

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

**Decision Notice**

**Date: 15 July 2010**

**Public Authority:** Harborough District Council  
**Address:** Adam & Eve Street  
Market Harborough  
Leicestershire  
LE16 7AG

**Summary**

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The complainant requested copies of two reports held by the council relating to a proposed development of houses on a former builder's yard. The reports relate specifically to the council's initial requirement for a section 106 agreement to be entered into by the developer/landowner in support of the approval, however this requirement was subsequently dropped after the consideration of the contents of the reports. The council applied sections 41 and 43 to the information, however after the Commissioner's intervention it agreed with him that the information was in fact environmental information and that it should have been considered under the Regulations. It therefore applied regulation 12(3) and 12(5)(e) to the information.

The Commissioner's decision is that regulation 12(3) applies to the information. As such, he has not gone on to consider the application of regulation 12(5)(e). He has also decided that the council breached regulation 14(3) of the Regulations as it did not provide an adequate refusal notice citing the exceptions which it was relying upon within the relevant time period.

**The Commissioner's Role**

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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.

2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

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3. This complainant requested from the council reports relating to a proposed development in a builder's yard. A planning inspector recommended planning permission should be approved with a requirement for the developer to enter into a section 106 agreement to provide funds and services to the local community. Two reports were subsequently put to the planning committee, one from the applicant and another was ordered by the council. After this the requirement for the section 106 agreement was dropped and planning permission approved. The reports are viability reports, one submitted by the developer, the other being an assessment submitted by a third party specialist company 'Intali' on behalf of the council.

## The Request

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4. On 12 August 2009 the complainant wrote to the council stating  
"When we spoke last Monday you promised to get back to me about copies of the two reports referred to in the Agenda notes - can you please update me."
5. On 21 August 2009 the council responded stating:  
"Unfortunately we cannot grant access to these documents. This .....  
.....information is of a highly sensitive nature. It was supplied to Harborough District Council in confidence and is considered to be commercially sensitive. As such we cannot release this information by virtue of section 41 and 43 of the Freedom of Information Act 2000."
6. On 1 October 2009 the complainant requested from the council:

"I write with reference to the planning permission granted for the development of the above yard.

Although I was unable to attend the Planning Committee Meeting on July 7th I understand that the committee decided to waive the Town & Country Planning Act 1990, section 106 Community Charge.

I would like to know exactly why this decision was taken: I have been trying to obtain documents via (name of council officer) Harborough Planning Office, namely a report compiled on behalf of the council by Intali. I have recently been advised by (name of other council officer) that my request 09/138 has been refused based on the fact that the reports contain 'highly sensitive' information. Perhaps you could explain to me the nature of this 'highly sensitive' information - surely if this relates to values placed on the site these figures could be easily deleted but the main body of both reports could still be issued."

7. The council responded on 12 October 2009. In that letter it explained that the reports related to the viability issues relating to the section 106 agreements and gave further detail as to why the decision to allow planning permission was made without the requirement for the section 106 agreement. The Chief Executive stated in her response:

"The 7th July Committee report deals in detail with the section 106 viability issues. I enclose an extract. It specifically refers to viability reports submitted on behalf of the applicant and their assessment by an independent company (Intali) on behalf of the council. Given the robust nature of the information presented it was considered that Paragraph B10 of Circular 05/2005 was applicable. This refers to National Policy on viability/planning obligations and to circumstances where it can be demonstrated that it may not be feasible in some cases to meet all the requirements set out in local, regional and national planning policies, whilst remaining economically viable.

The information and recommendation made was on the basis of such information and upon the advice of the council's legal officer who advised on the basis of the evidence presented, with reference to case law and Government Guidance. I appreciate that this is extremely disappointing for you. Planning Officers too share this frustration, but in this particular case on the basis of the evidence presented it was considered 'with reluctance' unreasonable to recommend the refusal of the application on this basis."

Section 106 agreements require a developer to agree to take actions necessary to make a development acceptable in planning terms. They are increasingly used to support the provision of services and infrastructure, such as requiring the developer to fund the development of roads, recreational facilities and affordable housing.

8. The council therefore provided some information on the contents of the reports, but did not disclose the specifics of the reports to the complainant.

9. It also stated:

" in respect of your information request... the council is restricted by confidentiality in terms of what information it can disclose, especially where it relates to personal or commercial financial data. I shall nevertheless arrange for the applicant to be asked if they have any objection to the relevant information being released and will forward that if they respond positively.

10. On 2 November 2009 the complainant wrote to the council asking it to review its decision not to disclose the information to her.

11. On 13 November 2009 the council wrote again, stating:

"I have asked the owner to release the viability study documents but they have declined. I regret I can add no more to what (name of council officer who wrote refusal notice) said in his email to you of 21 August. You will appreciate that the council does have to respect any personal and financial details it receives."

## **The Investigation**

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### **Scope of the case**

12. On 14 December 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she had requested should have been disclosed to her.

## Chronology

13. The Commissioner wrote to the council on 19 January 2010 stating that a complaint had been received and that it would be investigated in due course.
14. On 29 January 2010 the council wrote acknowledging the request and asking for details as to how to provide the information to the Commissioner for consideration.
15. On 11 March 2010 the Commissioner wrote to the council providing information as to how to provide the information to him.
16. The council provided the information to the Commissioner on 21 April 2010.
17. On 22 June 2010 the Commissioner telephoned the council asking it to confirm whether the developer was acting of behalf of a limited company or whether he was acting privately on his own behalf. The council confirmed that the developer was acting on his own behalf. The Commissioner also explained to the council that his decision was that the information is environmental information and that the request for information should have been considered under the Regulations. The council confirmed that it had realised that after it had responded to the complainant and that it agreed that that was the case.
18. On the same day the Commissioner wrote to the council asking it to confirm if it wished to apply regulation 12(5)(e) in place of the exemptions it had claimed under the Act. He also asked it to confirm if it wished to apply regulation 12(3) to the information.
19. The council wrote back on the same day confirming that that was the case.

## Analysis

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### Substantive Procedural Matters

20. The Commissioner notes that the council refused the request for the information because it considered it exempt under section 41 and 43 of the Act. However the Commissioner's decision is that that the information is environmental information falling within Regulation 2(1) of the regulations.

21. Regulation 2(1)(c) provides that –

“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 -

(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’

22. The factors referred to in (a) include -

‘ 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’

23. The Commissioner is satisfied that the information falls within the definition of environmental information as provided in Regulation 2(1)(c). The information relates to a measure in an application for development at a builder’s yard which is likely to affect the elements of the landscape as described in Regulation 2(1)(a).

24. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

### **Exceptions**

25. The council sought to apply section 41 and 43 of the Act to the information. However the Commissioner pointed out that the information was environmental information and that therefore it should have been considered under the regulations. The council therefore confirmed that it wished to apply regulation 12(5)(e) to the information.

26. However the Commissioner also highlighted to the council that it was likely that the information was personal data for the purposes of regulation 12(3). The Commissioner asked the council if it also sought to apply this exception to the information and the Council agreed that it did.

### Regulation 12(3)(Personal data)

27. The Commissioner is the regulator of both the Data Protection Act (DPA) and the Act. The rights of an individual under DPA, which include the right of access to personal information about themselves, are not compromised by the provisions of the Act. Section 40 of the Act provides an exemption relating to personal information in various ways. In *Bowbrick v Information Commissioner* (EA/2005/2006) the Information Tribunal confirmed that the Commissioner can use his discretion to look at section 40 when considering cases under the Act:

*'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'*

28. This case refers to environmental information and must therefore be considered under the Regulations rather than the Act. The Commissioner considers however that the same principle must apply.
29. Regulation 12(3) applies to exempt personal data from disclosure under the Regulations in some circumstances. The Commissioner has therefore decided, as the regulator of the Data Protection Act, to use his discretion to consider whether regulation 12(3) applies to the requested information.

### Regulation 12(3)

#### Is the information personal data?

30. The council confirmed that the developer in this case is an individual rather than a private company, and that he is therefore acting on his own behalf. The Commissioner has considered the information and is satisfied that the report which the developer provided to the council is information about the developer's personal affairs, plans and finances. It contains details on the developer's plan to develop an area of his land and his response to the council's requirements for a section 106 agreement.
31. Additionally, the report which the council obtained from Intali was instigated by the council in order to consider and assess the merits of

the report which the developer provided to it. It therefore discusses, considers and analyses in great detail the contents of the first report. It therefore also contains personal information relating to the developer.

32. Section 1 of the DPA defines personal data as data which relate to a living individual who can be identified:
- from those data, or
  - from those data and other information which is in the possession of, or is likely to come into the possession of the data controller.
33. The complainant is already aware of the identity of the developer. A disclosure of the reports would provide detailed information on his plans, finances as regards the development and his affairs which can directly be associated with him. The Commissioner is therefore satisfied that the information is personal data relating to him.

#### The data protection principles

34. Regulation 12(3) excludes personal data from disclosure if disclosing it would breach one of the data protection principles of the Data Protection Act 1998.
35. The First Data Protection Principle requires that personal information should be processed "fairly". In order for a disclosure of this information to be fair the developer would generally have to have had an expectation that his information may be disclosed to any member of the public by the council at the time that he first provided his information to it. This might be because the council told him that that would occur or because it would have been obvious at the time he was providing it.
36. Any disclosure under the Act or the Regulations is a disclosure to the public at large and not just to a requestor. If the public authority is prepared to disclose the requested information to an applicant under the Regulations it must be prepared to disclose the same information to any other member of the public who asks for it. The individual must therefore have had that level of disclosure in mind when he provided his information. It may not be fair to disclose personal data as widely as this if the individual only expected a limited disclosure of his information. In this case the developer would have clearly expected a limited disclosure of his information. The council would need to check the robustness of the arguments put to it and would therefore disclose as much information as was needed to verify the arguments.



37. The Commissioner notes that the information concerns a private property, and a potential section 106 agreement to facilitate planning approval on that property. The reports detail how the imposition of the section 106 agreement would affect the viability of those plans.
38. It is important to note in this context that the fact that the information was provided to the council in support of a building application does not make that information "public information". The planning process is normally carried out in a fairly transparent manner. Planning applications and some documents associated with planning approval are made available for interested parties to consider and pass comment on. For this purpose decisions and plans are often published on the internet and decisions taken transparently. The disclosure of this sort of information is well known about and understood, and it would therefore be reasonably obvious to an individual submitting this sort of information to the council that it would be likely to be disclosed in this way.
39. However not all planning documents are disclosed to the public in this way. Access is generally only provided to certain documents, such as the planning application forms, the associated drawings and the decision itself. The information which the complainant requested is not a planning application, a discussion about the planning merits of the proposal or the likely decision. The information relates to section 106 viability issues. There is no legal requirement or historical context for the council to make this sort of information available to the public under existing planning legislation.
40. Following the above, an individual who is submitting a planning application would have an expectation that the information which is normally disclosed in the planning process would be disclosed. The Commissioner does not however consider that that expectation would stretch to the sort of information which is held in the reports in this case because this sort of information is not normally disclosed by councils during the planning approval process.
41. The Commissioner also notes that the developer's agents specifically put the council on notice that its submission was to be treated with the utmost confidence. It stated that if the council could not agree to that then it should not read the document further but should return the information to the agents. The council did not do this. This would therefore have raised the developer's expectation that the information would be retained for council use only and would not be disclosed beyond the level necessary to make a decision on the section 106 proposal.

42. The Commissioner does not consider that this exchange provides overwhelming evidence in its own right that a disclosure would not be fair. There will be circumstances in which a disclosure of the personal information would be fair in spite of such an exchange. To accept otherwise would potentially lead to agreements not to divulge personal information where there is a clear public interest in that information being disclosed.
43. The Commissioner will therefore consider such information as evidence but will look at the wider circumstance behind the submission of the information before making a decision as to whether a disclosure would be fair in reality or not. One such factor may be where there is a known and compelling public interest argument in favour of disclosure.

Are there any compelling public interest factors in favour of disclosure?

44. Notwithstanding the individual's reasonable expectations or any damage or distress that might be 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.
45. In this case the complainant and others in the community have questioned the size of the proposed development. Her argument is that increased traffic parking on the narrow lanes in the area would result in the emergency services being unable to gain access to properties easily in an emergency situation. The Commissioner does not however consider that these factors are relevant to his decision in this case as the withheld information does not address planning considerations such as these but concentrates on other matters.
46. However the complainant also argues that the withdrawal of the section 106 requirement has resulted in the loss of valuable resources for a small community which is in need of these funds. She questions the transparency of the decision to withdraw this requirement as the refusal to allow access to the reports means that she and other interested parties are unable to scrutinise the reasons behind that decision.
47. The Commissioner has considered this argument. There is a strong public interest in transparency and accountability in so far as council planning decisions are concerned. As it stands the community are not able to scrutinise the council's decision fully because of the refusal to release the reports. The loss of the section 106 requirement has meant that a potential and significant resource has been lost to the community. The Commissioner notes however the statements made by

the council to the complainant highlighted in paragraph 7 above do highlight some of the issues which resulted in the withdrawal of the requirement. In particular he notes the statement:

“Given the robust nature of the information presented it was considered that Paragraph B10 of Circular 05/2005 was applicable. This refers to National Policy on viability/planning obligations and to circumstances where it can be demonstrated that it may not be feasible in some cases to meet all the requirements set out in local, regional and national planning policies, whilst remaining economically viable.”

48. The council has therefore provided the complainant with a very clear statement of the high level reasons behind its decision to withdraw the requirement for the section 106 agreement; that requiring that agreement would have damaged the economic viability of the whole development. Whilst the Commissioner would generally consider there to be a very strong public interest in the disclosure of information which adds additional transparency in such circumstances, he notes that the information in question in this instance is particularly sensitive to the individual concerned, and it is his view that its disclosure could be particularly damaging to the commercial interests of the developer.
49. Given that the council has already taken steps to provide a fair degree of transparency about its decision the Commissioner's view is that there is no overwhelming public interest in the disclosure of the specific information in this case.
50. The Commissioner's decision is therefore that a disclosure of this information would not be "fair" for the purposes of the First Data Protection Principle. For this reason the Commissioner's decision is that regulation 12(3) applies to the information.

#### Regulation 12(5)(e)

51. The council also applied regulation 12(5)(e) (commercial confidentiality) to the information. The Commissioner has not considered the application of this exception further given that he has found that regulation 12(3) applies.

#### **The Decision**

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52. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Regulations.

- The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
- In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.
- The Commissioner considers that the council was correct to apply regulation 12(3) to the information.

### **Steps Required**

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53. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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

**Dated the 15<sup>th</sup> day of July 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### **Regulation 2(1)** In these Regulations –

“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;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

### **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.