

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 12 March 2013

Public Authority: East Riding of Yorkshire Council
Address: County Hall
East Riding of Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant requested information from East Riding of Yorkshire Council ("the council") relating to correspondence between two named individuals, their legal representatives, and the council about an area of highway. The council withheld the information, citing exemptions under the Freedom of Information Act 2000 ("the FOIA"). The Commissioner asked the council to reconsider the request under the Environmental Information Regulations 2004 ("the EIR"). The council subsequently cited the exceptions under regulation 13(1), 12(5)(b) and 12(5)(f). These exceptions relate to third party personal data, legal professional privilege and information supplied voluntarily by a third party.
2. The Commissioner's decision is that the information should be withheld using regulation 13(1) of the EIR.
3. He does not require any steps to be taken.

Request and response

4. On 9 May 2012, the complainant requested information from the council in the following terms:

"I would like to see all the correspondence since 1st June 2011 up to and including today's date:

Either to or from [names and address] and/or Crombie Wilkinson

Solicitors, 19 Clifford St, York YP1 9RJ

And

Either to or from East Riding of Yorkshire Council

Relating in any way to [location] and/or any application to stop-up [same location]".

5. The council responded on 24 May 2012. It said that the information was exempt under section 42 of the FOIA.
6. The complainant requested an internal review on 25 May 2012
7. The council completed its internal review on 25 June 2012. The council explained that the original request was framed in very wide terms. To assist, it said that it had interpreted the request as relating to correspondence between the council, [the two named individuals] and the complainant relating to the particular location. The council said that it considered that the exemption under section 40(2) applied in relation to correspondence between the council and the two named individuals. It also said that it considered that the exemption under section 42(1) applied in relation to correspondence between the council and Crombie Wilkinson Solicitors. The council pointed out that that the complainant already had copies of correspondence between himself and the council about this matter.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the council had correctly withheld the information using the exemptions cited. During the Commissioner's investigation, the complainant said that the scope of his complaint could be limited to information between the following dates: 1 December 2011 and 14 February 2012 since this is the period in which he is most interested. He also accepted the council's interpretation of his request.
9. For clarity, when the Commissioner inspected the withheld information, he realised that some of it represents the personal data of the complainant according to the Data Protection Act 1998 ("the DPA"). Personal data is defined by the DPA as any information relating to a living and identifiable individual. When the requester is the subject of personal data, that information is exempt from disclosure under the FOIA by virtue of section 40(1). Public authorities must consider the

rights of subject access provided by section 7 of the DPA. The Commissioner's obligation is to complete an assessment under the DPA and this has been carried out separately.

Reasons for decision

Is the information environmental?

10. The council initially considered the request under the terms of the FOIA. However, the Commissioner's view is that the request should have been considered under the EIR. The definition of environmental information is set out in regulation 2 of the EIR. Regulation 2(1)(c) provides that any information on activities or plans etc. affecting or likely to affect the elements or factors of the environment will be environmental information. The Commissioner considered that the information relates to proposals that would affect the land and the request should therefore be considered under the EIR.

Regulation 13(1) – Third party personal data

11. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.

Is the withheld information personal data?

12. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The council withheld information consisting of correspondence between itself and the complainant's neighbours using this exception. The Commissioner was satisfied that this information relates to the complainant's neighbours and should be treated as their personal data.
13. The council also withheld other information under regulation 12(5)(b) and 12(5)(f) of the EIR however the Commissioner considered that it was appropriate to exercise his discretion to consider the application of regulation 13(1) to this correspondence as well, since it consisted of correspondence between the council and the third parties' legal representatives. As the legal representatives were acting on behalf of the complainant's neighbours, the Commissioner considers that this correspondence also represents the personal data of the complainant's neighbours.

Would disclosure breach the Data Protection Principles?

14. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

15. Whether or not the disclosure of information was within the reasonable expectations of the individuals concerned is not merely about consent although seeking the views of the individual concerned will often be a reliable indicator of what was expected, which may be a useful starting point. In this case, the council presented no evidence that it had consulted the individuals concerned however the council explained that it was clear from the context and the contents of the withheld information that the individuals would have expected the correspondence to remain confidential. The council explained that the correspondence was of a personal nature because it relates to the individuals' property and on-going problems connected to it.

Consequences of disclosure

16. The council argued that the disclosure would be likely to cause distress to the individuals concerns because they legitimately expected confidence in the circumstances. The council also indicated that the disclosure may disadvantage the individuals because it would reveal all the details of their negotiations with the council, including detailed communications with their solicitor. The council explained that the individuals may well have disclosed information to the council that they would not have disclosed to the complainant, given the on-going property issues.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

17. By way of background to this matter, the council explained to the Commissioner that there is a complex history to the property issues concerned. It said that the land on which the complainant's property was built was part of the garden area of the neighbouring property. The two owners of the latter property (forming the subject of this particular request) sold the land to the complainant and his wife in 2004. As part of the arrangement, the complainant and his wife also negotiated a right

of way across some of the land retained by their neighbours along the border between the two properties. In 2007, following an investigation by the council, the council concluded that land had been annexed from the highway in front of both properties and a retaining wall built by the complainant had been unlawfully placed on the highway.

18. Discussions and court applications then took place between 2010 and 2012 that involved the council, the complainant and his wife and their neighbours trying to resolve the issues. The proposal suggested by the council was to "stop up" the areas of land concerned which means in effect that the highway status of the land would be extinguished. The council also proposed to down-grade the status of the land enclosed by the retaining wall to public footpath status. Ultimately, an agreement could not be reached however the council said that it is currently making a further attempt to "stop up" the land. The council explained that the complainant and his neighbours remain in dispute over the issues.
19. The complainant explained to the Commissioner that he was unhappy with the way the council had handled the negotiations, especially those relating to the area of land in front of his property affecting the public right of access. He told the Commissioner that when the council had approached him about its proposals, it had initially said that it would be legal for him to drive over 15 yards of footpath. The complainant alleged that shortly before the "stopping up" application was due to be heard at the Magistrates Court, the council realised that their previous advice was flawed. The complainant explained that just two working days before the scheduled hearing, he received a letter from the council indicating that it had amended the "stopping up" application and that without any consultation with him, had already made an agreement with his neighbours to fully "stop up" the relevant area instead of simply down-grading it to footpath. He alleged that the council had already signed a transfer of the public highway land to his neighbours. The council explained that it had negotiated an easement (a private right of way for the complainant) over the land. The complainant said that the easement was not acceptable to him and he is particularly concerned about the impact on the value of his property. The withheld information relates to the latter period of negotiations.
20. The complainant argued that the public interest favours disclosure of the information. He argued that the negotiations concern the transfer of public highway to private individuals and there is therefore a strong public interest in disclosure. He said that the conclusion of the negotiations between the council and his neighbours is already in the public domain and this means that there is no longer any valid reason not to reveal the detail of the negotiations. He said given the nature of the correspondence, it could not be considered to be personal or private. The complainant also alleged that the council's actions had been illegal

and improper. The complainant said that the council had failed to follow the standard rules of the Highway Act in a specified way. He says the council has subsequently admitted this error. Finally, the complainant also said that he considers that he has a right to know the details of the negotiations since the easement directly affects and relates to his property.

21. In the Commissioner's view, there is always some general public interest in the disclosure of information held by public authorities because this serves the general aims of promoting accountability and transparency. This may in turn increase public understanding of the decisions taken by public authorities and helps to encourage engagement with public authorities. There is also, as the complainant points out, a particular public interest in transparency and accountability about council decisions affecting public highways. The council acknowledged the public interest in protecting the highway, which the Commissioner understands is a statutory responsibility of highway authorities. However, it said that in this case the highway authority had made a decision that parts of the highway could be "stopped up" without impeding its use because of the size of the areas of highway concerned.
22. The Commissioner notes that enforcement action against the alleged contraventions of the highway would have been an option that was open to the council. However, the council chose to expend significant resources trying to resolve the issue through alternative means. The council conceded that its actions had been, to a very large extent, an attempt to resolve an essentially private dispute between two land owners and it argued that this means that there was very little public interest in disclosure. In the Commissioner's view, this arguably increases the public interest in understanding more about the council's actions in this case and whether it is making the most effective use of its resources. However, there is always the question of degree and the Commissioner does not accept that disclosure of all of the negotiations between the council and a private party would be a proportionate response to this issue.
23. The Commissioner also does not agree with the complainant's point of view that because details of the transfer and easement have been put before the court this automatically means that all of the correspondence should in turn be disclosed. Firstly, the accessibility of court records is not absolute and will be at the court's discretion. Furthermore, knowing the outcome of negotiations is very different to knowing all the details of how that outcome was achieved. The Commissioner does not consider that there is any reason to assume that the negotiations between the council and the complainant's neighbour were not confidential.

24. The Commissioner notes that the complainant has alleged that the council's actions were illegal and improper in a specified respect, which he says has subsequently been acknowledged. If the error has been acknowledged, it is not clear to the Commissioner why it would be proportionate to disclose all the details of the negotiations between the council and a private third party. Furthermore, it is not the Commissioner's role to consider whether or not the council has acted illegally or improperly. The disputes that the complainant has in this area can properly be considered in the courts or potentially by other regulatory bodies to some extent. At this stage, the complainant's assertions are only allegations that are not supported by independent findings.
25. Finally, it is clear that the complainant has a strong personal interest in accessing this information. As he points out, the information directly affects him and his property. However, the FOIA is about information that is in the wider public interest as opposed to the private interests of individuals.
26. The Commissioner does not consider that persuasive evidence or argument has been presented by the complainant to demonstrate that disclosure was or should have been within the reasonable expectations of the individuals concerned. In general, members of the public are entitled to expect that correspondence sent to public authorities will remain confidential unless there are particular reasons to expect otherwise. Given the contentious background, the nature of the relationship between the parties, and the content of the withheld information, the Commissioner agrees with the council that there is a strong likelihood that the correspondence was expected to remain confidential. In the circumstances, the Commissioner considers that this was a reasonable expectation. Furthermore, the Commissioner considers that the disclosure could be distressing or be disadvantageous to the complainant's neighbours. It may also dissuade them from engagement with the council in the future.
27. While the Commissioner accepts that there is significant public interest in more transparency about the council's approach to this issue, he was not persuaded that the level of disclosure being sought by the complainant is proportionate in the circumstances. For the reasons set out above, the Commissioner decided that regulation 13(1) was engaged because disclosure would be unfair and would therefore contravene the first data protection principle.

Right of appeal

28. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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