

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

Decision Notice

Date: 14 December 2009

Public Authority: Chiltern District Council
Address: Council Offices
King George V Road
Amersham
Bucks
HP6 5AW

Summary

The complainant requested the Council to release a copy of the pre-planning application file SN17253. The Council refused to disclose this information citing sections 40(2), 41(1) and 43(2) of the Act. As the complainant remained dissatisfied she approached the Commissioner. After considering the case and the withheld information, the Commissioner decided that the requested information is environmental information and therefore the complainant's request should have been considered under the EIR. The Council reconsidered the request and decided that three documents could now be disclosed. It advised that the outstanding documents remained exempt from disclosure under regulations 12(4)(e), 12(5)(e), 12(5)(f) and 13 of the EIR. The Commissioner considered the application of these exceptions. He decided that some of the information is third party personal data and therefore remained exempt from disclosure under regulation 13 of the EIR. He considered the application of regulations 12(4)(e), 12(5)(e) and 12(5)(f) to the remaining documents and concluded that these exceptions are not engaged. The Commissioner has therefore required the Council to release the remaining documents within 35 days of this Notice.

The Commissioner's Role

1. 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.

The Request

2. The complainant contacted the Council on 27 April 2008 to request the following information:

“I formally request copies of all correspondence, (emails, minutes of meetings and reports) from when Planning Application [reference number redacted] was submitted, to [when] Planning Application [reference number redacted] was granted, relating to [address of property redacted] and Chiltern District Council, Planning Department.”
3. As no response was received, the complainant wrote to the Council again on 24 May 2008 attaching a further copy of her information request.
4. The Council responded on 29 May 2008. It confirmed that the majority of information it does hold relevant to this request is available from the Council's website or available to download/view during office hours at the Council's offices. It therefore wished to apply section 21 (the full text of this section and any other sections of the Act or EIR referred to in this Notice can be found in the Legal Annex towards the end of this Notice) of the Act to this information as it is available by other means. The Council advised the complainant that three documents remained, which are held on the pre-planning application file SN17523. It informed the complainant that it considered these documents were exempt from disclosure under sections 40(2) and 41 of the Act.
5. The complainant appealed against this decision on 1 June 2008. She stated that she required access to the pre-planning application file SN17253 and any personal information that may be held on this file relating to herself, daughter and son-in-law.
6. The Council acknowledged receipt of the complainant's request for an internal review on 3 June 2008 advising her that a response would be issued within 15 working days. With regards to the complainant's request for any personal data relating to herself, daughter and son-in-law, the Council confirmed that no information was held on the pre-planning application file of this nature.
7. The complainant contacted the Council again on 16 June 2008 to clarify that she was only interested in gaining access to the pre-planning application file SN17523 at this stage and requested a meeting with the Council to view this file and to discuss a number of other outstanding matters.
8. The Council informed the complainant of the outcome of the internal review on 19 June 2008. It confirmed that the pre-planning application file remained exempt from disclosure under sections 40(2), 41(1) and 43(2) of the Act.
9. The complainant wrote to the Council on 26 June 2008 to request a further review.

10. The Council responded on 4 July 2008 advising the complainant to refer the matter to the Information Commissioner, as it remained of the opinion that the pre-planning application file was exempt from disclosure under the Act.

The Investigation

Scope of the case

11. On 17 July 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had acted appropriately by withholding the pre-planning application file under sections 40(2), 41(1) and 43(2) of the Act.
12. The complainant also confirmed that she had concerns about the information the Council holds on herself, daughter and son-in-law. She stated that she requires copies of any information regarding herself, daughter and son-in-law, any information provided by other persons relating to herself, daughter and son-in-law and any reference to herself, daughter and son-in-law in the planning applications submitted by her daughter's neighbour. These issues will not be considered as part of this Notice. This is because they are requests for personal data relating to the complainant and her family. Having obtained the appropriate consent from the family members concerned, such requests should be considered under the DPA. They are not requirements of Part 1 of the Act. The Commissioner notes that these concerns have already been addressed under a separate case reference.

Chronology

13. A copy of the withheld information was forwarded to the Commissioner on 1 December 2008.
14. The Commissioner wrote to the Council on 1 September 2009. He advised the Council that the withheld information was environmental information and requested it to reconsider the request under the EIR. He also asked the Council to clarify exactly what documents were being withheld, as it appeared from the information supplied on 1 December 2008 that more than three documents were being withheld.
15. The Council responded on 7 October 2009. It explained that three documents were withheld, however, these documents had one or more attachments. It provided a further copy of the withheld information and labelled the three documents A – C. It also individually labelled each attachment (please refer to paragraph 20 for further details). The Council explained that it accepted that the request should have been considered under the EIR and confirmed that on reflection the attachment labelled C(ii) and drawings 9/0, 9/2 and 9/5 attached to C(iii) could be released. It advised that the remaining documents were still being withheld and outlined for each of these documents which exceptions of the EIR it felt applied.

16. The Commissioner wrote to the Council on 21 October 2009 to request some additional information and further explanations concerning the exceptions cited.
17. The Council responded further on 28 October 2009 providing the additional information.
18. The Commissioner wrote to the Council on 4 November 2009 to outline his preliminary view and to request that the Council reconsider releasing some of the documents it wished to withhold.
19. The Council wrote to the Commissioner on 9 November 2009. It confirmed that it disagreed with the Commissioner's preliminary assessment for reasons it had previously explained (which will be addressed in detail later in this Notice) and requested a formal Decision Notice.

Findings of fact

20. The withheld information is the pre-planning application file SN17253 and this consists of the following documents:
 - A. Handwritten note relating to a meeting between a named planning officer and the applicant.
 - B. Letter dated 30 October 2007 from a named planning officer to the applicant, attached to it:
 - (i) letter dated 15 September 2007 from the applicant to a named planning officer;
 - (i)(a) proposed site plan drawing no. 07/56/01 dated September 2007;
 - (ii) handwritten note;
 - (iii) map dated 2 October 2007;
 - (iv) map – dated 1 June 2007;
 - (v) plan – drawing no. 9.8.
 - C. Letter dated 29 March 2007 from a named planning officer to the applicant, attached to it:
 - (i) letter dated 8 March 2007 from the applicant to a named planning officer;
 - (ii) map dated 27 March 2007
 - (iii) Drawing No 9/0, 9/1, 9/2, 9/3, 9/5, 9/6 and 9/6a
21. As stated above in paragraph 15, the Council decided to disclose document C(ii) and those drawings labelled 9/0, 9/2, 9/5 attached to document C(iii) to the complainant. These documents will therefore not form part of the remainder of this Notice.

Analysis

Substantive Procedural Matters

22. As stated in paragraph 14 above, the Commissioner found that the requested information was environmental information and therefore that the complainant's request should have been considered under the EIR. Briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements including the land and 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 measure and activities designed to protect those elements. The Commissioner notes that the requested information is a series of correspondence concerning a plan to extend a residential property. This is a measure that affects or is likely to affect the elements outlined in subparagraph 2(1)(a) of the EIR.
23. As the Council failed to identify that the requested information was environmental information it issued a Refusal Notice citing exemptions under the Act. Regulation 14(3) of the EIR states that if a request for environmental information is refused by a public authority it should issue a Refusal Notice which specifies the exception(s) being relied on and the matters the public authority considered in reaching its decision with respect to the public interest test. As the Council dealt with the request under the incorrect regime, the Refusal Notice did not specify the exception(s) being relied on under the EIR and the public interest test arguments considered by the Council. The Commissioner has therefore concluded that the Council was in breach of regulation 14(3) of the EIR in this case.

Exceptions

Documents A, B, B(i), B(i)(a), B(ii), C and C(i)

24. The Council confirmed that these documents are exempt from disclosure under regulation 13 of the EIR. It stated that these specific documents contain personal data relating to the planning applicant or information from which the planning applicant could be identified. The Council explained that it felt disclosure of this information would breach the first data protection principle and that in accordance with the DPA it did not consider any of the conditions in Schedule 2, which if met would permit disclosure, were engaged in this case.

Regulation 13 – personal data

25. In order for regulation 13 of the EIR to apply, the requested information must firstly be personal data. Personal data is defined in section 1 of the DPA as follows:

“personal data” means data which relate to a living individual who can be identified -

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

26. The Commissioner has reviewed each of these documents in detail. Documents A, B, B(i), B(ii), C and C(i) are either correspondence between the planning applicant and a named planning officer, notes relating to a meeting that was held between these individuals or notes evaluating the specific plans submitted informally for consideration. These documents specifically contain information relating to the planning applicant or information from which the planning applicant can be identified. As a result, the Commissioner is satisfied that these documents are the personal data of the planning applicant concerned as defined in the DPA.
27. Document B(i)(a) is a drawing outlining the planning applicant’s intention to extend/alter his property, which was attached to Document B(i). This document contains information relating to the applicant’s property, its current layout and possible plans to alter its current appearance. As the property to which this drawing relates is owned by the planning applicant, the Commissioner is satisfied that this document falls within the definition of personal data.
28. As the Commissioner is satisfied that these documents are the personal data of the planning applicant, he must now establish whether disclosure of that data would contravene one of the data protection principles in the DPA. As stated above, the Council is of the view that disclosure would breach the first data protection principle. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”
29. In determining whether personal data would be processed fairly in releasing the requested information to the complainant, the Commissioner has considered whether there would be any unfairness to the subject of those data (the planning applicant).
30. The Commissioner notes that these documents are a series of correspondence between the planning applicant and the Council concerning a preliminary enquiry the applicant made prior to submitting a formal planning application. He also notes that pre-application enquiries are not made available to the public unlike official planning applications, which are available to the public via the Council’s website. The Commissioner accepts that as these documents relate to the preliminary enquiries made prior to an official application being submitted it is reasonable to assume that the applicant would not expect this information to be

released into the public domain. He has therefore decided that it would be unfair to disclose this information under the EIR.

31. The Commissioner now needs to consider whether any of the conditions in Schedule 2 can be met. He considers that the most applicable condition in this case is likely to be schedule 2(6)(1) of the DPA which gives a condition for processing personal data where:
 - The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
32. In deciding whether this condition would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas* [EA/2007/0060]. In that case the Tribunal established the following three part test that must be satisfied before this condition will be met:
 - there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public, and
 - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
33. The Council confirmed that it could identify no legitimate public interest in the disclosure of the personal data and felt that disclosure would be an unwarranted interference with the data subject's privacy.
34. Although the complainant appears to be pursuing access to this information for personal reasons only, in order to pursue a complaint against the planning department, the Commissioner can see a legitimate public interest in obtaining access to this type of information. Access would enable the public to gain a better understanding of how planning decisions are reached and when planning permission is required. It would also promote the advantages of this pre-application service and transparency of the Council's activities.
35. It is the Commissioner's view that this public interest is already met by the fact that formal planning applications are made available to the public. Requests for planning permission and any decisions reached are in the public domain, enabling these official applications to be scrutinised and challenged. Disclosure of these documents, in this case, is not necessary to meet this public interest and would be an unwarranted interference into the rights and freedoms of the data subject concerned (the planning applicant). As stated previously, the planning applicant would not expect their personal data in this situation to be released into the public domain. The planning applicant would only expect their personal data to be disclosed to the public once an official application is made to the Council and for this disclosure to be limited to the personal data submitted in conjunction with this official application.

- 36 In conclusion, the Commissioner is satisfied that disclosure would breach the first data protection principle and because condition 6 of Schedule 2 of the DPA is not met in this case. He has therefore concluded that regulation 13(2)(a)(i) of the EIR applies to this information.

Documents B(iii), B(iv) and B(v)

Regulation 12(4)(e) – internal communications

37. Documents B(iii) and B(iv) are maps which outline the curtilage to the planning applicant's property, B(iii) is an Ordinance Survey map and B(iv) is a map which the Commissioner understands was supplied by the applicant. Document B(v) is a block plan submitted by the applicant during the pre-planning application process. The Council confirmed that document B(iii) did not form part of the formal planning application and is therefore not available on the Council's website. Un-annotated copies of documents B(iv) and B(v) did, however, form part of the formal planning application and can therefore be found on the Council's website.
38. These three documents contain handwritten notes made by a planning officer and for this reason the Council has claimed that the annotated versions are exempt from disclosure under 12(4)(e) of the EIR.
39. For the Commissioner to agree that regulation 12(4)(e) applies the Council first needs to demonstrate that the documents are internal communications. Secondly it needs to apply the public interest test bearing in mind regulation 12(2) of the EIR which requires the Council to apply a presumption in favour of disclosure.
40. The Council confirmed that the three documents contain notes that were made by a planning officer when they were considering the pre-planning application submitted by the applicant. It explained that these notes were made to enable either the author or other planning officers to refer back to when the matter was being reviewed or progressed forward. For these reasons, the Council felt that the documents fell within the definition of internal communications.
41. The Commissioner has reviewed the documents. He notes that the handwritten notes were made by a planning officer when the pre-planning application was being considered. He accepts that the intention was for these notes to be consulted at a later date by either the same planning officer or another to enable the unofficial application to be progressed. As the notes were not a simple aide memoir but were designed to assist the planning officer and others in the pre-planning application process, the Commissioner is satisfied that these documents are internal communications for the purposes of the EIR.
42. As the Commissioner is satisfied that these documents are internal communications it is now necessary for him to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

43. In its submissions to the Commissioner, the Council accepted that disclosure of this information could possibly assist in ensuring that it is accountable for the planning decisions it makes, promote transparency and aid public debate. However, it felt there were more compelling arguments against disclosure.

Public interest arguments in favour of maintaining the exemption

44. The Council confirmed that it is charged with the duty of making good decisions in respect of planning applications that are submitted. It explained that this is based on the Council being able to give the best advice available and being able to consider all options thoroughly without the fear of any premature disclosure of pre-planning application information. It explained that it is important that planning officers are able to conduct a “thinking through of the options” exercise to enable any pitfalls, breaches of statutory requirements and subsequent need for planning permission to be identified in the knowledge that any such details of that process will not be disclosed.
45. It argued that little weight can be attached to the public interest in providing access to pre-planning application information as decisions reached on formal planning applications that are submitted, whether taken by officers under their delegated powers or by the Planning Committee, are made in the public domain. All documentation relating to formal applications is available for inspection at the Council offices or on the Council’s own website. Any planning decisions that are made are therefore based on information that is in the public domain and officers and Councillors identified to ensure they are accountable for the decisions made.
46. The Council explained that the pre-planning application process forms part of the Council’s ability to both develop and sustain the Council’s adopted planning policies. It is a useful and resourceful service, which would be hindered if disclosure were routinely ordered for this type of information. If planning officers knew that such information would be disclosed, they would feel constrained when giving advice which would then hinder the pre-planning process; a process which is of benefit to both the Council and its respective planning applicants.

Balance of the public interest arguments

47. The Commissioner has given careful consideration to the public interest arguments presented by the Council. He notes that there is a public interest in public authorities acting openly and in a transparent way. He also accepts that there is a strong public interest in the planning process; the ability to view applications and challenge or comment on those current applications being considered by the Council.
48. There is also a strong public interest in knowing how decisions are reached by the Council and ensuring that all planning applications are considered in a fair, consistent and unbiased way.

49. Concerning the arguments against disclosure, the Commissioner accepts that the pre-planning application service is a valuable resource to both prospective applicants and the Council itself. It enables prospective applicants to receive informal advice prior to the submission of an official application and enables the Council to highlight any planning issues of principle or requirements with an individual case at an early stage. Often informal advice is given regarding the likely outcome of an application. Such benefits enable the statutory planning process to run more smoothly and often speed up the official process. The Commissioner accepts that any disruption or hindrance to this process would not be in the public interest.
50. However, in this case, the Commissioner remained unconvinced that the disclosure of the annotated documents would have the effect the Council describes. The notes made on documents B(iii) and B(iv) simply highlight a discrepancy identified by a planning officer between the curtilage outlined on one map and another. The notes made on document B(v) make a simple and basic reference to the proposed extension and the planning site itself. The Council has not explained exactly how disclosure of this basic information would hinder the pre-planning process or the ability of planning officers to make decisions in the future. The Commissioner cannot therefore accept this public interest argument as a valid one.
51. It is the Commissioner's view that the withheld comments do not disclose any information regarding the pre-planning process or how decisions are reached. He has therefore concluded that there are no compelling public interest arguments in this case in favour of maintaining the exception provided by 12(4)(e) of the EIR.
52. As referred to in paragraph 39 above, regulation 12(2) of the EIR states that when considering the public interest test a presumption in favour of disclosure must be applied. Taking into account this requirement, it is the Commissioner's decision that the public interest in maintaining the exception does not outweigh the public interest in disclosure.
53. It is the Commissioner's view that these documents are the personal data of the planning applicant. In cases where the requested information is personal data and the public authority has not claimed the relevant exception, the Commissioner would usually go on to consider this exception and whether it applies. In this particular case the Commissioner cannot see any prejudice or unfairness to the data subject if these documents were disclosed. For this reason, he has not gone on to consider this exception in further detail.

Documents C(iii) – drawings 9/1, 9/3, 9/6 and 9/6a

54. These documents are the proposed ground floor, proposed first floor, proposed rear and side elevation and proposed front and side elevation drawings submitted to the Council by the applicant during the pre-planning application stage.
55. The Council has applied exceptions 12(5)(e) and 12(5)(f) of the EIR to these documents. The Commissioner will consider the application of each exception in turn and whether it applies in this case.

Regulation 12(5)(e)

56. Regulation 12(5)(e) provides that the Council 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”.

57. For the Commissioner to agree that this exception applies the Council would need to demonstrate that:

- the information is commercial and industrial in nature;
- the information is confidential where such confidentiality is provided by law;
- that confidentiality is required to protect a legitimate economic interest;
- the confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.

Secondly, and once the above four elements are met, the Council would need to apply the public interest test demonstrating that the public interest in maintaining the exception outweighs the public interest in disclosure.

58. In its submissions to the Commissioner, the Council argued that in total four sets of drawings were submitted to the Council in relation to this application at different stages during the pre-planning process and the official statutory planning process. The same drawings are available on the Council's website relating to the official application submitted. The drawings being withheld are the same as those that were submitted with the proposed plans and were therefore only filed on the pre-planning file SN17253. The Council argued that it was never the intention to make these drawings available to the public and by the very fact that they are only held on the pre-planning file it is unwilling to disclose them.

59. It is the Commissioner's view that the Council's arguments are not sufficient and are in fact irrelevant to the application of the exception cited. It has not demonstrated how the four part test outlined in paragraph 57 applies. He has therefore gone on to consider the application of this exception himself. It is the Commissioner's decision that the application of this exception falls at the first element of this test. The information is proposed drawings of the property subject to a possible future planning application. The information is not commercial or industrial in nature. For information to fall into this category the information would need to be about a commercial or industrial activity. For example, information relating to commercial contracts with a third party, information relating to a tendering process and any bids submitted from private companies. There are now numerous Decision Notices available on the Commissioner's website that address section 43 of the Act and regulation 12(5)(e). These give further examples of what types of information are considered to be commercial or industrial.

60. Even if the Commissioner were to accept that these drawings are commercial or industrial in nature, it would be his view that the drawings cannot be regarded as confidential information. With the exception of the date on these drawings, the

exact same drawings are available for the public to view on the Council's website in connection with the official planning applications that were submitted. It cannot therefore be argued that the drawings are confidential information or that the applicant has not consented to their wider disclosure.

61. It appears that the Council's concerns relate to the date of the drawings and the fact that they were submitted to the Council during the pre-planning application process and not considered beyond this point. It is the Commissioner's view that the date of the drawings is immaterial and that this and, the fact that they were only held on the pre-planning application file, are not valid or reasonable grounds for not disclosing these set of drawings.
62. For the reasons stated above in paragraphs 56 to 61, the Commissioner has concluded that regulation 12(5)(e) does not apply to this information. As the exception is not engaged, the Commissioner has not gone on to consider the public interest arguments submitted by the Council.

Regulation 12(5)(f)

63. Regulation 12(5)(f) provides that the Council may refuse to disclose information if its disclosure would adversely affect -
- “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”.
64. The purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. Once the three elements of the exception have been demonstrated, the Council then needs to apply the public interest test weighing up the arguments for and against disclosure.
65. The Commissioner will not outline the arguments submitted by the Council in support of this exception, as they are the same as those detailed above in paragraph 58.
66. It is the Commissioner's view that the Council has failed to demonstrate exactly how each of three elements of this exception apply in this case. He has therefore considered himself how and to what extent the three elements of this exception apply to these documents.
67. The Commissioner accepts that the information was not supplied by the planning applicant to the Council under any legal obligation; in fact it was provided to the Council on a voluntary basis as part of the pre-planning application process. He also accepts that the information was not supplied in circumstances that would entitle the Council to disclose it, apart from the Act or the EIR. He notes that the

information was submitted for informal consideration and that the applicant would not have reasonably expected at this stage in the process that this information would be made available for public scrutiny.

68. However, it is the Commissioner's view that it cannot be argued that the applicant did not consent to its ultimate disclosure and therefore that the application of this exception falls at the third element. The exact same drawings, with the exception of the date, are available to the public on the Council's website. It is clear that the applicant proceeded to submit a formal planning application and was therefore aware from at least this point that this information would be made available for public scrutiny. The Commissioner cannot therefore see how the applicant could reasonably object to the disclosure of these earlier drawings.
69. As stated above, the only difference between these drawings and those available on the Council's website is the date of the drawings and it is the Commissioner's view that this is immaterial. The Council's argument that these drawings were submitted at the informal stage and have therefore only been held on the pre-planning application file which is not routinely disclosed, is not a valid or indeed relevant submission in support of this exception.
70. The Commissioner has therefore concluded that the exception provided by regulation 12(5)(f) of the EIR does not apply in this case. As the exception is not engaged there is no need for the Commissioner to go on to consider the public interest test.
71. It is the Commissioner's view that these drawings are the personal data of the planning applicant. In cases where the requested information is personal data and the public authority has not claimed the relevant exception, the Commissioner would usually go on to consider the exception and whether it applies. In this particular case the Commissioner cannot see any prejudice or unfairness to the data subject if these drawings were disclosed. For this reason, he has not gone on to consider this exception in further detail.

Procedural Requirements

72. The Commissioner notes that the Council failed to issue its Refusal Notice within 20 working days of the receipt of the request. The complainant's information request was dated 27 April 2009. However, the Refusal Notice was not issued until 29 May 2008. The Commissioner has therefore found that the Council was in breach of regulation 14(2) of the EIR.

The Decision

73. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the EIR:
- it correctly relied upon the exception provided by regulation 13(2)(i)(a) for the non disclosure of the documents labelled A, B, B(i), B(i)(a), B(ii), C and C(i).
74. The Commissioner's decision is that the Council did not deal with the following elements of the request in accordance with requirements of the EIR:
- It breached regulation 14(3) by failing to identify that the information was environmental information and to issue an appropriate Refusal Notice in accordance with the EIR.
 - It breached regulation 14(2) by failing to issue its Refusal Notice within 20 working days.
 - It incorrectly relied upon the exceptions provided by regulations 12(4)(e), 12(5)(e) and 12(5)(f) for the non disclosure of documents labelled B(iii), B(iv) B(v), C(iii) in particular drawings numbered 9/1, 9/3, 9/6 and 9/6a.

Steps Required

75. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
- (i) Release the following documents to the complainant:
- B(iii)
 - B(iv)
 - B(v)
 - C(iii) – drawings labelled 9/1, 9/3, 9/6 and 9/6a
76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

77. 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

78. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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

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

Dated the 14th day of December 2009

Signed

**David Smith
Deputy 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.”

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Environmental Information Regulation 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 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 13(1)

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or

- (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3)

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4)

In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5)

For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

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).

Data Protection Act 1998

First data protection principle states –

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

(6)(1) –

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.