

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

Date: 3 September 2014

Public Authority: East Lindsey District Council
Address: Tedder Hall
Manby Park
Louth
Lincolnshire
LN11 8UP

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning contravention notice. East Lindsey District Council provided some of the requested information but withheld other information under the exemption for investigations and proceedings conducted by public authorities (sections 30(1)(b) and 30(2)(a)&(b) of the FOIA). Elements of the disclosed information were also redacted for third party personal data under section 40(2) of the FOIA.
2. The Commissioner's decision is that East Lindsey District Council :
 - Wrongly handled the request under the FOIA and breached regulation 5(2) and regulation 14 of the EIR;
 - Correctly withheld information under regulation 13 of the EIR;
 - Correctly withheld information under regulation 12(5)(b) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 23 December 2013, the complainant wrote to East Lindsey District Council (the "council") and requested information in the following terms:

"Your letter to Mr Jones dated 23 September 2013 referred to having received a letter, which you say cannot be disclosed under data protection rules. The content of that letter could easily be disclosed with the name and address of the complainant redacted, therefore, please treat this letter as a formal request made under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 for release of the information.

We also request disclosure of the content of any other such letters or emails received by the council in respect of the alleged 'holiday letting' use, including those communications gathered at the time of the earlier investigation in 2007.

Please can you also confirm the following matters, which are not data protected, having regard to this dispute in respect of the use of the property (including in 2007) and all of which is relevant to the matters at hand:-

- *The number of complaints involved;*
 - *The number of complaints and/or individual items of correspondence which have been received;*
 - *Specific details of the issues raised in that correspondence; and*
 - *Details of what investigations the council has undertaken."*
5. The council responded on 16 January 2014 and refused the request, citing the exemption for investigations and proceedings conducted by public authorities (section 30(1)(a) and section 30(1)(b) of the FOIA).
6. Following an internal review on 7 February 2014, the council stated that it was applying the exemptions in sections 30(1)(b) and 30(2)(a)&(b) and disclosed some information from a relevant planning enforcement file. Elements of the information were redacted for third party personal data under section 40(2) of the FOIA.

Scope of the case

7. On 14 February 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation the council disclosed additional information to the complainant, namely a redacted version of a 2006 file falling within the scope of the request. The council also, at the Commissioner's prompting, agreed to reconsider the request under the EIR.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had legitimately withheld some of the requested information.

Reasons for decision

Is it Environmental Information?

10. The Commissioner has considered whether the council correctly handled the request under the FOIA or whether the requested information constitutes environmental information as defined by the EIR.
11. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'

12. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
13. The Commissioner notes that the withheld information relates to decisions regarding planning, specifically planning enforcement . He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)- (f), and he has concluded that it can for the reasons given below.
14. In this case the subject matter of the withheld information relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
15. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
16. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA.

Regulation 5 – duty to provide environmental information

17. Under regulation 5(2) a public authority should, ordinarily, make information available to a requester within 20 working days of the date of receipt of the request.
18. In this case the council disclosed additional information to the complainant during the Commissioner's investigation. Whilst the Commissioner welcomes this disclosure he finds that, in providing the information after 20 working days had passed, the council breached regulation 5(2) of the EIR.

Regulation 14 – refusal to disclose information

19. 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.

20. 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.
21. During the course of his investigation the Commissioner invited the council to reconsider the request under the EIR. The council agreed to do this and confirmed that it considered that the requested information should be withheld because disclosure would adversely affect the course of justice and because it contained third party personal data. The Commissioner has gone on to consider whether the council is entitled to rely on the exceptions it has cited.

Regulation 13 – personal data

22. Regulation 13(1) provides that information which is the personal data of a third party (i.e. not the applicant) is exempt if a disclosure of the information would breach any of the data protection principles.
23. The first question which the Commissioner needs to consider is whether the information is personal data for the purposes of the Data Protection Act 1998 (DPA) or not. Personal data is defined in the DPA as information which

"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"

24. The withheld information in this case is a letter from a complainant to the council which relates to the alleged breach of planning under

investigation by the council. Having viewed the withheld information the Commissioner is satisfied that the information is personal data.

25. The complainant has stated that they consider that the letter could be disclosed in a redacted form which removes any identifying information. In response to this the council has stated that it would not be possible to simply redact the name and address of the complainant as the content of the letter and with the rural, isolated nature of the property subject to the complaint combine to make the complainant easily identifiable.
26. Having considered the council's submissions the Commissioner is satisfied that the withheld information constitutes the personal data of third parties and that, even with the removal of names and addresses, when combined with other information already in the public domain, disclosure of the information would result in their identification.
27. Having decided that the information is personal data, the next question which the Commissioner must consider is whether a disclosure of that information would breach any of the data protection principles.
28. The most relevant data protection principle in this case would be the first data protection principle. This requires that information is processed 'fairly and lawfully'. The Commissioner must therefore decide whether a disclosure of the information would be 'fair'.

Would disclosure of the information be fair?

29. The council has argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which 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.'

Reasonable expectations

30. The council has explained that the individuals concerned have sought and been given assurances that their details or details which could identify them will not be shared. The council confirmed that its

complaint form for these purposes also states that information submitted to the council will be treated as strictly confidential.

31. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information. The Commissioner considers that individuals will have an expectation that information which relates to their private lives, specifically their domestic environment will not be disclosed.
32. The Commissioner is satisfied that the data subject would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.

What damage or distress would the individual suffer if the information was disclosed?

33. In this instance the information is a complaint relating to planning enforcement matters. The council has stated that the individuals submitting the complaint have made it clear that they do not wish their identity to be made known to the complainant. On the basis of information provided by the council the Commissioner is satisfied that it is likely that disclosure of the information would result in intrusion and distress to the individuals concerned.

The Legitimate Interests of the Public

34. 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 there is a more compelling public interest in disclosure.
35. In this case, the complainant clearly has a personal interest in knowing who has submitted a complaint about them to the council. However, the relevant interests in this context are those of the broader public and the Commissioner considers that the public interest in this regard is served by the planning and planning enforcement processes which provide opportunities for individuals to engage, challenge and hold planning authorities to account.
36. The Commissioner believes that the legitimate interests of the public in knowing who has submitted a complaint to the council must be weighed against the individual's right to privacy. In this case, the Commissioner considers that the public interest does not outweigh the right to privacy of the individuals submitting the complaint, particularly given the intrusion and distress which is likely to result from disclosure.

37. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle. The Commissioner considers that the data subjects had a reasonable expectation of privacy in submitting their complaint to the council and to release the requested information would be unfair and would be likely to cause distress. He is therefore satisfied that the council was correct to refuse disclosure under regulation 13.

Regulation 12(5)(b) – The course of justice

38. Under regulation 12(5)(b) a public authority can refuse to disclose information to the extent that its disclosure would adversely affect 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.

39. As the Commissioner's guidance clarifies, the course of justice element of this exception is very wide in coverage and can include "...information about other types of civil and criminal investigations and proceedings, such as those carried out under planning or charity law."¹

40. The withheld information in this case consists of correspondence which relates to prospective planning enforcement in relation to the complainant's property.

41. The council has confirmed that the information relates to an investigation into an alleged breach of planning control within section 171A(1) of the Town and Country Planning Act (1990) (As amended by the Planning and Compensation Act 1991). The council has stated that the complainant is alleged to be using their residential property for commercial holiday lets without planning permission to use a single dwelling house as self-catering accommodation. The council has confirmed that it has a statutory duty to investigate such matters and, in the event of a breach, to take enforcement action.

42. Having considered the withheld information and the council's submissions the Commissioner is satisfied that the information relates to

1

[http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

an investigation which the council is required to undertake under planning law. He has, therefore, concluded that the information falls within the scope of the exception. He has gone on to consider whether disclosure of the information would result in adverse affect to the investigation in question.

Adverse affect

43. Regulation 12(5)(b) allows a public authority to refuse to disclose information "to the extent that its disclosure would adversely affect" the course of justice, etc. "Adversely affect" means there must be an identifiable harm to or negative impact on the interests identified in the exception.
44. The council has stated that the investigation in question was not complete at the time of the internal review and that, at the time of its submissions to the Commissioner, it was still ongoing. The council has argued that disclosing details of its investigation would alert the complainant to the strategy and methodology used by the council and this would adversely affect this and any future enforcement investigations.
45. Having considered the relevant factors the Commissioner considers that disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information when the case is still 'live'. Disclosure of the information would provide an indication of the arguments, strengths or weaknesses which the council might have, unbalancing the level playing field under which any subsequent adversarial proceedings are meant to be carried out. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.

Public interest test

46. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
47. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosure

48. The council has acknowledged that there is a public interest in accountability and transparency in relation to its actions and decisions.

The council has noted that there is a particular public interest in transparency where information relates to its regulatory activity because this may have a significant impact on individuals and/or the environment.

49. The council has further noted that disclosure of the investigation information could further the public understanding of issues arising out of planning legislation and a planning authority's role in dealing with such matters.
50. The complainant has stated that they have concerns about the motivations of those submitting complaints to the council in relation to their property. Access to the information would enable them to defend themselves against accusations made.

Public interest in maintaining the exception

51. The council has stated, after having consulted with its Principal Enforcement Officer, that it disclosing the information would be extremely prejudicial to its investigation and to its ability to take any enforcement action.
52. The council has stated that its investigation is still "live" and ongoing and disclosure of the information at this time would undermine and adversely affect its case.
53. The Commissioner notes that, more generally, the ability of planning authorities to take effective enforcement action would be harmed by disclosure because any weaknesses in the case for enforcement, as well as strengths, would be exposed. The Commissioner notes that disclosure would effectively provide a 'blueprint' on how to evade successful prosecution and would inappropriately limit the powers of public bodies.

Balance of the public interest

54. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and why it pursues a particular course of action.
55. The Commissioner notes that the information is still current. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the basis of the council's strategy in considering the appropriateness of enforcement action in such

scenarios and this could result in adverse effect to the course of justice via revealing the council's strategy to potential opponents. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.

56. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. He also notes that the complainant has concerns that the complaints about their property and the council's consideration of enforcement action might be inappropriate or unjustified. However, the Commissioner has not been presented with any compelling evidence that this is the case. He also considers that the planning appeal process provides mechanisms for such issues to be addressed and concerns about maladministration, similarly, can be progressed in other arenas than under the EIR.
57. In addition, the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake planning and enforcement matters on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.
58. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, he does not consider that they he has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
59. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Right of appeal

60. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF