

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

Decision Notice

Date: 3 December 2009

Public Authority: Tandridge District Council
Address: Council Offices
Station Road East
Oxted
Surrey
RH8 0BT

Summary

The Complainant requested all information held by the council relating to planning activities and applications on a particular building from the council. The council provided access to the planning applications which were already in the public domain, however it refused access to further information on the basis that the information it held was exempt under section 40 of the Act (personal data). The Commissioner considered the information and informed the public authority that it was his view that the information should have been considered under the Environmental Information Regulations 2004 ('the regulations'). The council responded indicating that it did not accept that that was the case and wished to continue to rely upon section 40 under the Act. It added however that in the event that the Commissioner decided that the information was environmental information then it would instead rely upon regulation 13(1).

The Commissioner has considered the information. Further to this, he has considered the application of regulation 13(1) to the information. His decision is that the council was not able to rely upon this exception in this case, other than for one small section of information which relates to the personal life of a third party. His decision is therefore that the exception is not engaged other than for that small section of information. Further to this the Commissioner has identified that some of the information is the personal data of the complainant. The Commissioner's decision is that this information is exempt under regulation 5(3).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

3. The information in question relates to planning applications submitted to the council to change the use of a building used as business premises. The buildings forecourt is partly used by residents whose properties border the business. The complainant believes that the authorisation of the planning application had subsequent effects on her ability to access her property in the manner which she has previously been able to. Also involved in application decisions relevant to this was the county council, which had regulatory functions in relation to the highways and access to the forecourt.
4. The complainant sought information from the council as to why the council had authorised a planning application with resultant effects on her access rights to her property. There was a long series of correspondence which ran over a number of years leading eventually to the request in this case, amongst other requests under the Act. Additionally private litigation was entered into between the parties relating to rights of access to the property

The Request

5. On 9 November 2007 the complainant requested from the authority "all information held on microfiche relating to 7 High Street".
6. On 15 October 2007 the council had replied to earlier, similar requests for the same or similar information, and on 7 December 2007 the council wrote to the complainant stating that the refusal notice of 15 October 2007 also applied to the information requested on 9 November 2007. That notice refused information on the grounds that section 40 of the Act applied, however it also included a disclosure of some of the information requested.

7. On 4 April 2008 the complainant also asked for “all information that implies or states an agreement between myself (i.e. the complainant) and 7 High Street regarding the use of the forecourt....” “This must also include any information implying such an agreement from Mr A.”
8. On 9 April 2008 the council responded. It stated that all of the information on the planning applications was available on the planning website of the council; however information between the legal department and the council was exempt under section 42. As noted below however this information was subsequently disclosed to the complainant on an informal basis and is not therefore considered further in this notice.
9. On the same date the complainant emailed the council and requested:
 1. Under FOI I request confirmation that the withheld documentation refers to the fact that Tandridge District Council has previously granted planning permission with parking spaces on the land in front of the garages.
 2. Under FOI, I request confirmation that the withheld documentation refers to the fact that Tandridge District Council had previously granted parking spaces to the side of the building.
 3. Under FOI, I request confirmation that the withheld documentation refers to the fact that Tandridge District Council had granted a parking space on the far side of the forecourt
 4. Under FOI, I request confirmation that the withheld documentation refers to the number of parking spaces previously granted by Tandridge District Council.
 5. Under FOI I request confirmation that the withheld documentation refers to the fact Tandridge District Council agreed “not to pursue” unregulated parking.
10. On 14 April 2008 the council responded to the complainant stating that it had previously informed her that the information it held was exempt, and that it was therefore not prepared to enter into correspondence about that information further.
11. Also on 14 April 2008 the complainant wrote to the council referring to the council's letter of 15 October 2007 and stated:
 - i) “the penultimate paragraph on page 1 refers to “correspondence with Mr A and file notes relating to conversations and meetings with him.” the second paragraph page 2 states: “the correspondence with Mr A and the file notes are being withheld on the grounds that that these documents contain personal information about Mr A and that to release this information to the public would breach the first data protection principle laid down by the Data Protection Act 1998.

ii) Planning history is in the public domain and does not qualify as “personal information”. There is therefore no reason to withhold any reference to planning history contained in the withheld documentation.”

It also reiterated the need for the council to comply with all of these requests.

12. On 23 April 2008 the council stated that it was replying in regards to all of the matters raised in the above letters. It stated that “the withheld documentation refers to the enforcement history of the site and is not in the public domain. It stated that the complainant had already been informed of the reason why the documents were not being disclosed and therefore the council would not enter into further correspondence about their contents.”

The Investigation

Scope of the case

13. On 26 January 2008 the complainant contacted the Commissioner to complain about the way her requests for information had been handled.
14. During the course of the Commissioner’s investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The planning applications themselves were disclosed to the complainant.
 - Information which had initially been withheld under section 42 of the Act (legal professional privilege), was re-examined under the regulations and regulation 12(4)(e) applied (internal communications). However after further consideration the council decided that this information could be disclosed and it therefore provided a copy of it to the complainant.
15. The council states that the only information which has been withheld relating to this case is that which the council refers to in paragraph 6 above. This is information which was withheld from the complainant on the basis that that it is correspondence between the council and Mr A. The council withheld this under section 40 of the Act. It is this information which is therefore the subject of this Decision Notice.

Chronology

16. On 10 June 2008 the Commissioner wrote to the council stating that a complaint had been received which the Commissioner considered eligible, and that it would be investigated in due course. That letter also asked the council if it wanted to review its decision in the case prior to the complaint being allocated for investigation.
17. On 19 June 2008 the council responded indicating that given the past history of correspondence between the parties it did not wish to review its refusal notice.

18. On 24 June 2008 the Commissioner wrote to the council stating that in light of that decision, the case would be allocated for investigation in due course, and asked whether the council wished to submit any further arguments.
19. On 10 July 2008 the council wrote seeking a clarification of the complaint which had been made as it understood that all of the information which had been asked for had been provided to the complainant other than some information withheld under section 42 of the Act (legal professional privilege) and other information withheld on the basis that section 40 applied.
20. On 28 May 2009 the Commissioner wrote to the council stating that the case was due to be allocated and asking it to submit the withheld information to the Commissioner together with any further arguments which the council wished to rely upon.
21. The council responded on 26 June 2009 providing a copy of the withheld information together with further arguments in support of its position.
22. On 7 July 2009 the Commissioner wrote to the council stating that the case had now been allocated. The Commissioner stated that after an initial analysis he considered the information to be environmental information and that the council should have considered it under the regulations rather than the Act. He asked the council to reconsider its position and to submit further arguments.
23. On 30 July 2009 the Commissioner reminded the council about his email and asked for a response.
24. On the same day the council responded to the email. It stated that after due consideration it considered that the information was not environmental information and wished to continue its reliance upon the exemptions under the Act. However it also stated that in the event that the Commissioner did not agree with this it wished to rely upon regulation 13(1) and regulation 12(4)(e) (internal communications).
25. On 11 August 2009 the council wrote again to the Commissioner. It stated that it had reconsidered its position regarding the information it claimed to be exempt under regulation 12(4)(e) and had therefore disclosed this to the complainant.

Analysis

Substantive Procedural Matters

26. The Commissioner notes that the council initially refused the request for the information because it considers it exempt under section 40 of the Act. However the Commissioner considered that the information was environmental information which falls under the scope of the Regulations.

27. The Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR.

Regulation 2(1)(c) provides that –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

(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’

28. The factors referred to in (a) include -

‘ 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’

29. The Commissioner is satisfied that the information in question is correspondence on a measure (i.e. a planning application) to change the use of land and to make changes to a shop frontage. The information also involves discussions surrounding the use of the forecourt, the widening of a vehicle crossover and issues relating to this.
30. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

Exemptions

Section 40

31. The council exempted the information under section 40 of the Act on the basis that it was personal information relating to a third party and that its disclosure would breach one of the principles of the Data Protection Act 1998.
32. However the Commissioner established above that the information should properly have been considered under the regulations. Section 40 cannot therefore be applicable to the information. The Commissioner wrote to the council and asked it to reconsider its application of section 40 on this basis, however the council did not accept that the information was environmental and chose instead to continue its reliance upon section 40. The Commissioner's decision is that that was not correct.

Exceptions

Regulation 5(3).

33. The council stated that in the event that the Commissioner did not accept that the information fell to be considered under the Act rather than the regulations it would choose instead to rely upon the exception in regulation 13(1) of the Act to exempt the information from disclosure. However the first question to consider is whether any of the information is the personal data of the applicant or of a third party.
34. Section 1(1) of the Data Protection Act 1998 states that:
- "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'.
35. The Commissioner has considered the information which is held by the council and his decision is that a limited amount of the information is actually the personal data of the complainant. This information is third party comments and opinion on the actions of the complainant which have been reported to the council and recorded as file notes by council officers. Regulation 5 (3) disapplies regulation 5(1)(the general right to access information under the regulations) where the information is the personal data of the applicant. This information is therefore exempt from disclosure under the regulations. The Commissioner recognises however that the complainant is likely to have access rights to this information under section 7 of the Data Protection Act 1998 (the 'DPA'). The council should therefore consider the complainants rights to this information under section 7 of the DPA.
36. Third party information held by the council is directly addressed in regulation 13(1).

Regulation 13 (1)

37. Regulation 13(1) provides an exception to the right to information where the information in question is the personal data of a third party and where its disclosure would breach one of the data protection principles. Regulation 13(1) is provided in the legal annex to this Decision Notice.

Is the information personal data?

38. The Commissioner wrote to the council suggesting that whilst the withheld information was correspondence and telephone records of the council's dealings with Mr A, he was acting on behalf of a limited company in those letters. Limited companies have their own legal personality in law, but their information is not caught by the DPA because they are not a "living individual" as defined in section 1(1) of the DPA provided above.
39. The council's response was that in this case Mr A was acting in a personal capacity, albeit that he wrote to the council on the company's headed paper. It also argued that where small, 'one man' limited companies are concerned the distinction between the affairs of the company and the affairs of the individual is a very fine one. However the Commissioner has searched Companies House database which shows that there are several Directors of the company, including two other limited companies on its board. The council's argument in this respect is therefore based on a false premise.
40. The information relates to the change of use of the premises in question to a store front for business uses. The premises are not Mr A's personal address but a business address of the company in question. He does not live there. Examining the correspondence between the parties, Mr A uses the company's headed paper when corresponding with the council, and follows his name in the sign off of many of the letters with "for and on behalf of (name of the company)". The council also writes back to him using the name of the company. The Commissioner does not therefore accept that Mr A was acting on his own behalf but considers that he was acting on behalf of a limited company, and that the council understood that that was the case.
41. The Commissioner is therefore satisfied that the information is not personal data relating to the director, but is correspondence he has had with the council on behalf of a limited company. The information does not pertain to Mr A's personal or private life but to the company's aspirations as regards the planning application.
42. As the information is not the personal data of Mr A the Commissioner's decision is that the exception in regulation 13(1) is not applicable.
43. The Commissioner recognises one exception to this Decision. A small number of the documents make reference to matters ongoing at Mr A's home. These appear to relate directly to Mr A's domestic residence and work being carried out by him there. They do not directly relate to matters relating to the company's planning application. The Commissioner recognises that it would not be fair for the council to disclose information pertaining to this matter. It would entail a disclosure of information intrusive to Mr A and his family life in a way that the other information held by the council is not, and this disclosure would not be warranted bearing in mind the full circumstances of this case. Accordingly the Commissioner recognises that this information does fall within regulation 13(1) as its disclosure would breach the fair processing requirements of the first data protection principle.

The Decision

44. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

- The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
- In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.
- The council was not correct to apply regulation 13(1) to most of the information it holds pertaining to its correspondence and telephone conversations with Mr A.
- The council was however able to apply section 13(1) to the sections of the documents referring to planning and clarification matters relating to Mr A's place of residence.
- The council was also able to withhold information which is the personal data of the complainant under regulation 5(3). However it should have considered that information for disclosure under the subject access rights provided by section 7 of the Data Protection Act 1998.

Steps Required

45. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

to disclose to the complainant information which he identified above as not falling within an exception.

to consider the personal data of the complainant for disclosure under the provisions of section 7 the Data Protection Act 1998.

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

Failure to comply

47. 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

48. 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

49. 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.
50. 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 3rd day of December 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Interpretation

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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Duty to make available environmental information on request

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.

(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.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Personal data

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.

(2) 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 these Regulations 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 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 (which relate to manual data held by public authorities) were disregarded.