

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

Decision notice

Date: 28 November 2011

Public Authority: Edenbridge Town Council
Address: Doggetts Barn
72A High Street
Edenbridge
Kent
TN8 5AR

Decision

1. The complainant has requested information about bills for maintenance of a local sewage plant [redacted]. The council responded, stating that it was not possible for it to disclose detailed information on payments received [redacted] or discuss financial arrangements made with other parties.
2. The Commissioner's decision is that Edenbridge Town Council has not provided the complainant with a valid refusal of his request. It has therefore failed to correctly deal with the complainant's request for information, and has breached regulations 11 and 14 of the EIR. He finds that, on the balance of probabilities, the requested information is not held by the public authority.
3. The Commissioner does not require the public authority to take any steps.

Request and response

Background

4. [redacted] [For clarity: the Commissioner is aware that the complainant's property is subject to a contractual arrangement with the council].

5. On 14 July 2010, the complainant wrote to the council and requested information in the following terms:

"You have billed the previous owner [name redacted] under section 3 of our agreement. Please advise how many times, since the agreement was formed in 1986, that the Council has additionally billed [name redacted] under section 2b together with supporting documentation."

6. The council responded on 24 August 2010. It stated that:

"It is not possible for me to disclose detailed information to you on payments received from previous owners [...]"

7. The council's response does not refer to either FOIA or EIR, does not issue any formal refusal of the request in terms expressed in either of these disclosure regimes, does not inform the complainant of his right to an internal review and fails to inform the complainant of his right to submit a complaint to the Information Commissioner.

8. The complainant requested an internal review on 23 September 2010. Following a reminder, dated 13 July 2011, the council's solicitors wrote to the complainant on 8 August 2011 and stated that:

"There is little further that can be added to the comments and explanations already provided to you. [...] You have made reference to a former owner of your property but you will appreciate that the Council is not able to discuss financial arrangements made with any other parties."

9. The response again makes no reference to applicable exceptions to disclosure.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He complained that the council had declined to answer his request, and also about the timescales relating to its handling of his request.
11. The Commissioner considers that the requested information is environmental information because it relates to *"factors, such as [...] emissions, discharges and other releases into the environment, affecting or likely to effect the elements of the environment referred to in [regulation 2(2)(a)]"* under regulation 2(2)(b) of the EIR, or alternatively to *"measures [...] 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" . Therefore the appropriate disclosure regime for the requested information is the EIR, not FOIA.

12. The scope of the complaint relates to the council's refusal to disclose information on request, and the substantial delay in relation to the internal review. This has therefore been considered in light of the relevant provisions under the EIR.
13. The Commissioner contacted the council, to ask for its detailed arguments in support of its reasons for refusing the complainant's request.
14. It was anticipated that the council had intended to refuse the request as the information would be the personal data of the previous owner, which would require a refusal of the information under the provisions of regulation 13(1). Instead, the council explained that the requested information was not held by it. Under the EIR, this requires a refusal issued under regulation 12(4)(a).

Reasons for decision

Regulation 12 - Exceptions to the duty to disclose environmental information

15. regulation 12(4)(a) of EIR states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;"

16. The complainant has confirmed that he moved into the property in 2003.
17. The council explains that its statutory duty is to retain financial information for six years and this is how long it keeps its financial records before securely disposing of them. The Commissioner understands that this is standard practice, based on HMRC requirements and the Companies Act.
18. It has therefore explained to the Commissioner that, by the time the complainant submitted his request in 2010, it had disposed of its records

prior to 2004, which would have contained the information described in the complainant's request.

19. Therefore, irrespective of the validity of any claim that the information would be personal data, the council's explanation is that it does not hold the information requested by the complainant.
20. In cases where there is a dispute over whether information is held, the normal standard of proof to be applied is 'the balance of probabilities'. In other words, is it more likely than not that the information is held? In assessing this balance of probabilities, the Commissioner can take into account various factors, including the scope and thoroughness of any searches made for the requested information.
21. A principal consideration will be an examination of the reasons why the requested information may be held (for example, if the council has a valid 'business reason' to hold the information), set against any reasons given why the information is not held (eg, the 'business reason' is no longer a valid one).
22. In this case, the six-year retention period for financial information is an established standard and there is no 'business reason' why the information prior to 2003 (when the complainant moved into the property) would still be retained. The council has explained that when it received the request it checked to see if the older records had been destroyed, and it has confirmed to the Commissioner that they had.
23. The Commissioner recognises that, having checked whether the applicable financial records had been disposed of, and on receiving confirmation that they had, no further searches would seem necessary as the requested information would be contained in the council's financial records. Therefore, he concludes that, on the balance of probabilities, the council does not hold the requested information.
24. In the terms expressed by the EIR, the complainant's request should have been formally refused under the provisions of regulation 12(4)(a), that the requested information is not held by the council. This was not done.

Regulation 14 – Refusal to disclose information

25. The council's response failed to specify the reasons why the council was not disclosing the requested information, which is a breach of the provisions of regulation 14(3)(a) and 14(3)(b) of EIR. Indeed, until he contacted the council the Commissioner was under the misapprehension that the requested information was held, but was being refused as personal data.

26. The council's responses to the complainant, both initially and at internal review, are sufficiently ambiguous that this assumption is a valid one, but the responses are also consistent with its subsequent explanation that the information is not held. This ambiguity does not assist the complainant, nor does it help to prevent unnecessary approaches to the Commissioner.
27. The response additionally fails to inform the complainant of his right to make representations to the council under regulation 11, or of his subsequent right to bring an appeal to the Commissioner. This is a breach of regulation 14(5)(a) and 14(5)(b).

Regulation 11 - Representation and reconsideration

28. Regulation 11 obliges a public authority to consider any representations made to it by an applicant, provided those representations are made within 40 working days of any refusal of an applicant's request. It is required to reconsider its response, and provide the applicant with a further response within 40 working days of receiving his representations.
29. In this case, the complainant replied to the council's 24 August 2010 response on 23 September 2010. This is within the required time frame and consequently the council is obliged to reconsider its response and write again to the complainant within 40 working days with the outcome of its reconsiderations. There is no evidence that the council did so, until it received the complainant's chasing letter of 13 July 2011, at which point it instructed its solicitors to respond. This substantial delay is a breach of regulation 11(4).

Other matters

30. The Commissioner has noted, above, certain procedural shortcomings in the way the council has approached the complainant's request. These are based largely around an observation that the council appears to have dealt with his correspondence informally (ie 'in the normal course of business') rather than as a formal information request.
31. The Commissioner therefore wishes to remind the council of its obligations under FOIA and EIR and the importance of recognising circumstances in which the applicable legislation may have effect.
32. The complainant has commented that he inferred, from the council's response, that the council could show that the previous occupant of his property had been billed for additional repairs, and that he took action on that basis. He complains that he has been materially misled by the

ambiguity in the response. The Commissioner makes no finding as to whether the ambiguity was deliberate, but he observes that the complainant was not told that the council's financial records prior to 2004 had been disposed of, and that enquiries had therefore determined that the requested information was not held. This is not consistent with the Commissioner's guidance on writing a refusal notice¹ or with the Code of Practice issued by DEFRA for public authorities for compliance with the EIR².

1

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/FEP058_WRITING_A_REFUSAL_NOTICE.ashx

² <http://archive.defra.gov.uk/corporate/policy/opengov/eir/pdf/cop-eir.pdf>

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Andrew White
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF