# Freedom of Information Act 2000 (FOIA)

# Environmental Information Regulations 2004 (EIR)

# Decision notice

**Date:** **9 January 2012**

**Public Authority:** **Teignbridge District Council**
**Address:** **Forde House**
**Newton Abbot**
**Devon**
**TQ12 4XX**

## Decision

1. The complainant requested the following:

- details of procedures followed by Teignbridge District Council's (the "council") Planning Service Lead officer ("PSL") in determining a planning application submitted by the complainant's client.

- details of an investigation into a complaint (the "investigation report") made by the complainant's client against the PSL and the name of the handling solicitor.

- A copy of the PSL's employment contract, details of their remuneration. The complainant also asked for confirmation that the PSL was leaving the council's employment and details of any associated severance/remuneration package.

2. The Commissioner's decision is the following:

- in failing to provide details of the investigation report within 20 working days and failing to handle this element of the request under the correct legislation, the council breached regulation 5(2) of the EIR;

- in relation to the request for details of the investigation report, in issuing a refusal under the FOIA and failing to correct this at the internal review, the council breached regulation 14 of the EIR;

- in relation to the request for details of the PSL's severance package, the council correctly relied upon section 40(2) of the FOIA in withholding the information.

3. The Commissioner does not require the public authority to take any steps.

## Background

4. The complainant acts on behalf of their client, Trago Mills (South Devon) Limited ("Trago Mills"). Their client had submitted a planning application (reference: 07/03512/FUL) which was refused by the council. A complaint was made to the council which identified an allegation of bias or prejudice against the PSL who was responsible for handling this and other planning applications submitted by Trago Mills. The council conducted an investigation into the complaint and it is against this background that the requests for information were submitted.

## Request and response

5. On 15 February 2010, the complainant wrote to the council and requested information in the following terms:

   "We understand that arrangements are in place for [name redacted] employment with the Council to end.

   Can you please confirm this and, if it is correct, please provide full details of the remuneration he will receive in connection with the termination of his employment.

   Please also provide us with a copy of his contract of employment and details of his remuneration package whilst in the Council's employment."

6. The council responded on 1 March 2010. It provided some information and confirmed that information relating to remuneration in connection with termination of employment was being withheld under the personal data exemption (section 40(2)).

7. On 2 August 2010 the complainant wrote to the council and submitted the following, further request:

   "Please provide us with details of [name redacted] severance package.

   From previous correspondence you will be aware that our client company lodged a planning application for a petrol station which was

considered by [name redacted]. Please can you review and confirm the procedures followed by [name redacted] in determining the application.

Finally, please also provide us with the name of the solicitors undertaking the Independent Solicitor's Report and the details of the Report itself."

8. The council responded on 2 September 2010. The council confirmed that it was withholding details of the severance package and details of the requested report under section 40(2) because it considered that disclosure would breach one of the principles set out in the Data Protection Act 1998 (DPA). In relation to the severance package, the council explained that it considered this would also fall within the category of information provided in confidence, engaging the exemption in section 41 of the FOIA. However, as it considered that the information was exempt under section 40(2), it did not go on to consider section 41 in more detail.

9. The council provided the name of the investigating solicitor and confirmed that, beyond information contained in the (withheld) investigation report, it did not hold information regarding procedures followed in determining the application.

10. The complainant wrote to the council on 20 April 2011 and asked it to reconsider its handling of both requests for information, conflating the outstanding elements into the following 3 categories:

(i) Details of [name redacted] severance package on leaving the council's employment;

(ii) the procedures followed by [name redacted] in relation to a specific planning application;

(iii) the investigation report.

11. Following the internal review the council wrote to the complainant on 24 May 2011. It stated that it was now prepared to release the investigation report to the complainant.

12. In relation to the request for procedures followed regarding the planning decision (ii), the council also provided a copy of a meeting note (generated after receipt of the request). In relation to (i), the council confirmed that it was maintaining its reliance on section 40(2) of the FOIA to withhold details of the terms of [name redacted] departure. In doing so, the council explained that these matters were the subject of a compromise agreement, the terms of which prohibit disclosure.

## Scope of the case

13. The complainant contacted the Commissioner to complain about the handling of their request for information. The complainant asked the Commissioner to consider the following:

    (a) Whether the request for information identified under (ii) above, should have been handled under the EIR rather than the FOIA.

    (b) Whether the council's grounds for initially withholding the investigation report were correct.

    (c) Whether the council has correctly confirmed that no further information relating to procedures is held.

    (d) Whether the council issued compliant refusal notices.

    (e) Whether the council has correctly applied section 40(2) of the FOIA to the withheld information.

14. The Commissioner has confined the scope of his investigation to these 5 elements.

## Reasons for decision

*"From previous correspondence you will be aware that our client company lodged a planning application for a petrol station which was considered by [name redacted]. Please can you review and confirm the procedures followed by [name redacted] in determining the application."*

*"….please also provide us with the name of the solicitors undertaking the Independent Solicitor's Report and the details of the Report itself."*

### Is it Environmental Information?

15. The Commissioner has considered whether these elements of the request identify environmental information.

16. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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…'*

17. The Commissioner considers that the phrase 'any information…on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.

18. In this instance, the Commissioner notes that the request identifies information consulted in making a determination regarding a planning application. He has concluded that such information, if held, would be likely to constitute a measure as defined in regulation 2(1)(c) of the EIR.

19. In addition to reaching a conclusion on the general principle of information potentially captured by the request, the Commissioner has also referred to the specific investigation report which, in exploring the conduct of the PSL in determining the planning application makes widespread reference to planning policy and procedures.

20. Having referred to the investigation report, the Commissioner is of the view that this contains both environmental and other information which is inextricably linked and therefore cannot be easily separated. In this situation, the Commissioner, following the Tribunal[1], considers that the *predominant purpose* of the information contained in the investigation report covers environmental information and that the information, in its entirety, falls under the EIR. In its submissions to the Commissioner, the council has acknowledged that this element of the request should have been handled under the EIR.

[1] EA/2007/0072 - *Department for Business Enterprise and Regulatory Reform v the Information Commissioner & Friends of the Earth*

21. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.

22. The Commissioner finds that, in failing to provide the requested information within 20 working days, the council breached regulations 5(1) and 5(2) of the EIR.

23. With regard to element (b) of the complaint, the internal review process is designed to provide a further opportunity for authorities to reconsider their arguments and conclusions. In this case, the requested information was provided to the complainant at the internal review stage so the principle has been shown to work. The requirement to examine the initial exemption has, therefore, disappeared and the Commissioner does not require the council to take any remedial steps in this regard.

**Has all the relevant information been provided?**

*"From previous correspondence you will be aware that our client company lodged a planning application for a petrol station which was considered by [name redacted]. Please can you review and confirm the procedures followed by [name redacted] in determining the application."*

24. Element (c) of the complaint alleges that the council has failed to provide all information falling within the scope of this element of the request. The Commissioner considers that the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.

25. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information *is* held, including whether it is inherently unlikely that the information so far located represents the total information held.

*What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?*

26. The council has confirmed to the Commissioner that it conducted searches of its planning application database, "Comino". Comino was searched using the relevant planning application number.

*If searches included electronic data, which search terms were used?*

27. The council explained to the Commissioner that the relevant planning file was originally held in paper form but that it was subsequently scanned and held electronically.

*Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?*

28. The council has confirmed that no relevant information has been deleted.

*Is there a business purpose for which the requested information should be held? If so, what is this purpose?*

29. The council explained to the Commissioner that, at the time the request was received, officers were asked whether other information relating to the planning application was held. Email searches were undertaken but the council confirmed that, having spoken with officers, the only associated information held in this form would have related to requests for meetings to discuss the application.

30. The council has confirmed that such information would be regularly deleted from officers' inboxes. Once an email has been deleted from an inbox and deleted from the 'deleted items' folder it would only be available for 24 hours. The council explained that its email system is backed up at the end of each night for business continuity purposes but that this backup would subsequently be overwritten by the next day's backup and, therefore, no longer held. The council considered that, in any event, such information fell outside the scope of the request and there was not a business purpose for retaining such emails.

## Conclusions

31. The Commissioner has considered the explanations provided by the council and, being mindful of the difficulties associated with 'proving a negative', he has referred to the information which was provided in response to the request. He has also had regard for publically available information relating to the planning application[2].

[2] Published online here: http://gis.teignbridge.gov.uk/TeignbridgePlanningOnline/Results.aspx?Type=Application&Refval=07/03512/FUL

32. The Commissioner considers that, beyond the explicit or implicit references to procedures in the available information, it is unlikely that there would be additional documentation regarding procedures followed in relation to the specific planning application. There is nothing within the information provided which suggests further relevant information is held and the Commissioner has not been provided with evidence to the contrary.

33. The Commissioner has concluded that, on the balance of probabilities, the council has correctly confirmed that no further relevant information is held.

**Refusal Notice – section 17 / regulation 14**

34. Where a public authority refuses a request for environmental information it must, under regulation 14, issue a written refusal as soon as possible and within 20 working days after the date of receipt of the request. Under regulation 14(3), the refusal should specify the reasons not to disclose the information, 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)."

35. Under regulation 14(5) of the EIR, the refusal notice should also inform the applicant of the right to make representations (request an 'internal review') to the public authority under regulation 11.

36. Section 17(1) of the FOIA provides that, where an authority is relying on one of the exemptions listed in Part II of the FOIA to refuse a request, it must give a requester 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."

37. Section 17(7) requires that refusal notices should provide details of any procedure provided by an authority for dealing with complaints about the handling of requests, or state that such a procedure is not provided.

38. The Commissioner has considered whether the responses issued by the council on 1 March 2010 and 2 September 2010 comply with section 17 of the FOIA and regulation 14 of the EIR.

39. In relation to the notice issued on 1 March 2010, he notes that this states that information is being withheld, specifies the relevant exemption and explains why the exemption applies. It also advises the requester of the right to complain about the handling of the request and explain how a complaint should be submitted.

40. The Commissioner has concluded that the refusal notice issued by the council on 1 March 2010 complies with sections 17(1) and 17(5) of the FOIA.

41. In relation to the council's response of 2 September 2010, the Commissioner has established that the investigation report and procedures followed in determining the planning application (which form part of the report) constitutes environmental information.

42. In relation to these elements of the request, the Commissioner finds that, in issuing a refusal under the FOIA and failing to correct this at the internal review, the council breached regulation 14 of the EIR.

43. In relation to the request for details of the PSL's severance package, the Commissioner finds that the council correctly handled this under the FOIA and that its refusal notice complies with sections 17(1) and 17(7).

**Personal Information – section 40(2)**

44. Section 40(2) provides that

"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."

45. Section 40(3) provides that –

"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 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"

*Is the information 'personal data'?*

46. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the Data Protection Act 1998 (DPA). In this instance, the Commissioner accepts that information about an individual's financial settlement and the terms of their leaving an authority's employment is personal data as defined by the DPA.

*Does the disclosure of the information contravene any data protection principles?*

47. In refusing to provide details of the PSL's severance package the council has argued that disclosure would contravene the first data protection principle.

48. 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".

49. In deciding whether disclosure of personal data would be unfair the Commissioner has taken into account the following factors:

- The existence of a compromise agreement between the individual and the council.
- The individual's reasonable expectation of what would happen to their personal data.
- The individual's relatively senior position at the council.
- What damage or distress would the individual suffer if the information was disclosed?
- The legitimate interests of the public in knowing the amounts of public money being spent by the council.

*The existence of a compromise agreement*

50. The council has confirmed that details of the PSL's severance package are covered by the terms of a compromise agreement.

51. The Commissioner believes that compromise agreements play an important role in employer/employee relationships. They avoid the time,

expense and stress of litigation in an Employment Tribunal when an employer/employee relationship comes to an end. Such agreements provide the opportunity to conclude the relationship in private and allow both parties to make a fresh start if they so choose. The Employment Rights Act 1996 established the opportunity for parties to reach a compromise agreement and has built safeguards into the process to ensure employees receive independent and accountable legal advice before entering into such agreements. In this instance, details of the reasons for the individual's departure and any payment(s) made to them are included in the compromise agreement.

52. The Commissioner also believes that the right to access official information and the right to reach an equitable compromise when an employer/employee relationship comes to an end are not mutually exclusive. However, where a compromise agreement has been reached between a council and a senior employee of that council, a balance has to be struck between a public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way, and its duty to respect its employees' reasonable expectations of privacy.

*Reasonable Expectations*

53. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the outgoing employee's reasonable expectations. The compromise agreement includes a confidentiality clause, which is binding on both the individual and the public authority.

54. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information. For example, he considers that information relating to the termination of an individual's employment will attract a strong general expectation of privacy.

55. The Commissioner is satisfied that the data subject would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.

*Seniority*

56. The Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the FOIA. The Commissioner also believes that a distinction can be drawn about the levels of information which junior staff should expect to have disclosed about them compare to what information senior staff should expect to have disclosed about them.

This is because the more senior a member of staff the more likely it is that they will be responsible for making influential policy decisions and / or decisions relating to the expenditure of public funds.

57. The Commissioner's general approach is that public sector employees should expect some details about their salary to be placed in the public domain. However, it is reasonable to assume that they would not expect details of exact payments to be made publicly available.

58. Disclosure of exact payment details would clearly lead to a greater infringement into the privacy of individuals as it would reveal the specific details of their financial situation.

59. In this instance the information requested identifies payments made to a senior member of the council on termination of their employment.

60. The Information Tribunal in *Rob Waugh v the Information Commissioner and Doncaster College* (EA/2008/0038)[3] considered similar conditions relevant to those in this case. The Tribunal, in considering the concept of fairness under the first data protection principle, held that it was;

*"…necessary to consider in terms of fairness what would be* [the data subject's] *reasonable expectations about the use and subsequent release of the material."*

61. Similar to the current case, in EA/2008/0038, the settlement agreement between the public authority and data subject included a confidentiality agreement which limited the information that would be made available to the public about the termination of his employment. The Tribunal upheld this, giving rise to;

*"…a reasonable expectation that no further information would be released."*

62. The Tribunal also held that, even in the public sector, there is an expectation that information subject to compromise agreements should be accorded privacy, particularly where there is no evidence of wrongdoing or criminal activity. In relation to the current complaint, he Commissioner has not been provided with any evidence of these latter two activities.

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3 http://www.informationtribunal.gov.uk/DBFiles/Decision/i282/Rob%20Waugh%20v%20IC%20&%20Doncaster%20College%20(EA-2008-0038)%20Decision%2029-12-08.pdf

63. In view of this, although the PSL held a senior role at the public authority the Commissioner considers that their expectations of privacy are objectively reasonable and outweigh the arguments for disclosure based on an employee's professional life.

*What damage or distress would the individual suffer if the information was disclosed?*

64. The Commissioner has considered what the consequences of disclosure might be and has then looked at other related factors. In this case the consequences of disclosure are less obvious or tangible than in some cases however it may still be unfair to disclose the information.

65. Disclosing details of a severance agreement might well pose a risk to the data subject's chances of promotion or employment. The Commissioner has also taken into account that the data subject's emotional wellbeing may be affected by disclosure even though the distress or damage caused may be difficult to clearly evidence.

66. The Commissioner has looked at some related factors. The fact that some information about the PSL's departure may have been and may still remain in the public domain could be argued to give weight to the further disclosure of information. The disclosure of the investigation report lends further weight to this argument. However the details and terms of the severance package or compromise agreement were never made public. It is important to note that the Commissioner is concerned with additional damage or intrusion that disclosure would cause.

67. The Commissioner considers that there is a real risk that release of the information would cause damage and intrusion to the data subject.

*The Legitimate Interests of the Public*

68. In considering the legitimate interests of the public, the Commissioner notes there is a real public interest in knowing how much money has been spent by the public authority particularly where an employee's employment has been terminated.

69. Although the exemption contained in section 40(2) if found to be engaged is absolute and therefore not subject to the public interest test, the Commissioner will still consider legitimate interests in favour of disclosure when conducting an investigation.

70. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. This has been evident in cases for example

involving MPs expenses (such as EA/2006/0015 & 0016) where on appeal the High Court stated:

*"The expenditure of public money through the payment of MPs salaries and allowances is a matter of direct and reasonable interest to taxpayers."*

71. It can be argued in this case that there is a strong public interest in knowing the terms of the PSL's severance package and therefore how much public money was spent. However disclosing such details may deter parties in the future from entering into such agreements. As the Audit Commission's report ("By Mutual Agreement – Severance payments to council chief executives") states, severance payments can also be in the public's interest:

*"Reducing the number and size of severance payments may appear to be in the best interests of taxpayers, but quick, agreed departures can save public money. Dysfunctional relationships, or drawn-out legal disputes at the top of organisations, can have substantial negative effects on services. So, councils are permitted to agree payments on contract terminations as being in the 'efficiency of the service'."*[4]

72. The Commissioner believes that the legitimate interests of the public in knowing how much money is spent on settlements of this kind must be weighed against the individual's right to privacy. In the Decision EA/2008/0038, the Tribunal concluded that the legitimate interests of the public in accessing the requested information were not sufficient to outweigh the data subject's right to privacy, particularly given the substantial detriment that would result from disclosure.

73. The Commissioner also considers that, in this instance, the public interest in knowing whether appropriate policies and procedures have been followed, or whether a public authority has displayed malpractice, has been served by the disclosure of the investigation report

74. In addition, the Commissioner also believes that the unilateral breach of the confidentiality terms in the compromise agreement would also be unlawful. This fact alone would also mean the exemption was applied correctly.

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[4] "By Mutual Agreement – Severance payments to council chief executives" , available online here: http://www.audit-commission.gov.uk/SiteCollectionDocuments/Downloads/20100315bymutualagreementrep.pdf

*Conclusions*

75. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle. The Commissioner considers that the data subject had a reasonable expectation of privacy in particular in relation to details of their departure from the council's employment and to release the requested information would be unfair and would be likely to cause distress to the data subject. He is therefore satisfied that the council was correct to refuse disclosure under section 40(2).

## Right of appeal

76. 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

77. 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.

78. 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**
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