

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

Decision Notice

Date: 20 July 2011

Public Authority: Blackpool Borough Council
Address: Town Hall
Blackpool
FY1 1AD

Summary

The complainant asked the Council to disclose copies of four complaints it received from members of the public concerning the alleged right of way across a piece of land he believes to be private. Initially, the Council responded to the request under the Act and refused to disclose the information to the complainant under section 41 of the Act. During the Commissioner's investigation the Council accepted that the requested information is environmental information and therefore that the complainant's request should have been considered under the EIR. It informed the Commissioner that it had reconsidered the request and now wished to rely on regulation 13 of the EIR. The Commissioner considered the application of regulation 13 of the EIR to the withheld information and concluded that it does apply. He did however find the Council in breach of regulations 14(1), 14(2) and 14(3)(a) of the EIR.

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 (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.

The Request

3. The complainant contacted the Council on 9 July 2010 to request the following information in relation to a piece of private land to the west of a property in Blackpool [address redacted]:
 - "all user evidence in accordance with section 31(1) of the HA [Highways Act] 1980";
 - "all documentary evidence relating to the alleged public use of the private land under section 31 and 31 of the HA 1980"; and
 - copies of any complaints received by the Council relating to the alleged public right of way over the piece of land in question.
4. The Council responded on 5 November 2010. It informed the complainant that it does not hold the information requested in bullet points one and two of his request. Concerning bullet point three of the request, the Council advised the complainant that it holds four complaints relating to the land in question but considers this information to be exempt from disclosure under section 41 of the Act. It also informed the complainant that it considers disclosure of this information would breach the Data Protection Act 1998.
5. The complainant contacted the Council on 8 November 2010 to request an internal review.
6. The Council responded on 21 December 2010. It informed the complainant again that it does not hold the information requested in bullet points one and two of the request. Concerning bullet point three, the Council confirmed that it does hold the details of 4 complaints but again considers this information is exempt from disclosure under section 41 of the Act.

The Investigation

Scope of the case

7. On 30 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had acted appropriately by withholding the requested information under section 41 of the Act. The complainant also asked the Commissioner to consider the Council's decision to withhold the four complaints in their entirety and whether redacted versions (with names and addresses of the complainants redacted) should be provided.

8. During the Commissioner's investigation the complainant raised further issues relating to his understanding of the Highways Act 1980 and access to this type of information via this legislation. The Commissioner wishes to point out that these are not issues he can consider or indeed comment on in this Notice, as they are not within his jurisdiction. He can only consider an applicant's right of access to recorded information held by a public authority under the Act or the Environmental Information Regulations (EIR) if this is applicable.

Chronology

9. The Commissioner wrote to the Council on 3 March 2011 to inform it that he had received a complaint from the complainant.
10. The Commissioner wrote to the Council on 11 April 2011 to request a copy of the withheld information. He also asked the Council if it had considered whether the withheld information was environmental information and, if it agreed with the Commissioner's preliminary view that it was, to reconsider the request under the EIR.
11. The Council responded on 19 May 2011. It confirmed that it was happy to accept the Commissioner's view that the withheld information is environmental information and submitted further arguments to support its decision to withhold the information.
12. The Commissioner noted that the Council's response provided reasons why the information should not be disclosed under the Data Protection Act 1998 (DPA). As the withheld information constitutes the personal data of third parties rather than the applicant, the request should be considered under the EIR rather than the DPA, as the DPA only provides an applicant with the right of access to his/her own personal data. The Commissioner therefore wrote to the Council again on 31 May 2011 to ask that it considers the complainant's request under the EIR.
13. The Council responded on 7 June 2011. It informed the Commissioner that it considers the withheld information is exempt from disclosure under regulation 13 of the EIR.

Analysis

Substantive Procedural Matters

14. The Council initially considered the complainant's request under the Act citing section 41 of the Act for its reasons of non disclosure. However, the Commissioner's view is that the requested information constitutes

environmental information and the correct access regime is therefore the EIR. He will now explain why.

15. The requested information relates to the use of a piece of land and a dispute over whether there is a public right of way across the land or whether it is private. The Council assert that the public has a right of way in a particular manner. However, the complainant considers the land, which is owned by his father to be private land.
16. A right of way or the usage of land in a particular way is a “measure”, as defined in regulation 2(1)(c) of the EIR which affects or is likely to affect the element of the environments outlined in regulation 2(1)(a) of the EIR (please refer to the Legal Annex towards the end of this Notice for the full text of this section of the EIR). The Commissioner interprets the definition of environmental information widely and considers information concerning, about or relating to measures, activities and factors likely to affect the environment to be environmental information.
17. The withheld information in this case, i.e. the four complaints the Council received relating to this land, is information which relates to the alleged public right of way the Council asserts applies to this land.

Exceptions

18. The exception under regulation 13 of the EIR applies to information that is the personal data of an individual other than the applicant (the complainant), where disclosure of that information would breach the data protection principles or section 10 of the DPA.
19. In this particular case the Council argued that the withheld information i.e. the four complaints in their entirety is the personal data of third parties and that disclosure under the EIR would breach the first data protection principle outlined in the DPA.
20. The Commissioner must first consider whether the withheld information is personal data. If he is satisfied that it is, he will then go on to consider whether disclosure would breach the first data protection principle outlined in the DPA, as the Council has alleged.

Is the withheld information personal data?

21. Personal data is defined in Section 1 of the DPA as follows:

“personal data” means 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.”

22. The Commissioner has reviewed the withheld information. The withheld information is four complaints received by the Council from members of the public relating to the use of the land in question. Each complaint contains the name and address of each complainant and the contents of their complaint. The Commissioner considers that a living individual can be quite easily identified from their name and address. He is therefore satisfied that this information constitutes personal data. He also accepts that the content of each complaint is the personal data of each complainant. He is satisfied from the contents alone (i.e. if these were released with the names and addresses redacted) that it would still be possible for the complainant and other members of the public either in close vicinity of the land in question or with a particular interest in the dispute to identify each complainant from what they have written.

23. As the Commissioner is satisfied that the withheld information in its entirety is the personal data of the four individuals who voluntarily contacted the Council about the usage of the land, he now needs to consider whether disclosure of this information under the EIR would breach the first data protection principle outlined in the DPA.

Would disclosure breach the first data protection principle?

24. The first data protection principle 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.”

25. The Council argued that the four complainants provided the information to the Council on a voluntary basis and therefore they have an expectation that their details and the contents of their complaints will be treated confidentially. At least one of the four complainants specifically stated in their correspondence to the Council that they did not wish for their identity to be released to anyone. The Council confirmed that its complaints process is based on an expectation of confidentiality. If it were to disclose complainant’s details and the substance of their complaint to the world at large this would result in a break down of this

process and members of the public being less willing to co-operate with such process or bring issues of concern to the Council's attention in the future.

26. The Council explained that the dispute over the land in question had already been investigated; enforcement action had already been taken and the matter dealt with through the court process. It considers the disclosure of this information would more than likely lead to these complainants being targeted by the complainant (applicant) in this case and his family. This would cause these individuals unwarranted distress.
27. For the reasons explained above, the Council argued that disclosure of the four complaints, in their entirety, would be unfair to the data subjects concerned and therefore in breach of the first data protection principle.
28. The Commissioner has given this matter careful consideration. He first wishes to highlight exactly what disclosure under the EIR and/or the Act effectively means. Disclosure under the EIR and/or the Act is to the world at large; it effectively means that the information in question should be released into the public domain. Therefore the relevant consideration here is not whether the requested information should be released to the applicant but to the world in general. If disclosure is ordered in this case it means that any member of the public can request it and again access to it; not just the applicant/complainant in this case.
29. The Commissioner accepts that the integrity of the Council's complaints process is based on an expectation of confidentiality. In many situations public authorities rely upon the assistance on the general public to bring matters, such as breaches of planning control, unlawful usage of a particular area of land or property, blockages to rights of way etc, to their attention. If the details of such matters, particularly the name and address of informants or information from which they can be identified, did not remain confidential and were released into the public domain, member of the public would be less inclined in future to report such matters to their local authority. The Commissioner therefore accepts that such processes must operate on a confidential basis to maintain their integrity.
30. The Commissioner agrees with the Council that the four complainants will have the expectation that their details will remain confidential and will not be released into the public domain. He notes that one complainant specifically stated in their correspondence to the Council that they required their details to remain confidential. As the four complainants clearly have an expectation of privacy, the Commissioner considers it would be unfair to release their details and the contents of their complaints into the public domain in response to this request.

Disclosure would be an unwarranted intrusion into the private lives of the four complainants concerned and would cause these individuals undue distress.

31. The Commissioner accepts that there is a legitimate interest in releasing information which promotes the accountability and transparency of a public authority. He also accepts that there is a public interest in gaining access to information which enables the public to understand more clearly how such disputes of this nature are handled. However, he notes that this matter has already been fully investigated and addressed via the formal court process. He does not consider the disclosure of this information would add anything further at this stage to any legitimate interest a member of the public may have. The Commissioner accepts that the complainant remains dissatisfied with the way the dispute has been handled, has his own personal reasons for pursuing this matter and possibly considers certain issues still remain unanswered. However, he considers there are more appropriate means of pursuing these matters rather than seeking the public disclosure of the four complainants concerned under the EIR. As stated above, he considers the disclosure of this information would be an unwarranted intrusion into the private lives of these individuals.
32. For the reasons explained above, the Commissioner is satisfied that the withheld information is exempt from disclosure by virtue of regulation 13 of the EIR, as disclosure of this information under the EIR would breach the first data protection principle outlined in the DPA.

Procedural Requirements

33. As the Council failed to address the complainant's request under the EIR until the Commissioner became involved, it failed to issue an appropriate refusal notice to the complainant within 20 working days of his request which cited the exception (regulation 13) being relied on and why this applied. The Commissioner therefore finds the Council in breach of regulation 14(1), 14(2) and 14(3)(a) of the EIR.

The Decision

34. The Commissioner's decision is that the Council dealt with the following aspects of the request in accordance with the EIR:
 - it was entitled to rely on regulation 13 of the EIR for the non disclosure of the withheld information in its entirety.
35. However, the Commissioner's has also decided that the Council did not deal with the following aspect of the request in accordance with the EIR:

- it breached regulations 14(1), 14(2) and 14(3)(a) by failing to issue an appropriate refusal notice to the complainant under the EIR within 20 working days of his request.

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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

38. 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.
39. 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 20th day of July 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
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Water Lane
Wilmslow
Cheshire
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Legal Annex

Freedom of Information Act 2000

Section 1(1)

Provides that -

“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 41(1)

Provides that –

“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.”

Environmental Information Regulation 2004

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 13(1)

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2)

The first condition is –

- a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a)

(which relates to manual data held by public authorities) were disregarded.

Regulation 14(1)

If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2)

The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including –

- a) any exception relied on under regulations 12(4), 12(5) or 13; and
- b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4)

If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5)

The refusal shall inform the applicant –

- a) that he may make representations to the public authority under regulation 11; and
- b) of the enforcement and appeal provisions of the Act applied by regulation 18.