

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

Decision Notice

14 August 2008

Public Authority: Surrey County Council
Address: County Hall
Penryn Road
Kingston Upon Thames
Surrey
KT1 2DN

Summary Decision

The complainant requested Surrey County Council ('the council') to disclose all application documents it held relating to the widening of a vehicle crossover carried out on her neighbour's property. In addition, the complainant requested any recorded information held which details the reasons why her neighbour contested the Council's decision to refuse the first application that was submitted. Concerning the first element of this request, the Council confirmed that it does not hold any further recorded information to that already provided. Regarding the second part of the request, the Council advised the complainant that no recorded information is held of this description. As the complainant remained dissatisfied and believed further recorded information must be held, she approached the Commissioner. After considering the case, including both the submissions made by the complainant and the Council, the Commissioner concluded that no further information is held by the Council. He noted that the Council had already supplied copies of all information it does hold and therefore concluded that the Council had complied with regulation 5(1) of the EIR in this case.

The Commissioner's Role

4. The Environmental Information Regulations 2004 (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 to the EIR.

The Request

4. The complainant first contacted the Commissioner on 29 April 2007 to request that her complaint against the council be given formal consideration. As it was difficult to establish from the protracted correspondence between the council and the complainant over some months, what information had been requested and whether the complainant had received an adequate response from the council, the complainant was asked to make a fresh information request for all outstanding information she required. On 6 August 2007, the complainant made a fresh request for the following information relating to the crossover widening carried out on her neighbour's property:
 1. details of the constraints requested by her neighbour in relation to the widening of the vehicle crossover;
 2. a statement from the Council regarding the constraints/conditions applied to the approved widening of the vehicle crossover, both at the time it was passed and any changes that have occurred since;
 3. for copies of all application documents relating to this widening;
 4. copies of correspondence between her neighbour, the Council and Tandridge District Council relating to this widening and to the earlier refused widening proposal; and
 5. to know the reasons why her neighbour contested the Council's decision to refuse the first application that was submitted for the widening of the vehicular crossover.
3. The Council responded to this request on 6 September 2007 supplying all recorded information it said that it held relevant to the complainant's request. For some elements of her request the complainant was informed that no recorded information was held by the Council.
4. As the complainant remained dissatisfied, she approached the Commissioner again on 8 September 2007. The complainant remained unhappy with two elements of her request and requested that these issues be formally considered as a matter of urgency. The two parts of the request dated 6 August 2007 referred to the Commissioner for consideration are as follows:
 3. the complainant's request to receive all application documents relating to the agreed widening of the vehicle crossover at her neighbour's property
 5. her request to know on what grounds her neighbour contested the Council's decision to reject the first application that was submitted for the widening of the crossover.

The complainant stated that she believed the Council held further recorded information to that already provided in respect of the above two issues and was of the view that additional information was being deliberately withheld from her.

5. Although no internal review was undertaken, the Commissioner decided to accept this case for reasons that will be explained in more detail in paragraph 10 of this

Notice. The Commissioner wrote to the complainant on 17 September 2007 and informed her that her complaint now awaited allocation to a case officer.

The Investigation

Scope of the case

6. As stated previously, the complainant referred two elements of her initial request to the Commissioner for formal consideration, as she believes that recorded information has been deliberately withheld from her. This Notice will therefore focus on these two aspects of the complainant's request, which are as follows:
 - copies of all application documents relating to the agreed widening of the vehicular cross over (part 3 of requested outlined in paragraph 2)
 - the complainant's request to know on what grounds her neighbour contested the Council's decision to reject to first application that was submitted for the widening of the vehicular cross over (part 5 of the request outlined in paragraph 2).
7. Although the Council responded to the request under the Act, it became clear to the Commissioner during his investigation that the information requested fell within the scope of the EIR under regulations 2(1)(a) and 2(1)(c) (the full text of all relevant regulations referred to in this Notice can be found in the Legal Annex section at the end of this Notice) for the following reasons.
8. Regulation 2(1)(a) of the EIR defines environmental information as material on the state of the elements including the land and the landscape. Subparagraph 2(1)(c) extends this definition to include information on measures such as policies, legislation, plans and activities affecting or likely to affect the elements described in subparagraph 2(1)(a) as well as measures or activities designed to protect those elements.
9. This request relates to information held on the widening of a vehicle crossover for which work commenced on 6 and 7 February 2007. It is the Commissioner's view that the application to widen the crossover is a measure or plan which affects or is likely to affect the land and landscape of the area as covered by regulation 2(1)(c). The complainant's request is for recorded information believed to be held by the Council on this measure.
10. As stated in paragraph 5 above, the Commissioner notes that no request was made for an internal review by the complainant prior to approaching the Commissioner with her complaint. Prior to accepting a case, the Commissioner usually expects a complainant to have exhausted the internal complaints process offered by the public authority. The EIR specifically states in regulation 11 that a complainant can make representations to the public authority if it appears to them that the public authority has failed to comply with their request. In accordance with regulation 11, the public authority is required to consider the further representations and to notify the complainant of its decision within 40 working

days. This decision should also outline to the complainant their rights to then approach the Commissioner. As this request was initially considered under the provisions of the Act, which does not make such requirements as explicit and the Commissioner notes that there were special circumstances surrounding this case, he decided to exercise his discretion in this instance and accepted the case prior to an internal review being undertaken.

11. As the Commissioner is satisfied that the request falls within the scope of the EIR, his investigation has sought to establish whether the Council complied with the requirements of the EIR and, in particular, whether further recorded information is held in relation to the complainant's request as outlined in paragraph 6.
12. During the Commissioner's investigation the complainant raised further issues and complaints relating to additional information requests. Some of these matters were outside the scope of the Commissioner's powers and other issues were not within the scope of the original request. For these reasons these additional issues are not the subject of this Decision Notice.

Chronology of the case

13. The Commissioner wrote to the Council on 10 April 2008 to request some additional information. He requested further information to establish what searches had been completed by the Council to determine what information is held and asked the Council to respond to the complainant's reasons for believing that further recorded information must be held relating to the requests outlined above in paragraph 6.
14. The Council responded on 8 May 2008 providing the additional information and explanations that had been requested. It confirmed exactly what checks and searches had been carried out, why it holds no further recorded information and responded to each of the points raised by the complainant (these points will be explored in more detail in the Analysis section of this Notice).
15. The Commissioner wrote to the complainant on 16 May 2008 to communicate the additional information that had been provided by the Council. He also outlined his view at this stage that no further recorded information is held relevant to the complainant's request.
16. The complainant responded on 26 May 2008 and 1 June 2008. Some new issues were raised. However, as stated above in paragraph 11, the complainant was advised that these matters could not be considered as part of this investigation. The complainant also raised further reasons as to why further recorded information should be held and suggested a further line of enquiry for the Council to consider.
17. The Commissioner wrote to the Council on 4 June 2008 and asked it to consider the complainant's suggested line of enquiry and to also respond to the further reasons she had raised as to why further recorded information should be held by the Council.

18. The Council responded further on 24 June 2008. It advised that it had already carried out the complainant's suggestion as part of its initial investigation and provided a further response to the additional concerns the complainant had raised.

Analysis

Procedural issues

19. As the Council failed to identify that the requested information was environmental information it dealt with the complainant's request under the Act. As a result the Council did not issue an adequate Refusal Notice in accordance with the requirements of regulation 14 of the EIR. Under the EIR there is a specific exception where information is not held; 12(4)(a) and this should be cited in the Refusal Notice if being claimed. As the Council dealt with the request under the Act it failed to cite this exception in the Refusal Notice it issued. The Commissioner has therefore concluded that the Council was in breach of regulation 14(3)(a) in this case.

Is further recorded information held?

20. The Commissioner will now consider whether further recorded information is held by the Council to that already provided in response to the complainant's request. The Commissioner will first consider the complainant's request to receive copies of all application documents relating to the approved widening of the vehicle crossover.

Copies of all application documents

21. The complainant confirmed that in response to her initial request she only received a copy of the first application form, which was refused by the Council on 31 March 2006. She stated that she was not provided with a copy of the application form that would have been submitted for the approved widening of the crossover, for which work commenced on 6 and 7 February 2007. As the Council failed to supply this, the complainant believes this information has been deliberately withheld from her.
22. The complainant referred to an email she received from a member of the Council. Although this was undated it comprised of seven pages responding to various previous emails she had sent to the Council concerning the widening of the crossover. She advised that this email confirmed at the time that no formal application from her neighbour for a new vehicle crossover had been received by the Council. The complainant believes this email suggested that one would be required. In addition, the complainant stated that Tandridge District Council wrote a letter dated 16 August 2006 stating that planning permission was not required. The complainant advised that this decision could only have been reached after an application form for the approved widening had been received in accordance with the Council's own planning procedures.

23. In correspondence to the Commissioner dated 17 April 2008, the complainant also raised concerns with the Council's interpretation of this aspect of her request. She stated that she felt the Council may have misinterpreted this aspect of her request and limited its searches to application documents received from her neighbour only. She explained that this would be incorrect, as she requires access to all application documents relating to the approved widening of the vehicle crossover from any source.
24. The complainant is also of the view that the Council holds an "application letter"; a document which, to date, it has not supplied. She referred to a computer printout that she had received from the Council which indicated that an "application letter" was held in relation to the vehicle crossover. A further printout also seemed to suggest that an application form was received on 2 October 2006, around the time work commenced on the vehicle crossover.
25. The Commissioner requested the Council to address the above concerns and to explain in detail what searches it had undertaken to identify what recorded information is held relevant to this matter.
26. The Council first confirmed that it interpreted this aspect of the complainant's request to be a request for copies of all application documents; therefore the application form and any supporting papers relating to the vehicle crossover carried out at her neighbour's property from any source, including her neighbour. The Council confirmed that it does not hold any further application documents relating to the widening to those already provided to the complainant whether submitted by her neighbour or any other source.
27. It explained the numerous searches it had carried out to ensure that no further recorded information exists. It stated that it had checked and rechecked several times the relevant vehicle crossover file, the road file held by the East Area Highways, in addition to the file on her neighbour's property held by the Transportation Development Council. Despite these repeated searches it could not locate any further recorded information or any evidence to suggest that a second application form was held by the Council at the time of the complainant's request.
28. The Council listed the recorded information it does hold and confirmed that the following information has already been supplied to the complainant:
 - copy of the vehicle crossover application dated as received 7 March 2006
 - letter from the council dated 31 March 2006 refusing the application
 - letter from the council dated 2 October 2006 stating conditions for revised design
 - 2 pencil drawings (undated) and one entitled "Vehicle Prevention barrier for footpaths ref no. 1000/502B".
29. Although not part of this investigation, as it relates to a subsequent request made by the complainant, the council also confirmed that it provided the following information to the complainant. This request was worded differently to the request

being considered by the Commissioner here and requested “all documentation and correspondence relating to the application TD30342”:

- printouts from the vehicle crossover database
- additional supporting paperwork from the relevant crossover file
- internal correspondence relating to the application supplied by Transportation Development Control and the East Highways Group from relevant vehicle crossover files and staff email accounts.

30. In addition to checking all relevant sources within the Council, it made enquiries to the members of staff that were involved in this matter. The East Area Transportation Group Manager confirmed that he did recall requesting the complainant's neighbour to submit a second application. The member of staff in the Council's Highways Division who handled the actual application also recalled that a second application together with plans to alter the existing crossover was made by the neighbour. This member of staff also suggested various locations within the Council where this information would be held if it existed. As stated previously, these checks and repeated checks of all areas were carried out but no record of any further application form or evidence to suggest that one was held at the time of the complainant's request could be found. Although the recollections of staff seemed to suggest that a second application was made, the Council stated that it was unable to confirm definitively from hard evidence that a form was ever received and therefore held at the time of the complainant's request. It explained that it was possible that a subsequent decision was taken to use the previous application form when the proposal to widen the crossover was revisited and confirmed that this is not unusual in planning situations where an initial application was refused.
31. The Council referred to one of the database printouts the complainant made reference to. It stated that the application date field on the database system is completed by members of staff in the Highway Division when an application is received. It stated that it appreciated that this field was completed on 2 October 2006 in this case. However, it was of the view that this simply confirmed that the member of staff dealing with this particular application populated this field on this date. As stated above, although there is some verbal evidence to suggest that further information may have been held at some point in time, repeated checks have confirmed that there is no evidence that this information was held at the time of the complainant's request. It was also unable to locate any further recorded information relevant to the complainant's request to that already provided.
32. Concerning the complainant's request to receive a copy of the “application letter” referred to on another database printout she received from the Council, it confirmed that no “application letter” exists. The Council provided a copy of this printout to the Commissioner and explained that the reference to an “application letter” is simply an option council officers can select on the vehicle crossover database. It stated that the end of the printout shows a drop down box which list various types of standard letters and forms that can be generated on the system once one of these options is selected. The “application letter” is the first of many options that can be selected from this drop down box. The Council confirmed that

no "application form" was generated for this case, therefore this information is not held and cannot be provided to the complainant.

33. The Commissioner has considered the evidence available. In response to this request, the Council confirmed what information is held and supplied copies of this information to the complainant. Regarding whether further recorded information exists, the Commissioner is satisfied that the Council has undertaken repeated searches of all sources within the Council and on the balance of probabilities he is satisfied that no further recorded information was held at the time of the complainant's request.

Request to know on what grounds the neighbour contested the Council's decision to refuse the first application

34. The complainant confirmed that she was unhappy that the Council was unable to supply this information and explained that she does not believe that no recorded information is held detailing the reasons why her neighbour contested the Council's decision to refuse the first application. She advised that she would expect some form of case note or log to be held which detailed her neighbour's views. She stated that she was informed by the Council that this particular issue was discussed during a telephone call between the East Area Transportation Group Manager and her neighbour. She therefore does not accept that no note of this conversation was made from such a senior officer within the Council.
35. The complainant also referred to an interim report dated 5 April 2007 produced by the Council which stated that her neighbour contested the Council's response. She confirmed that she therefore feels it is fair to assume from this that if the Council knew that her neighbour contested the initial refusal it will also know the reasons why he contested it.
36. The Council confirmed that it does not hold recorded information which details the reasons why the complainant's neighbour contested its initial decision to refuse the application. It explained that it has undertaken various searches of the contents of the vehicle crossover file and the road file together with the email accounts of the members of staff involved in this application but could not locate any relevant recorded information. Concerning the recording of telephone conversations, the Council advised that it is normal practice to retain a written record of the content of a conversation where it is considered that a written note is required. However, on this occasion the East Area Transportation Group Manager recalled that no written record was taken of the call.
37. Regarding the interim report dated 5 April 2007, it acknowledged that this does refer to the complainant's neighbour contesting the initial refusal and that this resulted in a meeting taking place with the East Area Transportation Group Manager. When questioned further about whether any recorded information was held relating to this meeting which may contain the requested information, the Council advised that the only information that exists relating to this meeting is a letter from the Council to the complainant's neighbour. It explained that a copy of this letter had already been provided to the complainant in response to one of her

many information requests and confirmed that this letter does not contain any details relating to the reasons why her neighbour contested the refusal.

38. It is apparent from the Council's submissions and the verbal evidence of the East Area Transportation Group Manager that no formal record was made of the telephone call in which the requested information was relayed. The Council, also, confirmed that it does not hold any further recorded information which contains the reasons why the complainant's neighbour contested the Council's decision to refuse the first application. The Commissioner is therefore satisfied that on the balance of probabilities the requested information is not held. He is also satisfied that any recorded information that is relevant to this aspect of the complainant's request (the letter referred to in paragraph 36 from the Council to the complainant's neighbour) has already been disclosed.

The Decision

39. As explained in more detail in paragraph 19, the Commissioner found that the Council was in breach of regulation 14(3)(a) of the EIR in this case.
40. The Commissioner is satisfied that the Council does not hold any further recorded information relevant to the complainant's request. Any recorded information that is held relevant to this matter has already been provided and therefore the Commissioner is satisfied that the Council has complied with regulation 5(1) of the EIR.

Steps Required

41. The Commissioner requires no steps to be taken.

Other Matters

42. Although the Commissioner is satisfied that on the balance of probabilities the Council does not hold further information of relevance to the request, he would like to take this opportunity to draw the Council's attention to part iii of the Section 46 Code of Practice on records management. The principles it contains apply to the EIR as well as to the Act, and all public authorities should observe its recommendations for both regimes. Whilst the paragraph below forms part of the foreword rather than the Code itself, the Commissioner hopes that the advice it contains will assist the Council in dealing with future requests of this nature:

"Any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements for their eventual archiving or destruction are inadequate. Consequently, all public authorities are strongly encouraged to pay heed to the guidance in the Code".

The Commissioner would remind the Council that any evidence of repeated record keeping issues will be dealt with by more formal enforcement action or a Good Practice Recommendation.

43. The Commissioner would also like to draw the Council's attention towards paragraph 8.2 of the Code itself which states:

"Records of a business activity should be complete and accurate enough to allow employees and their successors to undertake appropriate actions in the context of their responsibilities, to

- Provide authenticity of the records so that the evidence derived from them is shown to be credible and authoritative...."*

The full text of the Code can be obtained online at:-

<http://www.dca.gov.uk/foi/reference/imp/imp/codemanrec.htm>

Right of Appeal

44. 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@dca.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 14th day of August 2008

Signed

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

Freedom of Information Act (2000)

Section 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.”

Environmental Information Regulations (2004)

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 5(1)

Provides that-

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 11 – Representations and reconsideration

Regulation 11(1)

Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2)

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3)

The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4)

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

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 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).

Regulation 14(4)

If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

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.