

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

Decision Notice

Date: 15 March 2011

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire
SY2 6ND

Summary

The complainant requested information from Shropshire Council (the Council) regarding planning matters at a property. When the Council responded to the request, it refused to supply some of the requested information citing section 40(2) of the Freedom of Information Act. Whilst the public authority dealt with the request under the Freedom of Information Act, the Commissioner is of the opinion that the information was of an environmental nature and that the request should therefore have been dealt with under the Environmental Information Regulations. Consequently the Commissioner finds that, the Council is entitled to withhold the remaining information under Regulation 13. However, in responding outside the statutory time, the public authority breached regulation 5(2) of the Environmental Information Regulations.

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.

Background

2. The background to this matter is that the complainant was concerned that work his neighbour was undertaking on her property was in breach of a tree preservation order. The complainant corresponded with the Council regarding the matter over a lengthy period and it appears that matter resulted in a conflict between the neighbours.
3. The Commissioner notes that it therefore appears that the complainant submitted his request to the Council in light of the conflict.

The Request

4. On 22 June 2009, the complainant made the following request for information:

All public documents, suitably redacted internal communication - including e-mail regarding all formal applications, informal advice or other contact with or involving the occupant of [a property] and my responses with your officers and predecessor authority during the last 12 months.

5. The request was received and acknowledged by the Council on 25 June 2009. Some information and a partial refusal notice were then provided by the Council on 27 July 2009. The Council answered the request under the Freedom of Information Act 2000 (FOIA) and refused to disclose some information on the basis of the exemption at section 40(2).
6. The Council then provided an internal review of its response on 7 August 2009. It explained the reason for the delay in responding and also indicated that further information had been located. A redacted copy of this further information was then provided on 11 August 2009 and the Council again explained that section 40(2) was being relied upon to withhold some information.

The Investigation

Scope of the case

7. On 16 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Council had disclosed some information when responding to the request. It then provided further information during the course of the

Commissioner's investigation. As these elements were informally resolved, the Commissioner has not considered them in this Decision Notice.

9. Therefore the scope of this complaint is limited to the remaining withheld information only. The Commissioner has considered whether the Council was correct to apply the exception at Regulation 13 of the EIR to the remaining withheld information and whether it responded to the request in accordance with the procedural requirements of the EIR.

Chronology

10. The Commissioner wrote to the Council on 12 April 2010 requesting a copy of the withheld information and arguments to support its reliance on the exceptions within the EIR.
11. On 10 May 2010 the Council provided a substantial response including copies of the withheld information.
12. On 31 January 2011 the Commissioner invited the Council to disclose some further information which it had previously withheld under Regulation 13 of the EIR.
13. On 8 February 2011 the Council confirmed to the Commissioner that it would disclose some further withheld information as invited.

Analysis

Substantive Procedural Matters

14. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
15. The remaining withheld information entails written records held by the Highways Team within the Environment Department. It consists of notes of informal telephone conversations between a council officer and the complainant's neighbour.
16. The Commissioner considers that the information requested falls within regulation 2(1)(c): "measures (including administrative measure), 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 these elements". The remaining withheld information is information on activities that affect or are likely to affect the elements of the environment. Therefore, the Commissioner considers the information to be environmental information.

Exceptions

Regulation 13

17. Regulation 13 provides an exception for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ("DPA"). (The relevant sections of Regulation 13 are included in the legal annex attached to this notice).
18. In order to rely on the exception provided by Regulation 13, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data as:

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 intention of the data controller or any other person in respect of the individual.

Is the requested information personal data?

19. The Council have submitted that the withheld information is personal data and having reviewed the information the Commissioner is satisfied that it falls within the description of personal data as defined by the DPA. The individual is the owner of the property about which the complainant requested information. She is the focus of the withheld information and can be clearly identified from it. The Commissioner therefore accepts that the information in the context of the request is personal data as defined by the DPA.

Would disclosure of this personal data breach any of the data protection principles?

20. Having accepted that the withheld information constitutes the personal data of a living individual, the Commissioner must next consider whether the disclosure would breach one of the data protection principles. He considers that first principle to be most relevant in this case.

The first data protection principle

21. The first data protection principle has two components which are as follows:
 - Personal data shall be processed fairly and lawfully; and

- Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
22. The full text of the first principle and a list of Schedule 2 conditions are included in the legal annex.

Would it be fair to disclose the withheld information?

23. In determining whether a disclosure is fair under the first data protection principle for the purposes of Regulation 13 of the EIR, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with the general principles of accountability and transparency.

a) Reasonable expectations of the data subject

24. The Commissioner notes that disclosure under the EIR represents disclosure to the wider world. When considering the reasonable expectations of the data subject, the Commissioner considers whether they would be likely to expect that their personal data would be disclosed to anyone who requested it.
25. The Council told the complainant that the data subject in this case would have a reasonable expectation of confidence with regard to her discussions with the Council as it is believed that she *"conducted the conversation/s without the presumption that any comments would be made publicly accessible to a member of the public making a request for information"*.
26. The Commissioner considers that whilst the remaining withheld information appears to be held on the file relating to a tree preservation order, it records conversations which the data subject conducted with the council officer in a private capacity.
27. The Commissioner notes that formal and public processes such as planning and assessing compliance with tree preservation orders carry an expectation that information relating to those processes will be made publically available and open to scrutiny. However, in this case, the Commissioner has considered that the conversations were not relating to the formal planning or tree preservation order process and as such were informal conversations making comments or requests for advice in a private capacity. The Commissioner therefore considers that the data subject would have little or no expectation that the matters discussed would be disclosed to the wider world.
28. The Commissioner also considered that the Council had approached the data subject for her consent to disclose her personal data, but consent was not provided.

b) Consequences of disclosure

29. The Commissioner recognises that the subject of local planning issues is an emotive one and one which often provokes a vigorous response from those who are understandably concerned about any impact a development may have on their homes and lives. In this case, the Commissioner notes that there appears to be a conflict between the data subject and the complainant who are neighbours. The Commissioner has also considered the nature of the withheld information and he is satisfied that disclosure of the information to the public and the associated loss of privacy has the potential to exacerbate this conflict between the data subject and the complainant.

c) General principles of accountability and transparency

30. It is important to recognise that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties in order to promote accountability and public confidence. There is also a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them. However, in the Council's view these arguments do not apply in this case and there is little legitimate interest in knowing the comments made by an individual which do not relate to the formal elements of the planning process.
31. The Commissioner acknowledges that the planning process should be sufficiently transparent to determine that the correct procedures have been followed, and to allow for challenges. However, in this case, the withheld information does not relate to the planning process and therefore he does not consider there to be sufficient legitimate interest to disclose the comments made by the data subject in this case. Whilst the complainant may have an interest in what has been recorded as having been said, this does not mean that the wider public interest is served by disclosure of the information requested.
32. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individual whose property the request was made in relation to). In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject.
33. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on consider the other elements of the first data

protection principle. The Commissioner therefore upholds the Council's application of Regulation 13 because disclosure of this information would breach the first data protection principle.

Procedural Requirements

Regulation 5: duty to make information available on request

34. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
35. The complainant submitted his request for information on 22 June 2009. The Council provided some information and a partial refusal notice on 27 July 2009. The Council then undertook a review of its response on 7 August 2009. It explained the reason for the delay in responding and also indicated that further information had been located. This further information was then provided on 11 August 2009. As some of the information was not provided within 20 working days, the Commissioner finds that the Council breached regulation 5(2).

The Decision

36. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The Council was correct to rely on the exception at Regulation 13 of the EIR as a basis to withhold the remaining withheld information.
37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The Council has breached regulation 5(2) of the EIR in failing to comply with regulation 5(1) within twenty working days following receipt of the request.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 15th day of March 2011

Signed

**Andrew White
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 5 - Duty to make available environmental information on

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.

Regulation 13 - Personal data

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.

Data Protection Act 1998

SCHEDULE 1

First data protection principle

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

Conditions relevant for purposes of the first principle: processing of any personal data

Condition 1 provides that –

The data subject has given his consent to the processing.

Condition 2 provides that –

The processing is necessary—

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

Condition 3 provides that –

The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

Condition 4 provides that –

The processing is necessary in order to protect the vital interests of the data subject.

Condition 5 provides that –

The processing is necessary—

- (a) for the administration of justice,

- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

Condition 6 (1) provides that –

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.

Condition 6 (2) provides that –

The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.