

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

Decision Notice

Date: 9 March 2011

Public Authority: East Sussex County Council
Address: County Hall
St Anne's Crescent
Lewes
East Sussex
BN7 1SW

Summary

The complainants are a firm of solicitors representing clients who are in dispute with the council over their house. The house is close to the intended route of a new section of road and the clients are concerned that this will adversely affect their enjoyment of, and the value of their property. The council provided some of the client's personal data to the complainants in response to their request under section 7 of the Data Protection Act 1998 (the 'DPA'). However it withheld other information on the basis that section 40(2) of the Act applies, and other information on the basis that Regulation 12(4)(e) of the Environmental Information Regulations 2004, (internal communications) applies. Section 40(2) refers to the personal data of third parties.

The Commissioner's decision is that all of the information is environmental information. He has also decided that all of the information is the personal data of the complainant's clients. The council should therefore have dealt with the request as a subject access request under the DPA. As such the council had no duty to respond to the request under Regulation 5(1) of the Regulations due to the application of Regulation 5(3).

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.

2. The Environmental Information Regulations (the 'Regulations') 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 Regulations 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 Regulations.

Background

3. The complainants are solicitors whose clients own a house which borders the intended route of a new road. Their clients asked the council to consider the compulsory purchase of their clients' home, arguing that the intended road had blighted their property. They also provided evidence demonstrating that the road damaged their ability to sell the property at an appropriate market value. The information in question therefore relates to the council's discussions on this dispute.
4. The complainants wrote to the council on behalf of their clients making both a subject access request and a freedom of information request for all information relating to their clients application and their situation. The Council responded to the client's subject access request providing the information which it considered to be the personal data of the clients. However it withheld other information on the grounds that it contained third party personal data and because the information consisted of internal council communications.

The Request

5. On 5 March 2010 the complainants requested from the council:
 1. Agendas minutes and reports for all relevant East Sussex County Council meetings at which our clients or their home are referred to: both full Council and committees.
 2. Any local or central government protocols or procedures relevant to the Scheme and its effect on our clients and any relevant decisions referring to (name of clients) or their home or their interests.

3. Any correspondence or documentation referring to (name of clients) or their home or their land in connection with the Scheme, apart from Part 2 papers.
4. Copies of all correspondence between anyone employed by or on behalf of East Sussex Council, Rother District Council and Hastings Borough Council in respect of ascertaining Land Ownership, together with the notes or minutes of any meetings and attendance notes of any telephone conversations and details of any other inquiries made including via the Land Registry referring directly or indirectly to our clients of their home.
6. On 6 April 2010 the council responded. It provide some information which it stated was personal data but said that other information was exempt under sections 40(2) and Regulation 12(4)(e). It provided the information it held in response to the second part of the request.
7. On 8 April 2010 the complainants wrote to the council and asked it to review its decision to refuse parts of the request.
8. On 12 April 2010 the council wrote back to the complainants asking it to specify its grounds for asking the council to review its decision.
9. The complainants responded on 14 May 2010 reiterating that they wanted the council to review its entire decision in respect of its request.
10. On 17 June 2010 the council responded. It said that it had reviewed its decision and its view was that the exceptions had been correctly applied.

The Investigation

Scope of the case

11. On 29 June 2010 the complainants contacted the Commissioner to complain about the way his request for information had been handled. The complainants specifically asked the Commissioner to consider whether the information which they had asked for should have been disclosed to them. The Commissioner notes that the second part of the request, (protocols) etc was responded to and as the complainant's complaint did not cover this he has not considered this further within this notice. Further to this, in a telephone call to the complainant's on 8 March 2011 he confirmed that they only wished to pursue the sections of any minutes and agenda's etc which are relevant to their clients rather than copies of the minutes, agendas in their entirety.

Chronology

12. On 23 September 2010 the Commissioner wrote to the council stating that a complaint had been received. He also asked the council to provide him with a copy of the excepted information.
13. The council telephoned the Commissioner on 15 October 2010 and asked for the deadline for sending information to him to be extended. The Commissioner agreed an extension until the end of October.
14. On 9 November 2010 the Commissioner wrote asking the council to provide its response to his questions.
15. The council responded on 18 November 2010 explaining that due to changes in circumstances since the original decision was made it was reconsidering its decision with a view to being able to informally resolve the complaint. It would therefore respond within the next week.
16. On 29 November 2010 the Commissioner wrote to the council again asking it to respond to his request.
17. The council responded on 2 December 2010 explaining that there had been a delay in the preparation of the information due to adverse weather conditions. It did however provide its additional arguments and confirmed that it was satisfied that it was still unable to disclose the information for the reasons it had provided previously.
18. The council then provided the information to the Commissioner on 6 December 10.

Analysis

Substantive Procedural Matters

Is the Information Environmental Information?

19. The Commissioner has considered whether the information is environmental information or not. His decision is that the information is environmental information falling within Regulation 2(1) of the Regulations.
20. 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’

21. 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’

22. The information in question is correspondence relating to the plan to build a road close to the client’s house, and how that plan would be likely to affect that house and its value. The information is therefore environmental information which should have been considered under the Regulations rather than the Act.

23. Given this, the refusal notice which the council issued would normally breach the requirements of Regulation 14(3), which requires that a public authority that refuses a request specifies the exception it is relying upon in the refusal notice. However the Commissioner’s decision in other parts of this Notice prevents him from making this finding.

24. The Commissioner also notes that the complainant made his request on 5 May 2009. The council’s initial response was made on 9 June 2009. This date falls outside of the 20 day period for responses required by the Regulations. The council did not inform the complainant that it needed further time to consider his request as is required under regulation 7(1). The Commissioner therefore considers that in normal circumstance this would mean that the authority breached regulation 14(2). Again however the Commissioner’s decision in other parts of this Notice prevents him from making this finding.

Exceptions

Regulation 5(3)

25. The Commissioner is the regulator of both the Data Protection Act (DPA) the Freedom of Information Act and the Regulations. 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 or the Regulations. 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.
26. 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.
27. Regulation 5(3) provides an exception to an authority's duty to provide information in response to a request under the regulations when the information in question is the personal data of the applicant. Although the council did not claim it, the Commissioner has decided, as the regulator of the Data Protection Act, to use his discretion to consider whether regulation 5(3) applies to the requested information.
28. The information relates to the complainant's clients' request to the council for it to reconsider its position as regards purchasing their house because of the environmental damage that would occur as a result of the road building project. The information is a record of the council's discussions about the appeal, together with reference information relating to that.
29. In *England & London Borough of Bexley v Information Commissioner (Appeal No: EA/2006/0060 & 0066)* the Tribunal found that information relating to an address of a property was personal data as it would be easy to find out the identity of those living at that property from that address.
30. It found that the owners could be identified from the Council Tax register and the Tribunal went on to conclude that,

"The address alone, in our view, also amounts to personal data because the likelihood of identification of the owner.... In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of the property and therefore have a substantial asset. ...The key

point is that it says something about somebody's private life and is biographically significant."

31. The Tribunal went on to say that the important question was "... what meaning or meanings the data may have in the context of someone's private life. Does the fact that Mr X owns a property potentially worth several thousand of pounds say something about Mr X? In our view it does, and the owner is the focus of that information." (para 98).
32. The Commissioner has considered this as regards the information in this case. It is his view that all of the information which has been withheld by the council refers to the complainant's clients and to their ongoing dispute with the council.
33. The information includes technical discussions about the value of the property, information about actions taken by the complainant's clients and other discussions detailing the options of the council when responding to their clients.
34. The Commissioner is satisfied that all of this information provides a degree of information about the complainant's clients or their property and about their personal lives.
35. The Commissioner's decision is therefore that all of the information is personal data relating to the complainant's clients.
36. Regulation 5(1) provides that an authority shall make environmental information available on request, subject to the other provisions and exceptions within the Regulations. However Regulation 5(3) provides that that duty will not apply where the information in question is the personal data of the applicant.
37. In this case the applicants for the information are solicitors acting on behalf of the house owners. Therefore they are requesting the personal data of their clients, on behalf of their clients. The Commissioner therefore finds that Regulation 5(3) applies in this instance, and his decision is that the information is therefore excepted from disclosure under Regulation 5(3).

Procedural Requirements

38. The Commissioner notes that the application of Regulation 5(3) to the information effectively removes the Commissioner's ability to consider the council's response to the complainant's request under the Regulations. In effect the application of Regulation 5(3) takes the complainant's request outside of the application of the Regulations. The

Commissioner must therefore consider the complainant's rights under the Data Protection Act.

The Decision

39. The Commissioner's decision is that the information is the personal data of the applicants. As this is the case the council is not under a duty to respond to the request because of the terms of Regulation 5(3).

Steps Required

40. The Commissioner requires no steps to be taken, however he draws the council's attention to his findings in the 'Other Matters' section of this Notice.

Other Matters

41. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
42. The Commissioner's decision is that the withheld information is in fact personal data belonging to the complainant's clients. Therefore he considers that the Council should have dealt with the entire request for information as a subject access request under section 7 of the Data Protection Act 1998.
43. The Commissioner will therefore consider the complaint to him partly as a request for assessment. He will therefore make a separate assessment on the data protection aspects of the council's response and will provide his assessment separately to both parties on a private basis.

Right of Appeal

44. 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.
Website: www.informationtribunal.gov.uk

45. 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.
46. 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 9th day of March 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Duty to make available environmental information on request

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.