

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

Decision notice

Date: 15 July 2013

Public Authority: Braintree District Council
Address: Causeway House
Bocking End
Braintree
Essex
CM7 9HB

Decision (including any steps ordered)

1. The complainant has requested the financial information contained in a set of accounts that an applicant had submitted to Braintree District Council (the Council) in support of an application for a Certificate of Lawfulness. The Council refused to provide the information on the basis of section 40(2) of FOIA, the personal data exemption. The Commissioner has concluded that the request should have been dealt with under the EIR rather than FOIA. However, he is satisfied that the information is exempt from disclosure on the basis of regulation 13(1), the personal data exception within the EIR. Nevertheless, the Council breached regulation 14(1) by failing to issue a refusal notice containing a valid EIR exception.

Request and response

2. On 25 October 2012 the complainant wrote to the Council and asked to be provided with unredacted copies of a series of financial accounts submitted by an applicant in support of his application for a Certificate of Lawfulness of an existing development, planning reference 12-01331/ELD.
3. The Council responded on 31 October 2012 and simply explained that *'because the information was requested to remain confidential we would need very good reason to go against that. It contains personal*

information/data of a living person and is therefore considered to be protected by the Data Protection Act'.

4. The complainant contacted the Council on the same day and explained that he was dissatisfied with this response and asked for it to be reviewed. He argued that the response did not include sufficient details to allow him to understand why the decision to withhold the requested information had been taken. The complainant also noted that the Council had originally published unredacted versions of the accounts on its website before removing them and more recently publishing redacted versions.¹
5. The Council informed him of the outcome of the internal review on 6 December 2012. The review explained that his request had been treated as a freedom of information request and in the Council's opinion the redacted information was exempt from disclosure on the basis of section 40(2) of FOIA because disclosure would breach the first and second principles of the Data Protection Act (DPA).

Scope of the case

6. The complainant contacted the Commissioner on 16 December 2012 to complain about the way his request for information had been handled.
7. The complainant asked the Commissioner to consider the following points of complaint:
 - The Council's failure to provide him with the financial information that had been redacted from the series of accounts in question;
 - The Council's failure to consider his request under the EIR rather than under FOIA;
 - The lack of clarity in the Council's initial response of 31 October 2012 as to its reasons for refusing his request; and
 - The Council's delays in handling the request.
8. The complainant provided the Commissioner with submissions to support his view that the requested information should be disclosed and the Commissioner has referred to these in his analysis below.

¹ The Commissioner understands that the unredacted versions of the account were published online in error.

Reasons for decision

The application of the EIR

9. In the Commissioner's opinion the Council should have considered this request under the EIR rather than under FOIA given that the requested information constitutes 'environmental information' as defined by the EIR.

10. Regulation 2(1) of the EIR sets out a number of different definitions of environmental information. The key definitions relevant to this case are those contained at regulations 2(1)(a) and (c):

"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;*

(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;*

11. The requested information relates to a particular Certificate of Lawfulness application which sought a determination regarding the use of land and buildings at a particular address as an agricultural contractor's depot. In the Commissioner's opinion the requested information therefore falls within the definition of regulation 2(1)(c) as information on a plan / activity likely to affect the elements of the landscape referred to in regulation 2(1)(a).

12. The Commissioner has therefore considered whether the requested information is exempt from disclosure under the EIR.

Regulation 13 – personal data

13. Regulation 13 of the EIR provides a very similar exception to disclosure to the exemption contained at section 40(2) of FOIA which the Council originally relied on to withhold the requested information.

14. Regulation 13(1) states that to the extent that information requested includes personal data of which the applicant is not the data subject and the disclosure of the information to a member of the public would contravene any of the data protection principles set out in the DPA, a public authority shall not disclose the personal data.

Is the withheld information 'personal data'?

15. Clearly then for regulation 13(1) to be applicable, the withheld information therefore has to constitute 'personal data' which is defined by the DPA 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.'

16. The complainant has argued that the information redacted from the accounts cannot be considered to be the applicant's private or personal data but simply non-commercially sensitive business data in the form of accounts. The complainant argued that such data, if released, might be expected to reveal information about the nature of the business, but nothing about the personal information or habits of the applicant.
17. The Council disagrees. It argued that, as the accounts show, they were prepared in the name of the applicant, as an individual, and not as a company. Consequently they need to be considered as his personal financial information and therefore personal data.
18. The Commissioner is satisfied that the applicant can clearly be identified from the accounts in question given that they contain his name and address. With regard to whether the accounts 'relate to' the applicant, the Commissioner believes that data may 'relate to' an individual in a number of ways, including in their personal or family life, business or professional life. In the circumstances of this case, the Commissioner is satisfied that the accounts clearly relate to the business life of the applicant. Furthermore given the nature of the applicant's business - i.e. the Commissioner understands that he is effectively a self-employed contractor - the information can also be said to relate to the applicant's personal life. This is because the information effectively reveals the income which the applicant's business generates, which given his

employment status, is effectively akin to his own personal income from his employment activities.

The first data protection principle

19. The Council has argued that disclosure of the information would breach the first data protection principle which states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

20. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

21. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
22. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

The Council's position

23. With regard to the applicant's expectations about the disclosure of the accounts, the Council explained that the statutory requirements concerning information that a Local Planning Authority must make available for public inspection are set out in the Town and Country Planning (Development Management Procedure) (England) Order 2010. In relation to applications for Certificates of Lawfulness of existing or proposed development, the following information must be included in the register (i.e. available for public inspection):
 - The name and address of the applicant;
 - The date of the application;
 - The address or location of the land to which the application relates;
 - The description of the use, operations or other matters included in the application;
 - The decision, if any, of the local planning authority in respect of the application and the date of such decision; and
 - The reference number, date and effect of any decision of the Secretary of State on an appeal in respect of the application.²
24. Therefore the Council explained that there was no statutory requirement for the Local Planning Authority to make available any of the material that may have been submitted with an application other than that set out above, nor is there a statutory requirement for the Local Planning Authority to publicise such applications.

² http://www.legislation.gov.uk/ukxi/2010/2184/pdfs/ukxi_20102184_en.pdf See Part 7, section 36(7).

25. Nevertheless, the Council explained that it had been its practice to make details of Certificates of Lawfulness applications available for public inspection on its website in the same way that it makes details of other planning applications available on its website. The Council explained that it was also its practice to notify Parish Councils and adjoining occupiers/owners in relation to applications for a Certificate of Lawfulness.
26. However, the Council explained that when the applicant in this case submitted his application he made a specific request that the accounts which had been submitted be treated as confidential. In order to make as much information as publically available as possible, the Council subsequently agreed with the applicant's planning agents that a redacted version of the accounts could be placed into the public domain with the financial details removed.
27. In terms of the consequences of disclosure, the Council emphasised that the accounts were prepared in the applicant's individual name. It argued that to place information in the public domain pertaining to the applicant could lead to speculation and loss of confidence in the applicant's ability to conduct his business and the public at large being aware of his personal finances. The Council suggested that this could result in speculation and rumour within the village in which he resides which could damage his reputation and that of his family.
28. Finally, in terms of whether there was a legitimate interest in disclosure of the information, the Council argued that since the accounts did not provide conclusive evidence to support the applicant's claim for a Certificate of Lawfulness, there was no public interest in disclosing the requested information. It explained that the reasons for refusing the application are set out in the Council's decision which is available on the Council's website. It also noted third parties have no right of appeal in respect of the refusal of the Certificate of Lawfulness.

The complainant's position

29. The complainant argued that it was clear that custom and practice should lead to the assumption by those who submit planning applications, and indeed those members of the public who comment on such applications, that information supplied to the relevant Planning Authority would be publically disclosed. The complainant noted that in general only private and personal information had been redacted by the Council in relation to such applications. As noted above, he did not accept that the requested information fell within this description. Similarly, the complainant disputed the line of argument that disclosure of the requested information would have a negative impact on the

applicant's privacy given his view that the information related to his business rather than his personal accounts.

30. In terms of the legitimate interests in disclosing the information, the complainant argued that as the accounts were referred to in a covering letter from the applicant's agent as material evidence in support of the application, it was therefore very likely that the Council would take the accounts into consideration when determining this application.
31. The complainant explained that the application process required a consultation exercise to be carried out involving anyone who is likely to be affected by the decision regarding the application. The complainant argued that respondents to the consultation process were entitled to know, and consider, all evidence in connection with an application; to do otherwise was inequitable.

The Commissioner's position

32. The Commissioner is satisfied that the applicant would have had a reasonable expectation that the requested information would not have been disclosed by the Council. The Commissioner acknowledges that although custom and practice would dictate that information submitted as part of various types of planning application would be made publically available, there are exceptions to this general approach, particularly where the information relates to more private or personal matters. For the reasons discussed above, the Commissioner accepts that the requested information is of this nature. Furthermore, it cannot be ignored that the applicant, in submitting the accounts to the Council, specifically and explicitly requested that they be kept confidential, a request that the Council agreed to by only publishing redacted versions of the accounts online. Moreover, the Commissioner notes that under the relevant planning legislation there is no requirement for the Council to publish information submitted in support of an application of a Certificate of Lawfulness. The Commissioner is therefore satisfied that the complainant had a reasonable – and weighty – expectation that the requested information would not be disclosed by the Council.
33. The Commissioner also accepts the Council's line of argument that disclosure of the information would infringe the privacy of the complainant (and more broadly that of his family). This is because given the complainant's position as a self-employed contractor, disclosure of these accounts, which although obviously based upon his business activities, would also effectively provide a clear indication into his annual income. The Commissioner agrees that this could lead to unwarranted intrusion into the applicant's private life not only by indicating the level of his income but also via speculation and conjecture as to the success or otherwise of his business activities.

34. However, the Commissioner does not accept that when considering the application of regulation 13(1) any weight should be given to the Council's argument that disclosure of the requested information risks undermining the applicant's ability to conduct his business. This is because the DPA is limited to protecting the data subject's right to privacy and does not extend to protecting his commercial interests. This approach makes sense when one remembers that the DPA comes from a European Directive inspired by the European Convention on Human Rights and therefore the DPA is intended to protect the right to privacy and family life enshrined in the Convention rather than any broader prejudice that may be suffered by individuals.
35. In terms of the legitimate interests in disclosing the information, the Commissioner wishes to clarify that when determining whether exceptions have been correctly applied by a public authority he has to focus on the circumstances as they existed at the time of the request, not at the point when his decision notice is issued. The Commissioner understands that the application for a Certificate for Lawfulness was made on 27 September 2012 and that the Council issued its decision, refusing the application, on 23 November 2012. This request was of course submitted on 25 October 2012.
36. Therefore, the Commissioner does not accept the logic of the Council's argument that as it concluded (on 23 November 2012) that the accounts did not provide conclusive evidence in support of the application, there was no public interest in disclosing the information. This is because, at the time the request was submitted – which is when the application of regulation 13(1) needs to be considered – the Council had not yet reached a decision about the application. Consequently disclosure of the information at the time of the request could have provided interested parties, eg neighbours of the applicant, with a greater understanding as to the nature of the application and moreover, in time, a greater ability to understand the rationale behind the Council's subsequent decision. The Commissioner believes that these are legitimate public interests that should not be dismissed lightly. In other words, the Commissioner has sympathy with the complainant's view that third parties who are likely to be affected by applications involving planning matters have a legitimate interest in understanding the basis upon which particular applications are made not least to inform their own response to any consultation process. The Commissioner believes that this argument attracts notable weight in this case given that the applicant's inclusion of the accounts clearly formed a material part of submissions made in support of the application; they do not appear to be peripheral to the application or indeed the Council's assessment of it.
37. However, despite these valid legitimate interests in disclosure of the requested information, the Commissioner has concluded that they do

not outweigh the legitimate interests of the applicant. This is because of the combination of the strong- and reasonable - expectation of the applicant that the requested information would not be disclosed and the specific nature of the infringement disclosure would have by revealing the level of the applicant's employment income for a number of years.

Regulation 14 – refusal to disclose information

38. In the circumstances of this case the Commissioner has found that although the Council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the Council will have failed to comply with the provisions of the EIR.
39. In these circumstances the Commissioner believes that it is appropriate for him to find that the Council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the Council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the Council actually dealt with the request under FOIA.
40. In the Commissioner's opinion the refusal notice issued on 31 October 2012 was so poor, failing as it did to specify the exemption that was being relied upon and why, that even if the Commissioner accepted that this request should have been dealt with under FOIA, the deficient refusal notice would have led the Commissioner to find the Council in breach of aspects of section 17 of FOIA, which is the equivalent section in that piece of legislation.

Alleged delays

41. The complainant was also dissatisfied with the time it took the Council to respond to his request and request for an internal review. Under regulation 5(2) of the EIR public authorities have to respond to requests within 20 working days. Furthermore, under regulation 11(4) public authorities also have to complete any subsequent internal review within 40 working days.
42. Although the Council failed to actually deal with this request under the correct legislation, he is nevertheless satisfied that both the request and internal review were dealt with within these timescales: the request was responded to within 5 working days and the internal review was completed within 27 working days.

Right of appeal

43. 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

44. 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.
45. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF