

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

Decision Notice

Date: 23 March 2009

Public Authority: South Gloucestershire Council
Address: The Council Offices
Castle Street
Thornbury
South Gloucestershire
BS35 1HF

Summary

The complainant, a developer, asked to be provided with the Development Appraisal used by South Gloucestershire Council ("the Council") during negotiations between the complainant and the Council concerning a Section 106 Agreement under the Town and Country Planning Act 1990. The Appraisal comprised of three documents written by third party consultants. The Council dealt with the request under the Freedom of Information Act 2000 ("the FOIA") and following its internal review, dismissed the appeal. This prompted the complainant to submit a further request specifically asking for the information under the Environmental Information Regulations 2004 ("the EIR"). This time the Council responded under the EIR and applied the exceptions under regulations 12(4)(e) and 12(5)(e) to the majority of the information. The Information Commissioner ("the Commissioner") investigated and was not satisfied that either exception was engaged. The Council is required to disclose the withheld information within 35 calendar days.

The Commissioner's Role

1. 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 Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

Background

2. On 3 October 2003, duplicate planning applications were submitted by Bovis Homes Limited ("the complainant") to the Council for a mixed use development of North Field Filton Airfield. These applications sought permission for a number of dwellings, employment land and supporting infrastructure and community

- facilities. On 14 March 2006 one of the applications was denied. The main reason for refusal was that the parties had failed to reach agreement on various matters concerning a Section 106 Agreement under the Town and Country Planning Act 1990. Section 106 Agreements contain planning obligations in favour of the local authority granting the consent. Following an appeal by the complainant on 30 June 2006 to the Planning Inspectorate, the Secretary of State upheld the decision not to grant planning permission on 19 June 2007.
3. The other duplicate planning application then became the subject of renewed negotiations between the Council and the complainant. On 8 November 2007, it was resolved that the Director of the Planning Transport and Strategic Environment Department would be given delegated powers to grant planning permission subject to a number of matters concerning the Section 106 Agreement being resolved satisfactorily. Substantive agreement was reached in November and December and the Agreement was signed on 14 March 2008.
 4. As part of the process of negotiating the terms of the Section 106 Agreement, the Council had hired independent consultants to complete a Development Appraisal of the land to be developed. As explained by the Council, Development Appraisals comprise an assessment carried out by experts. Its purpose is to provide the Council, as local planning authority, with information to help it to formulate its initial requirements for a Section 106 Agreement and to help it to negotiate the terms of the Agreement effectively.

The Request

5. On 30 January 2006, following disclosure of some information in response to an earlier request made by the complainant to the Council, the complainant wrote to the Council and requested information in the following terms:

“The document referred to as ‘Briefing Note’ refers at paragraph 6 to an independent development appraisal. The briefing note indicates that the independent development appraisal has been used to inform the Council’s position with regard to the Section 106 negotiations. Please will you therefore provide me with a copy of this document.”

6. The complainant wrote to the Council again on 22 February 2006 enclosing a copy of the original request and stating that it appeared that the Council had not responded.
7. On 23 February 2006, the Council responded confirming that it had received the information request on 1 February 2006. It stated that it believed that the information was exempt under the Local Government Act 1972. The Council also stated the following:

“We have also considered your request as a Freedom of Information request. In that regard we would draw your attention to the qualified exemption that exists in relation to section 43 of the Act. We confirm that we have considered the public

interest test as required by the Act. We therefore do not intend to respond to your request”.

8. On 28 February 2006, the complainant wrote to the Council to complain about its refusal. It stated that it did not accept that the Council had correctly concluded that the information was exempt but it stated that even if the exemption under section 43 of the FOIA applied, the public interest favoured disclosing the information in this case.
9. Following an acknowledgment dated 14 March 2006, the Council completed its internal review on 27 April 2006. In the review, the Council explained that it believed the information was exempt because disclosure would, or would be likely to, prejudice the commercial interests of the Council and it set out the reasons why it believed disclosure would have this effect. The Council also set out the reasons why it considered that the public interest did not favour disclosure of the information in this case.
10. On 23 May 2006, the complainant wrote further to the Council stating that it was unhappy with the outcome of the internal review.
11. On 26 July 2006, the Council wrote to the complainant to communicate the outcome of its “corporate complaint hearing” which is the final stage of its internal review process. It stated that a complaints panel had resolved that the appeal should be dismissed because the information was environmental and could not therefore be considered under the FOIA in accordance with section 39 which provides that environmental information is exempted from consideration under the FOIA.
12. Following the dismissal of the appeal, the complainant wrote again to the Council on 27 July 2006 and requested information in the following terms:

“I write to request a copy of the Independent Development Appraisal which has been used to inform the Council’s position with regard to the Section 106 negotiations on the above planning applications. As you are aware this document was referred to in a briefing to members of Development Control (West) Committee as a presentation on 4 January 2006. My request is made pursuant to the Environmental Information Regulation 2004”.
13. On 23 August 2006, the Council issued a refusal notice under the EIR in response to the request on 27 July 2006. It stated that it believed that the information was exempt under regulation 12(4)(e) and/or 12(5)(e) and it explained that it did not consider that the public interest favoured disclosure in this case. The Council also stated that it accepted that some parts of the appraisal were not exempt, for example, extracts from and references to a wide range of planning documents, including the Local Plan and other general guidance documents. It stated “All of these are, however, freely available”. No information was however made available to the complainant.

The Investigation

Scope of the case

14. On 27 July 2006, the complainant contacted the Commissioner to complain about the way his request for information on 30 January 2006 had been handled. The complainant asked the Commissioner to consider whether the Council had correctly refused to provide the information. As it subsequently became apparent that the complainant had also made a second request on 27 July 2006 because he wanted the Council to consider disclosure of the information he had earlier requested under the EIR, and that the timing of this request had some relevance, the Commissioner has also considered this request in the Notice. For clarity, the relevance of the timing is that during the Commissioner's investigation, the Council identified that it held a relevant report dated 24 March 2006 which post dates the first request made on 30 January 2006 but which would have been caught by the second request made on 27 July 2006.

Chronology

15. On 13 November 2006, the Commissioner contacted the Council and asked it to either disclose the information to the complainant or to provide reasons why the information is exempt under the EIR.
16. The Council responded on 12 December 2006. It explained to the Commissioner that it had in fact provided the complainant with a refusal notice stating that the Development Appraisal was exempt under the EIR. It provided a copy of the refusal dated 23 August 2006 which was the Council's response to the request made on 27 July 2006.
17. On 20 July 2007, the Commissioner telephoned the Council to ask whether the Council would be willing to disclose the information in light of the passage of time and the fact that the Commissioner understood that the Secretary of State had decided that the planning permission should not be granted. The Council stated that it would contact the Commissioner in due course once it had re-examined the case.
18. On 26 July 2007, the Commissioner sent an email to the Council. In addition to reiterating the points made during the previous telephone conversation, the Commissioner asked the Council to provide copies of the withheld information for his consideration and to explain in more detail why it believed the information was exempt. On the same day, the Commissioner also wrote to the complainant to set out his understanding of the complaint.
19. On 1 August 2007, the Council emailed the Commissioner. It explained in the email that although planning permission had been refused by the Secretary of State, there had in fact been two duplicate planning applications. It explained that renewed negotiations were currently continuing between the complainant and the Council regarding the second duplicate application. The Council therefore stated that it did not believe that its position had changed due to the passage of time.

20. The Council responded formally on 22 August 2007. It provided a copy of the following documents which it said collectively comprised the Development Appraisal requested by the complainant:
- Draft Final Report dated March 2003 by a third party company called Chesterton Planning and Development
 - Development Appraisal dated 30 August 2005 by a third party called Carter Jonas LLP
 - Development Appraisal dated 24 March 2006 by Carter Jonas LLP.

The Council confirmed that its position had not altered since it had written to the complainant on 23 August 2006. The Council stated that although it continued to believe that the information could not be disclosed, it accepted that once the Section 106 Agreement had been concluded, it should reconsider whether the information could be disclosed.

21. On 5 October 2007, the Commissioner sent an email to the Council. He pointed out that the Council had indicated in its refusal that it felt some information was not exempt. The Commissioner asked the Council to indicate precisely what information was not exempt.
22. On 16 October 2007, the Council replied. It supplied further copies of the withheld information with markings on the contents pages to indicate what information it believed was exempt. Additionally, the Council also provided a copy of a document dated April 2003 which comprised the Final Report by Chesterton. It stated that this was part of the Development Appraisal but it had not been included in the earlier response to the Commissioner.
23. On 23 January 2008, the Commissioner wrote to the Council and asked some background questions. Regarding the Council's application of regulations 12(4)(e) and 12(5)(e), the Commissioner expressed his provisional opinion that the exceptions had not been correctly applied in this instance.
24. On 12 February 2008, the Council asked the Commissioner for more time to consider the implications of disclosing any of the information. The Commissioner and the Council also discussed the background to the case.
25. On 13 March 2008, the Council responded to the Commissioner. It stated that it wished to maintain its position that both exceptions had been correctly applied and it provided some detailed rationale. The Council also brought to the Commissioner's attention the fact that the Section 106 Agreement had now been agreed.
26. The Commissioner sent an email to the Council on 18 March 2008 acknowledging that the Council had provided some more detail about why it believed the exceptions applied but the Commissioner pointed out that it did not appear that the Council had fully considered what information could be disclosed and disclosed that information to the complainant. The Commissioner asked the Council to reconsider its handling of the request and to provide further details of

- what information is being withheld making it clear whether the material was exempt under regulation 12(4)(e) or 12(5)(e).
27. On 28 March 2008, the Council provided the clarification requested by the Commissioner concerning information that it did not consider was exempt and explained that both the exceptions had been applied to all the information that it was continuing to withhold.
 28. On 3 April 2008, the Commissioner contacted the complainant by telephone to ascertain whether it wished to pursue a complaint in view of the fact that the Section 106 Agreement had been agreed. The complainant confirmed that it wished to continue.
 29. The Commissioner wrote further to the Council on 10 July 2008. The Commissioner stated that he continued to believe that the exception under regulation 12(4)(e) had been incorrectly applied. Regarding the exception under regulation 12(5)(e), the Commissioner explained that he did not accept that the Council had met all the conditions required to withhold the information correctly under this exception, in particular it had not shown that the information was confidential by law. The Commissioner asked the Council to provide him with some more information if it wished to maintain its position.
 30. On 7 August 2008, the Council replied. It stated that it disagreed with the Commissioner's view on the application of regulation 12(4)(e). It also indicated that it felt the Commissioner had taken too narrow a view of the application of regulation 12(5)(e) and provided further supporting arguments.
 31. On 5 November 2008, the Commissioner wrote to the Council and asked it to reconsider whether the exceptions still applied to the majority of the information in view of the fact that the Section 106 Agreement had been finalised. He asked the Council to disclose any information that was not exempt to the complainant.
 32. On 19 November 2008, the Council responded but did not disclose any information. It explained to the Commissioner that although the Section 106 Agreement had been completed, a number of provisions were still being negotiated.
 33. The Commissioner wrote further to the Council on 11 December 2008. He asked the Council to reconsider disclosing some information informally. He also explained to the Council that although the Commissioner was not satisfied that the information withheld under regulation 12(5)(e) could be deemed confidential according to the common law, it was open to the Council to argue that the information was exempt by statute law. He invited the Council to present such an argument if it wished.
 34. On 19 December 2008, the Council replied to the Commissioner. It explained that its position remained unchanged and provided some further supporting arguments on why it believed the information withheld under regulation 12(5)(e) is confidential according to the common law.

35. On 6 January 2009, the Commissioner wrote to the Council to clarify certain details of the case. The Commissioner asked the Council to clarify whether it considered that the Draft Final Report by Chesterton Planning and Development was part of the information being requested. The Commissioner also raised the issue again of the disclosure of information that the Council did not consider was exempt.
36. The Council responded on 20 January 2009. It clarified that the draft report was not being treated as forming part of the request for information as the Council had subsequently located the final report by Chesterton. Regarding the information that the Council had earlier stated was not exempt, the Council stated that it had not released any information and was unwilling to do so. It stated that because it felt it had not received "specific guidance" from the Commissioner, it "thought it best not to bear the risk of improper disclosure or inadvertent disclosure by association of the parts of the development appraisals that we considered were exempt".

Analysis

37. Full details of the legal provisions discussed in this part of the Notice have been included in the Legal Annex found at the end of the Notice.

Procedural matters

Request dated 30 January 2006

38. The Council did not consider the complainant's request dated 30 January 2006 under the EIR and had not rectified this failing by the date of the final stage of its internal review process on 26 July 2006. It was not until 23 August 2006 following a further request made by the complainant stating explicitly that he was asking for the information under the EIR that the Council gave any indication of why the information could not be disclosed under the EIR. In view of this, the Council breached regulation 14(1) of the EIR which sets out the obligations of public authorities when refusing requests for environmental information and also regulation 14(2) because it failed to issue a refusal under the EIR within 20 working days.

Request dated 27 July 2006

39. The Council provided a response to this request under the EIR on 23 August 2006. The Council indicated in its response that it accepted that some elements of the Development Appraisal were not exempt. It stated that an example of information that was not exempt were extracts from and references to planning documents and other general guidance documents. The Council stated that "All of these, are however, freely available in their original form". The Council did not specify what other information was being withheld and it did not make any information available to the complainant. During the Commissioner's investigation, the Commissioner referred to the Council's refusal and asked the

Council to specify what information was not exempt. The Council identified that some introductory material to one of the reports and three appendices were not exempt. The Commissioner therefore considers that the Council breached regulation 5(1) and 5(2) of the EIR for failing to provide this information within 20 working days after the date of the request.

Exception – Regulation 12(4)(e)

40. This exception provides that a public authority does not have to disclose information to the extent that the request involves the disclosure of internal communications. The exception is class-based which means that the Council does not need to show that any harm would or would be likely to result from the disclosure. It only needs to demonstrate that the information represents an internal communication. If the information can be deemed to be an internal communication, the public authority has to show that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Is the information an “internal communication”?

41. The information that is the subject of the complainant’s request comprises of reports by independent third parties, contracted by the Council to provide it with expert advice in order to help it to formulate and negotiate the requirements of a Section 106 Agreement. The Council has argued that this information is capable of being termed an “internal communication” and has made detailed submissions to the Commissioner on this point. The Commissioner has summarised the main arguments as follows:
- The concept of internal communication is not defined in the EIR except in Regulation 12(8) which states that it includes communications between government departments.
 - The Commissioner’s guidance “*A Brief Introduction to the Exceptions*” takes a very narrow and literal interpretation of “internal communications”. A more purposive construction is required which recognises that the use and the intended use of the information is more important than the source from which that information came. It is too artificial to interpret this exception as not being applicable simply if the communication comes from a third party consultant. Public authorities do not have all the relevant expertise necessary to perform their functions and therefore regularly buy in expertise solely for internal use.
 - The Commissioner’s guidance does not define what it considers to be a single entity or whether single entities can be joined together.
 - If the information was not capable of falling within the scope of regulation 12(4)(e), it would logically follow that as soon as environmental information is shared externally in any way, the information would cease to benefit from the exception.
 - The reason why the Council is seeking to withhold the information (to prevent unsettled views from being disclosed in order to create a private thinking space) is in line with the general interest that this exception is seeking to protect.

42. Article 4 of Council Directive 2003/4/EC upon which the EIR is based states that the exceptions should be interpreted in a “restrictive way” and the Commissioner has therefore interpreted regulation 12(4)(e) restrictively. In general, the Commissioner’s view is that this exception only covers communications passing between members of staff in a public authority. The Commissioner accepts there may be possible exceptions to the general rule set out above, for example where a third party is contracted to perform a statutory function on behalf of a public authority and so may almost be regarded as the employee of a public authority for the duration of that function being carried out. However, the Council did not advance arguments of this nature and ultimately, the Commissioner’s analysis has to be based on the arguments made by the Council. In the absence of convincing arguments, the Commissioner has to conclude that the exception is not engaged. In the circumstances of this case, the Commissioner does not accept that the advice provided by the third party consultants could be deemed an internal communication and therefore considers that it is not capable of falling within the scope of regulation 12(4)(e).
43. As the Commissioner was not satisfied that the information represented internal communications, he was not satisfied that this exception was correctly engaged in respect of either the request on 30 January 2006 or the request on 27 July 2006. He did not go on to consider the public interest test as a result.

Exception – Regulation 12(5)(e)

44. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. This exception is also qualified by the public interest test.
45. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that first need to met, namely:
- The information should be commercial or industrial in nature
 - The information should be confidential where such confidentiality is provided by law
 - The confidentiality should be required to protect a legitimate economic interest
 - The confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure
46. The Council submitted arguments that all the above conditions were met. However, the Commissioner focused on whether the information could be said to be confidential where such confidentiality is provided by law.
47. The Council argued that it is clear from the circumstances relating to the commissioning and intended use of the reports that the information would ordinarily be treated as confidential. The Council highlighted that the Development Appraisal is stamped “confidential” which is a clear statement of intent. The Council went on to argue that the information is confidential according to the common law and fulfils the common law test outlined in *Coco v N Clark*

(Engineers Limited) 1968 on the basis that the Council is owed a duty of confidence by the third parties and this creates a confidential relationship. The Council stated clearly that it does not believe it owes any duty of confidentiality to the third parties providing the reports.

48. The Commissioner's view is that a duty of confidence under common law is owed by one party to another and this means that the party in receipt of the confidential information cannot disclose it without the permission of the other party because to do so would be to breach their confidence. In this case, the Council has admitted that it does not owe any duty of confidentiality to the third party authors of the reports so there is no restriction on the Council from disclosing this information according to the common law. For the exception to be engaged there has to be an adverse effect on the confidentiality of the information. Such an adverse effect would not, in the Commissioner's view, be possible if the party to whom the confidence is owed (in this case the Council) discloses the information because it cannot breach a confidence that is owed to itself.
49. In view of the above, the Commissioner does not accept the argument that the information is confidential according to the common law and although the Commissioner invited the Council to submit arguments that any statute law was relevant, the Council decided to maintain its position that the arguments it had already made concerning the common law were sufficient.
50. As the Commissioner was not satisfied that the Council had demonstrated that the information was confidential where such confidentiality is provided by law, he was not satisfied that this exception was correctly engaged in respect of either the request on 30 January 2006 or the request on 27 July 2006. He did not go on to consider the public interest test as a result.

The Decision

51. The Commissioner's decision is that the public authority did not deal with the requests for information made on 30 January 2006 and 27 July 2006 in accordance with the EIR because it incorrectly applied the exceptions under regulations 12(4)(e) and 12(5)(e). The Council therefore breached regulation 5(1) of the EIR in respect of the information it incorrectly withheld because it did not make it available upon request and 5(2) because it did not make this information available within 20 working days after the date of receipt of the request.
52. The Commissioner also finds that, in respect of the request dated 30 January 2006, the Council breached regulation 14(1) of the EIR because it did not comply, by the date of the final stage of its internal review on 26 July 2006, with the obligations set out in that regulation to refuse the request under the EIR. The Commissioner also finds that the Council breached regulation 14(2) for not issuing its refusal under the EIR within 20 working days after the date of receipt of the request.

53. In respect of the request dated 27 July 2006, the Commissioner finds that the Council breached regulations 5(1) and 5(2) for not making available environmental information that was not considered exempt within 20 working days after the date of the request.

Steps Required

54. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR:

Disclose to the complainant the withheld information comprising the Development Appraisal, namely:

- The Final Report dated April 2003 by Chesterton Planning and Development
- Development Appraisal dated 30 August 2005 by Carter Jonas LLP
- Development Appraisal dated 24 March 2006 by Carter Jonas LLP

55. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

56. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

- The EIR Code of Practice issued under regulation 16 requires an internal review procedure to be fair, clear and simple. In his Good Practice Guidance No.5, the Commissioner qualifies this further by explaining that he does not expect an internal review to have more than one stage. The Commissioner is concerned that, despite his guidance on the matter, the Council is operating an internal review procedure with more than one stage. In light of this the Commissioner recommends that the Council amends its current internal review procedures as a matter of urgency.

Failure to comply

57. 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

58. 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 23rd day of March 2009

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

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.

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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

- (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 –

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

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.