scope of a request it intends to publish. It is not sufficient to say that it will identify for publication some, but not all, information within the scope of the request'².

4. Following an internal review the council wrote to the complainant on 26 January 2012 and stated that it was upholding its earlier decision to apply section 22 of the Act. It clarified that the only information it held at the time of the request was a 'draft report/member briefing prepared by officers on the Future Options for Greenland Dock and South Dock' which would form the basis of the final version to be published at an unknown future date. As this information was in draft form only it said that it would form the basis of the final version but added that this might be different to the original draft.

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<http://www.ico.gov.uk/foikb/FOIPolicySection22onlyappliestoinformationclearlyintendedforpublication.htm>

Scope of the case

5. The complainant contacted the Commissioner on 27 January 2012 to complain about the way his request for information had been handled. In particular, he said he was unhappy with the council's decision to apply section 22 of the Act to the requested information.
6. The scope of the Commissioner investigation is to consider whether the council has correctly applied section 22 and if so, whether the public interest is balanced in favour of maintaining it.

Chronology

7. On 23 February 2012 the Commissioner wrote to the council and requested the withheld information together with any further arguments it wished to advance in respect of the relevant legislative regime and the applicable exemptions/exceptions.
8. The council responded on 8 March 2012 and suggested that it might have applied section 22 of the Act to different information to that originally identified as being within the scope of the complainant's request.
9. The Commissioner responded on 12 March 2012 having discussed the matter with the complainant and clarified that the information requested was indeed the same as that originally identified and withheld by the council in its communications dated 28 December 2011 and 26 January 2012. He therefore requested from the council a copy of the withheld information together with any further arguments it wished to advance in respect of the relevant legislative regime and the applicable exemptions/exceptions.
10. On 16 March 2012 the council provided the Commissioner with a copy of the withheld information which it concluded was not environmental within the meaning of the EIR.
11. On 20 March 2012 the Commissioner replied and stated his view that to successfully engage section 22 of the Act a public authority must be able to identify which parts of the requested information held at the time of the request will be published at some future date. He pointed out that the council had not been able to do this as it believed the published information might be changed from the original. The Commissioner noted the council's view that this was because the original information was 'in draft form only and completion of the same (was) dependant on a number of related events, including ... the undertaking of an asset

condition survey'. In support of his view the Commissioner referred to the council to ICO's 'specialist guidance' on section 22 of the Act³ (which the complainant had already brought to its attention) and his Decision Notice in the case of the Ministry of Justice FS50121803.

12. The council responded on 28 March 2012 stating that its position in relation to section 22 of the Act was unchanged

Reasons for decision

Is the information 'environmental' within the meaning of the Environmental Information Regulations 2004 (the EIR)?

13. The first question the Commissioner considered was whether the requested information was 'environmental' within the meaning of the EIR.
14. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by Regulations under section 74 of the Act, to make the information available to the public in accordance with those Regulations or would be so obliged but for any exemption under those Regulations. The Regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in Regulation 2 of the EIR.
15. Regulation 2(1) of the EIR deals with the interpretation of the Regulations and the definition of environmental information.
16. Regulation 2(1) states:

"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

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<http://www.ico.gov.uk/foikb/FOIPolicySection22onlyappliestoinformationclearlyintendedforpublication.htm>

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);"*

17. The Commissioner has seen the requested information which consists of various options to be considered by the council for the future management of a marina and finds that it is not 'environmental' within the meaning of the EIR. The options for the management of the marina do not constitute a measure under the definition in 2(1)(c), there is no evidence that the different options will be likely affect the elements and factors in the definition. He has therefore considered the request under the Act.

Section 22 of the Act – Information intended for future publication

18. Section 22 of the Act provides that information is exempt if, at the time the public authority receives the request for it:
- a. It holds it with a view to its publication
 - b. It or another person intends to publish it at some future date, whether determined or not;
 - c. In all the circumstances it is reasonable to withhold the information prior to its publication and
 - d. The public interest in applying the exemption is greater than that for disclosing the information

19. The Commissioner has considered each of the above requirements and reached the following conclusions.

Intention to publish at the time request received

20. Section 22 only applies when the information is held with a view to publication at the time the request for it is received. In this case, the council has confirmed that, at the time of the request, the information sought by the complainant was held with a view to future publication on its website. However, it conceded that as the information concerned was a draft or work in progress, it was possible that the final version, which was subject to the results of an asset survey, might be different to the original one. The Commissioner therefore finds that, at the time of the request, the council held the requested information with a view to future publication.

Information held at time of the request

21. The Commissioner accepts the council's confirmation that the information requested was held by the council at the time of the request.

With a view to publication

22. The Commissioner interprets the words in section 22 of 'with a view to' to indicate an intention has been made to publish or at the very least that the information is held in the settled expectation that it will be published.
23. Publication requires the information to be generally available to the public. It is not enough if the intention is to make it available to a restricted audience.
24. If during the course of the preparation of the information for publication some material will be redacted, section 22 will not apply to the redacted information. This is because the public authority will no longer hold the information with a view to publication in the future.
25. In this case the council has informed the complainant that it intends to publish the information held at the time of the request on its website in accordance with the requirements of its Forward Plan at some time in the future. However, it has conceded that as the information is a draft or work in progress and its completion is dependant on a number of related events, including the results of an asset survey, it is possible that the final version for publication may be different to the original one.

26. The Commissioner is not persuaded by the council's arguments that the publication of a final version of the requested information at some future date, which it accepts might be different to the original one due to a number of related events, will engage section 22 of the Act. The reason for this is that although it intends to publish a version of the requested information at some future date, it cannot specify which part or parts will be the same as those which existed at the date of the request.

27. The Commissioner has considered his previous decisions in the cases of the Ministry of Justice FS50121803 and the Insolvency Service FS50435026 where he took the view that section 22 of the Act was not engaged. In the latter cases, it was clear that some or a version of the requested information was destined for future publication. However, as the public authority could not specify which information or the version that would be published, the Commissioner concluded that section 22 could not apply. Accordingly, in this case the Commissioner concludes that section 22 is not engaged in relation to the version of the information held by the council at the time of the request.

Right of appeal

28. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
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