

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

### Decision Notice

Date 19 June 2008

**Public Authority:** Peterborough City Council  
**Address:** Town Hall  
Peterborough  
PE1 1HG

### Summary

---

The complainant requested information concerning the council's submission of documents relating to a complaint of maladministration that she had made to the Local Government Ombudsman.

Items of the requested information were variously withheld under s43 (commercial interests), s21 (information accessible by other means), s30 (investigations and proceedings conducted by public authorities), s31 (law enforcement), s40 (personal information) and s41 (information provided in confidence).

The complainant withdrew her complaint in respect of one item. One item was found to be environmental information, was found to be already publicly available and therefore Regulation 6 of the Regulations applied. With regard to the remaining item the Commissioner decided that the exemptions were incorrectly applied apart from some information which was exempt under s40(1) of the Act.

The Commissioner found that the council failed to comply with s1 and s17 of the Act and failed to conform with the s45 Access Code of Practice.

### 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.

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 Act are imported into the EIR.

## The Request

---

2. On 7 & 8 November 2006 the complainant asked the council for the following documents that it had submitted to the Local Government Ombudsman for his investigation of a complaint of maladministration that the complainant had previously made against the council:
  - (i) a copy of the senior building control inspector's record of site visits
  - (ii) a copy of the documents supplied to the Ombudsman which showed that during consideration of building regulation approval, party wall matters were raised with the developer
  - (iii) a copy of the 2001 planning application and approved plan dated 13/2/02
  - (iv) a copy of the internal email trail entitled Appendix 18 which was supplied to the Ombudsman by the council.
3. The council issued the complainant with a refusal notice on 17 November 2006. It maintained that item (i) was exempt from release due to commercial reasons and that item (iv) was exempt due to the information being provided in confidence. It seems that these items were withheld respectively under s43 and s41 of the Act although the council did not state or explain this to the complainant. The council made no reference to having carried out a public interest test in respect of either of these exemptions. The refusal notice stated that item (iii) was on public record and could be viewed at the council's planning services office. No reason was provided by the council for withholding item (ii).
4. The complainant was not given any information about how to appeal against its decision to withhold the information.

## The Investigation

---

### Scope and chronology of the case

5. On 20 November 2006 the complainant contacted the Commissioner about the council's refusal to release the requested information. The complainant was advised to appeal first through the council's internal complaints procedure. Accordingly, the complainant wrote to the council on 20 November 2006 requesting an internal review.
6. On 4 January 2007 the Commissioner's office telephoned the council and was assured that the review would take place according to council procedures. This understanding was confirmed in a letter to the council dated 4 January 2007. However, on 7 February 2007 the council informed the Commissioner that it was unaware that the complainant had requested an internal review.

7. On 22 March 2007 the council told the complainant that it was unable to help further with her request for information. On 27 March 2007 the Commissioner notified the council that the complainant's case was deemed eligible for formal investigation under the Act.
8. On 7 September 2007 he requested copies of items (i) to (iv) that had been exempted from disclosure by the council. He also asked the council (a) to clarify which sections of the Act it had relied upon to withhold the information and (b) to provide a copy of its internal review of the decision to withhold the information.
9. The council replied on 26 September 2007. It forwarded copies of the withheld information to the Commissioner but did not supply a copy of the internal review. The drawings supplied by the council to the Commissioner did not indicate site boundaries or adjacent properties.
10. The complainant had informed the Commissioner that the drawings she had originally examined at the council offices had shown the extension to be sited some distance away from her property whereas ultimately it was built adjacent to her house. On 8 October 2007 the Commissioner asked the council to forward the plans which indicated the relevant site boundaries. Also, because the council had not supplied the clarification of the exemptions that he had requested or a copy of the review that he had asked for, he repeated his request for that information.
11. In response, the council stated on 15 October 2007 that there were no plans which showed the site boundaries or the surrounding properties in respect of the development in question. It again failed to refer to either the Commissioner's request for clarification or to his request for a copy of the internal review. On 15 October 2007 the Commissioner gave the council warning that he would need to serve an Information Notice under s51 of the Act if it continued to ignore his requests for information.
12. The council responded on 16 October 2007. It introduced additional exemptions and maintained that:
  - item (i) of the requested information was withheld under s30 (investigations and proceedings conducted by public authorities), s31 (law enforcement), s40 (personal information) and s41 (information provided in confidence).
  - item (ii) was the same document as item (i)
  - item (iii) was exempt under s21 (information accessible by other means)
  - item (iv) was withheld under s30, s31, s40 and s41.
13. In relation to items (i) and (iv) the council's response cited the exemptions but did not provide an explanation as to the reasoning behind their application to the information in question.

14. The council's response stated that the public interest in maintaining the exemptions at s30, s31 and s40 outweighed the public interest in disclosure. However, it failed to demonstrate how the opposing public interest arguments had been balanced in order to reach this conclusion or what the public interest arguments were. (It was also unclear why the public interest test might have applied to s40).
15. In reply to the Commissioner's request for a copy of the internal review the council enclosed copies of letters it had sent to the complainant stating no further information was available. The letters bore no relation to the Commissioner's request for a copy of the internal review.
16. In view of the council's failure to provide an appropriate case for the exemptions it had cited, on 18 October 2007 the Commissioner asked for amplification of the reasons for withholding the information. He advised the council to consider the exemptions guidance available on the ICO website.
17. Because the council had not referred in its response to the original withholding of information on commercial interest grounds, the Commissioner asked the council if it was still reliant on this exemption (s43).
18. He advised the council in his letter of 18 October 2007 that it was impermissible to engage s30 and s31 simultaneously and asked it to specify the relevant subsection of the exemption upon which it was reliant. Because the council had failed to provide an explanation of the public interest test in respect of either s30 or s31, he asked that it provide the detail of that test should it continue to rely on either exemption. He also asked the authority to provide a marked copy of the information indicating the parts that it considered were covered by the specified exemption.
19. In the same letter, the Commissioner asked the council to indicate the parts of the information that it considered were exempt by virtue of s40.
20. He also asked the council to provide an explanation of its application of s41 because of it appeared that it had not considered any of the relevant factors. Accordingly, he asked the council to supply:
  - details of the specific information believed to fall within the scope of the s41 exemption
  - details of the other person from whom the information was obtained
  - details of why the information was considered to have the necessary quality of confidence
  - evidence that the circumstances in which the information was provided gave rise to an obligation of confidence
  - details of why disclosure of the information would be detrimental to the person who communicated the information

- consideration of whether an action for breach of confidence would fail should disclosure be protected by a public interest defence.
21. Because the council had not supplied a copy of the internal review despite his requests, the Commissioner asked it to confirm whether or not such a review had been carried out. He advised that the internal review in question was that required by the s45 Access Code of Practice.
  22. The council's reply of 31 October 2007 failed to provide the confirmation that the Commissioner required in respect of the internal review. It failed to heed his advice in respect of the exemptions cited and continued with its argument that both s30 and s31 applied. It ignored the requirement to identify a specific subsection. The council failed again to provide an adequate consideration of the public interest test in respect of either s30 or s31. It failed to explain its engagement of s41 in the manner that the Commissioner had outlined and it failed to answer his query concerning the application of the public interest test to the exemption at s40. It failed to clarify whether it was still reliant on s43 to withhold the information and finally it failed to provide the marked copies that the Commissioner had requested.
  23. The Commissioner served an Information Notice on 8 November 2007 requiring that the council provide him with the following:
    - (a) a copy of the review of the council's decision to withhold the requested information
    - (b) specification of the exemption at either s30 or s31 upon which the council is reliant
    - (c) an explanation of the public interest test that was carried out in respect of the specified exemption.
  24. The council responded to the Information Notice on 26 November 2007. Its response failed to comply with the requirements of the notice. The Commissioner therefore informed the council on 14 December 2007 that he would proceed with his formal decision on the basis that no internal review had been carried out by the authority. His decision would also need to reflect the council's failure to specify the relevant exemption and its failure to carry out a satisfactory public interest test in respect of its engagement of a qualified exemption.
  25. On 8 January 2008 the council provided the Commissioner with an improved response to the Information Notice. The council accepted that it had not carried out an internal review of its decision to withhold the information. It confirmed that it was withholding information under s30 subsection (1)(a) of the Act and it submitted an explanation of the public interest test in respect of that exemption.

## Analysis

---

### Procedural matters

26. The council's refusal notice of 17 November 2006 failed to specify the exemptions upon which it relied to withhold the requested information. In failing to do so the council breached s17(1)(b) of the Act.
27. The council failed to inform the complainant that it held information of the description specified in item (ii) of the requested information. By failing to do so the council breached s1 of the Act.
28. The council failed to state in its refusal notice that the exemptions at s30, s40 and s41 were applicable to the requested information. It also did not explain why the exemptions applied. By failing to do so the council breached s17(1)(b) and (c) of the Act.
29. The council failed to provide the complainant with details of how to apply for an internal review of its decision to refuse the request for information. In failing to do so the council breached s17(7)(a) of the Act. It also failed to conform with the guidance issued in part iv of the s45 Access Code of Practice.

### Exemptions

#### Item (i) of the requested information

30. The council initially maintained that the senior building control inspector's record of site visits, item (i), was exempt from release due to commercial interests. The council failed to provide a case to support its argument and when asked to do so by the Commissioner it did not respond. Part way through the Commissioner's investigation the council also applied s30, s40 and s41 in order to withhold item (i). The complainant, however, later informed the Commissioner that she no longer required the record of site visits and her application for a decision in respect of that item was withdrawn. The Commissioner has therefore not considered the exemptions that were applied to item (i) within this decision notice.

#### Item (iii) of the requested information

31. The council informed the applicant that item (iii), the 2001 planning application and approved plan dated 13/2/02, was already publicly available at the council offices. The Commissioner acknowledges that this is the standard form of availability for viewing such plans as adopted by local authorities throughout the UK. The Commissioner has examined the documentation in relation to this part of the request and has received confirmation from the council that the information requested at item (iii) remains available for public inspection at the council offices.
32. Requests for information concerning such applications are generally considered under the Environmental Information Regulations as they fall within the definition of environmental information in regulation 2(1)(c) of the Regulations. In this case

the application is information on a measure (a plan) that is likely to affect several of the elements listed in regulation 2(1)(a): the land and landscape.

33. Regulation 6 of the Regulations state that where an applicant requests that information is made available in a particular form or format, a public authority shall make it available unless it is already publicly available and easily accessible to the applicant in another form or format. In this instance, the applicant had requested that copies be forwarded to her by post. In interpreting regulation 6 the Commissioner has considered Article 3(4) of Directive 2003/4/EC from which the Regulations are transposed. Article 3(4) contains the following wording: *'where an applicant requests a public authority to make environmental information available in a specific form or format (**including in the form of copies**)'* (emphasis added). The Commissioner therefore considers that by requesting the information in form of a copy (to be posted) the complainant had requested the information in another form and format. The authority's alternative provision of the information at its offices is publicly available and easily accessible to the applicant. Regulation 6(1)(b) therefore applies and the public authority is not required to make the information available in the form requested. The council's application of s21 was therefore incorrect but because of the Commissioner's finding under Regulation 6 no further steps are required.

#### **Section 41 (information provided in confidence)**

34. The council relied on s41 to withhold item (iv) of the requested information. One of the requirements of the s41 exemption is that the information was obtained from another person. Item (iv) is a record of email correspondence between council employees. It comprises internally generated information.
35. The council failed to provide an adequate case for maintaining the exemption at s41. When asked by the Commissioner to provide supporting arguments for its application of the exemption, the council failed to respond. The Commissioner has therefore decided that the exemption at s41 is not engaged.

#### **Section 40 (personal information)**

36. The council stated that item (iv) was withheld under s40. It did not state the relevant subsections upon which it relied. The council maintained that release of the email trail would be unfair and contravene the first data protection principle because it contained allegations made by the complainant's representative.
37. The Commissioner has examined the document at item (iv). References to the allegations and details of the representative who was employed to investigate the complainant's allegations against the council constitute the personal data of the complainant. The document also contains third party data relating to the developer.
38. The complainant's personal data is exempt via s40(1) of the Act. However, the Commissioner suggests how the Council now responds to the request in light of this in the other matters section of this decision.

39. The Commissioner has considered whether third party data in the document is exempt from disclosure under section 40(2) of the Act by virtue of section 40(3)(a)(i), which provides that information is exempt if it contains third party data and disclosure would contravene any of the data protection principles. In reaching his finding the Commissioner has had regard to what was publicly known about the situation, the expectations of the third parties in this context and also the limited distress the disclosure would cause. The first data protection principle requires that personal data shall be processed fairly and lawfully and in particular shall not be processed unless at least one of the conditions in Schedule 2 of the Data Protection Act (DPA) is met. Condition 6 of Schedule 2 legitimises the processing of personal data in cases where:

*'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'.*

There are legitimate public interests in disclosure related to public understanding of the planning system and transparency in the way complaints about planning are handled. In this case the Commissioner considers the disclosure is necessary for these purposes and the disclosure is proportionate to the limited prejudice to the rights and freedoms or legitimate interests of the data subject in this case. In the Commissioner's view it would not be unfair to the developer to disclose this information, he is also satisfied that condition 6 of Schedule 2 of the DPA has been met and that it does not prevent disclosure of the requested information. The information is therefore not exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i).

40. The Commissioner has also considered whether the names of council staff identified within the document should be disclosed. Those identified are either senior officers of the council or are public facing in their roles i.e. they are staff who are required to interact directly with the public in order to carry out their job. In considering whether disclosure would be unfair with respect to the first data protection principle the Commissioner has considered whether the information relates to the private or public lives of the third party (the staff). The information is about them acting in an official or work capacity. Disclosure in this case would not be unfair as it would not be reasonable for staff to expect information relating to their official work to be withheld. Also, disclosure of this information would not cause any damage or distress. The Commissioner is also satisfied that condition 6 of Schedule 2 of the DPA has been met. He has considered the same legitimate public interests as above and finds that disclosure is proportionate to the limited prejudice to the rights and freedoms or legitimate interests of the data subject in this case. The information is therefore not exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i).

### **Section 30 (investigations and proceedings conducted by public authorities)**

41. The council initially stated that the email trail – item (iv) - was withheld in the building control file under the exemptions at s30 and s31. It cited powers under



the Building Act 1984 which stipulate the enforcement action that a local authority may take when contravention of the Building Regulations has been discovered. It also cited action that could be taken by injunction – civil remedy.

42. The council later clarified that item (iv) was withheld under s30(1)(a) and not s31. On being asked by the Commissioner to outline the investigation that was conducted in support of its application of s30, the council explained that when the complainant's allegation of breach of planning control was received, council officers inspected the property to establish the situation on site. No one was charged with a breach and the file remained open due to the ongoing correspondence and investigation relating to her complaint.
43. In the Commissioner's view, the council's inquiry into the matter did not enter the enforcement stage necessary for the exemption at s30(1)(a) to apply. The information was not held for the purpose of an investigation ascertaining whether a person should be charged with an offence. His view therefore is that the exemption at s30(1)(a) is not engaged.
44. The s30 exemption is subject to the public interest test. As the Commissioner's decision is that the exemption is not engaged, the public interest arguments are not explored further in this notice.

### **Relevance of Environmental Information Regulations to item (iv)**

45. The Commissioner considered whether it was appropriate for item (iv) to have been dealt with under the Regulations rather than the Act. Item (iv) concerned an email trail which contained no environmental information as it is information on property maintenance and repair rather than on a measure as defined in Regulation (2)(1)(c) of the Regulations .

### **The Decision**

---

46. The Commissioner's decision is that the public authority dealt correctly with one part of the request for information (item iii) but under the wrong regime and was incorrect to rely on section 21. The public authority did not correctly apply the exemptions under sections 30 and 40, and 41 to item (iv), apart from some exemption which is exempt under section 40(1).

### **Steps Required**

47. The Commissioner requires that the council shall, within 35 days of the date of this decision notice, disclose the information contained in item (iv) to the complainant apart from her personal data which is exempt via s41(1) of the Act.
48. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

49. 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.

### **Other Matters**

50. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- The Commissioner finds Peterborough City Council's response to his enquiries to have been deficient.
  - The council repeatedly disregarded his requests for information and in so doing impeded his formal investigation into the complaint.
  - The council's response raised serious questions concerning the authority's understanding of its responsibilities under the Act and its knowledge of the s45 Access Code of Practice particularly in relation to Part VI Complaints Procedure.
  - The Commissioner acknowledges that when the responsibility for assisting with his enquiries was later transferred to more senior staff, the authority's response to his enquiries markedly improved.
  - The Commissioner has assessed that the complainant has the right of access to her personal information comprised in item (iv) of the request. The council should have treated that part of the request as a subject access request under the DPA. He expects the council to consider disclosing the personal data contained in item (iv) directly to the complainant as would have been required by the authority on receipt of a subject access request.
48. In light of the concerns that have arisen during his investigation this case will be referred to the Commissioner's Good Practice and Enforcement Team which will consider whether any further action is appropriate in the context of the ICO's FOI Enforcement Strategy.

## 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@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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 19<sup>th</sup> day of June 2008**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

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

## Legal Annex

**Section 1** provides that:

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

**Section 17(1)** provides that:

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.

**Section 17(7)** provides that:

- (7) A notice under subsection (1), (3) or (5) must—
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

**Section 30** provides that:

- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—
- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
    - (i) whether a person should be charged with an offence, or
    - (ii) whether a person charged with an offence is guilty of it,
  - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
  - (c) any criminal proceedings which the authority has power to conduct.
- (2) Information held by a public authority is exempt information if—
- (a) it was obtained or recorded by the authority for the purposes of its functions relating to—

- (i) investigations falling within subsection (1)(a) or (b),
  - (ii) criminal proceedings which the authority has power to conduct,
  - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
  - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.

**Section 40** provides that:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) 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 [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act 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
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

**The first data protection principle** states:

- 1. 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.

**Section 41** provides that:

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

**Section 45** states that:

1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.

(2) The code of practice must, in particular, include provision relating to—

(a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them,

(b) the transfer of requests by one public authority to another public authority by which the information requested is or may be held,

(c) consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information,

(d) the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information, and

(e) the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information.

**Regulation 6** of the EIR states:

**6.** - (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

(a) it is reasonable for it to make the information available in another form or format;

or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

(2) If the information is not made available in the form or format requested, the public authority shall -

(a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;

(b) provide the explanation in writing if the applicant so requests; and (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.