

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

Decision notice

Date: 28 November 2013

Public Authority: Warrington Borough Council
Address: Gilbert Wakefield House
67 Bewsey Street
Warrington
Cheshire
WA2 7JQ

Decision (including any steps ordered)

1. The complainant has requested a copy of reports produced by Warrington Borough Council relating to a proposed building development in Peel Hall, Warrington. The council applied section 36 to the information, or if the Commissioner considered that the information was environmental information, that Regulation 12(4)(e) applied. The council also applied Regulation 13 to personal data in the information if Regulation 12(4)(e) did not apply.
2. The Commissioner's decision is that the council was not correct to apply section 36 of the FoIA as the information is environmental information. He has also decided that the council was not correct to apply Regulation 12(4)(e). Although the exception was engaged the public interest rests in the information being disclosed.
3. The Commissioner considers that as regards the application of Regulation 13, it would be unfair to disclose information relating to employees of Satnam.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which has not been described in paragraph 3 above to the complainant.

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 15 February 2013 the complainant wrote to Warrington Borough Council and requested information in the following terms:

"(name redacted) has been made aware of the attached allegations etc and press stories that have been circulating about the appeal and Satnam/Peel Hall. He notes that the LA (local authority) have responded and have produced at least one internal report on this matter.

Would you send me copies of the LA review report(s) referred to in the attached documents and any further LA reports to committee etc., about the site, the appeal and Satnam in this context."

7. The council responded initially on 15 February 2013 stating simply that it was unable to provide the complainant with this information. The complainant then asked whether he needed to make his request under the Freedom of Information Act.
8. On 4 April 2013 the council issued a refusal notice to the complainant. It stated that the information was exempt from disclosure under section 36 and section 40 of the Act, or, to the extent that the information was environmental information that it was exempt under Regulation 12(4)(e) (internal communications) and Regulation 13 (personal data).
9. The council informed the complainant that although its normal procedures would be to offer a review to its refusal notice in this case the officer who had drafted the initial decision was also responsible for carrying out reviews. The council therefore told the complainant to make a complaint straight to the Commissioner rather than to seek an internal review by the council.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

11. The Commissioner considers that the complainant wishes to know whether the report held by the council should have been disclosed to him.

Reasons for decision

Background

12. Satnam Investments own land close to Winwick in Warrington. It submitted a planning application to develop 150 houses on one area of the land. Under planning law the council is under a duty to make a formal decision on the application with 13 weeks, however in this case it did not do so. Satnam therefore made an appeal directly to the Planning Inspectorate to determine the outcome of its application on the basis that the council had failed to do so.
13. The local MP had been involved in the proposed development and had made a number of requests for information previously and received information in respect of this. She and other councillors had highlighted evidence that the intention of Satnam was for a much bigger development than was submitted in the initial planning application. She said that this was phase one and there were a number of more phases to follow. In parliament she argued that the green space in the area would be severely affected by the intentions of the developer.
14. When Satnam appealed the application for non-determination the local MP voiced opinions in the press that the council had failed to act appropriately and had allowed a decision which should have been taken locally to now be determined centrally by the Planning Inspectorate. She voiced the opinion that this had detrimentally affected the local community to decide its own position on the application. It has been reported that she called for the executive director of environment and regeneration at the council to resign over the issue. She is quoted as saying that it had been "*an outrageous failure by the planning department and a breach of trust with local people*" (reported in 'This is Cheshire' 4 February 2013).
15. Further to this she said that she would write to the Chief Executive calling for a thorough investigation and for disciplinary action to be taken against whoever is responsible. "*Some time ago I called for an outside expert to be brought in to review the planning department and I renew that call now. It is simply not fit for purpose*"
16. The council carried out a review of the issues which led to Satnam appealing to the Planning Inspectorate for non-determination. That review is the withheld information held in relation to this request.

Is the Information environmental information?

17. The Commissioner must firstly determine whether the council was correct to consider the request as a request under the Act. As stated, the council did provide an alternative response under the Regulations should the Commissioner decide that it had been mistaken in its decision to apply the Act.

18. Regulation 2 provides the definition of Environmental information for the purposes of the Regulations. It defines environmental information as:

"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."

19. The withheld information is a review of why the planning application failed to be decided by the council's planning department within the allotted time, resulting in Satnam's appeal for non-determination.

20. The words 'any information... on' in the definition is interpreted widely. Whilst the information is not about the details of the plan directly, it is about the plan in that it relates to why the application was not decided within the allotted time by the council. It is therefore information 'on' or 'about' the plan. It is also a measure designed to ensure that planning applications are received and decided within appropriate time limits in the future – therefore again this is likely to affect the factors described in (a) above.

21. The Commissioner is therefore satisfied that the withheld information is information 'on' a plan which will have an effect on the land or landscape and the elements of the environment referred to in (a) above.
22. The Commissioner is therefore satisfied that the information is environmental information and that the question of disclosure needs to be determined under the provisions of the Regulations rather than under the Act. He has not therefore considered the council's application of section 36 further in this respect. However the arguments used in support of section 36 which the qualified person provided do extend to the arguments for the application of Regulation 12(4)(e) to a large extent.
23. In the event that the Commissioner decided that the information was environmental information the council sought to apply Regulation 12(4)(e).

Regulation 12(4)(e)

24. Regulation 12(4)(e) states that information may be exempt where the request involves the disclosure of internal communications.
25. In this case the withheld information is an internal report drafted by an officer of the council for the benefit of members. The report has not been shared outside of the council and it is therefore an internal communication for the purposes of the Regulations. The exception is therefore engaged.
26. The Commissioner must therefore carry out a public interest test as required under section Regulation 12(1)(b). The test involves a decision as to whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. When carrying out the test the Commissioner must also take into account the presumption in favour of disclosure outlined in Regulation 12(2).

The public interest in the exception being maintained

28. The central public interest in Regulation 12(4)(e) relates to creating a 'safe' space for public authorities to discuss, deliberate and seek advice about issues prior to making decisions. There is also a public interest in allowing free and frank discussions to take place in private in order to prevent a chilling effect occurring. The Commissioner has firstly considered the safe space arguments.

29. In this case the issue at hand was the reason for the lack of a decision in the planning application submitted by Satnam Developments, which ultimately led them to appealing to the Planning Inspectorate for a lack of determination of the application.
30. Presumably the criticism of the planning department by politicians and press led the council to consider that further investigation of the department was required. It is this issue, rather than any wider issues which the report considers.
31. The Commissioner understands that the findings of review were briefly expressed to by a press statement made by the Chief Executive of the council. It has been reported that he found that '*there were issues*' with the planning department at the time of the request (see Warrington Worldwide article at www.warrington-worldwide.co.uk/articles/15081/1/MP-accused-of-vendetta/Page1.html). The question is therefore whether the remainder of the information should be disclosed in light of this statement. It is noted that the 'issues' were not elaborated upon further by the council. He did not explain what those issues were nor how the council planned to address them.
32. The council argued that it needs a safe space in which to obtain, discuss and deliberate over the necessary information it needs in order to react the criticisms, free from the public eye so that it can produce a final decision which accurately reflects what has occurred and can then make plans to prevent the issues occurring again.
33. One central question regarding 'thinking space' is whether that space is still required at the time that the request is made; whether the issues in discussion were still 'live' at the time of the request. In this case the review has been completed and, as noted above, it has been reported that the Chief Executive did find that there were issues with the department.
34. The Commissioner considers that at the time of the request the review had been carried out. The need for a safe space in order to produce the review had therefore passed. It is questionable whether members had considered and addressed the issues highlighted at that point, however the request is for the review. The complainant did not ask for information relating to the steps taken by the council in response to the review. He simply asked for a copy of the review. In any event the review does include details of some changes which the Chief Executive intended to make as a result of his findings.
35. The issues surrounding the planning application itself were not decided at the time that the request was made (15 February 2013). The Planning Inspectorate made a decision refusing the application in July

2013. The report is dated 5 February 2013 and so was very recent at the time of the request. Therefore the wider issues were still 'live' in the wider sense. Politicians were still voicing their concerns about the planning department.

36. The Commissioner considers that although the wider issues may still have been 'live' the process of gathering and obtaining information and producing the report had been completed by the time of the request, and the Chief Executive had already identified some changes which he would make as a result of his findings. The Commissioner therefore considers that this weakens the council's arguments in this respect significantly.
37. The council argued that if the information is disclosed it will be likely to detrimentally affect up its ability to have free and frank discussions with its officers regarding issues of public contention in the future. It believes that if the information were to be disclosed the default position officers would take as regards such investigations or reviews would be likely to be a defensive if they believed that either they or the department might be criticised publicly in the future. This is the 'chilling effect' argument.
38. It argues that if this were to occur it would make it more difficult to identify operational changes which need to be made in order to ensure that a council department functions efficiently. It argues that in a high profile situation such as this one, where specific officers have been severely criticised there would inevitably be some degree of reservation about providing information to the reviewer which might lead to an individual, or the department as a whole receiving further criticism or disciplinary action.
39. The council argues that in such circumstances such as this a disclosure of the information would ultimately make it much harder to identify and take action to improve the service.
40. The council also considered that a disclosure of the review would be used by political opponents to gain political capital and attack the council. Certainly councillors from the other parties had joined the local MP in criticising the council however as the review had identified issues with the department they would surely argue that that criticism was warranted.
41. The Commissioner recognises that the criticisms would have already made staff feel like they had to defend their own actions when being interviewed by the Chief Executive. In general, council officers should be robust enough to answer the questions of the Chief Executive honestly and fully, even on a high profile issue such as this. The Commissioner accepts however that if there was a fear of vehement public criticism on

a personal level some individuals (but not all) might feel that in order to defend themselves they needed to withhold information. Other employees would still be likely to be full and frank however and this would to an extent weaken any argument that a review would fail purely because of a subsequent disclosure of the findings of the review. This is particularly the case in this instance, where no individuals' representations have been included within the review itself.

42. The Commissioner considers that a disclosure in this specific case is unlikely to have deterred officers from providing information to the Chief Executive in this case. Having read the review the Commissioner considers that a disclosure of the review may in fact have diffused the situation to some extent by explaining what the 'issues' which were discovered were, and how those issues were going to be addressed. For the most part a disclosure of the findings would actually support the staff concerned.
43. The Commissioner considers that the potential for the disclosure of this information to have a chilling effect is certainly apparent, but given the circumstances of this case he believes that that effect would be relatively low in this instance.

The public interest in the information being disclosed

44. There are two main elements to the public interest arguments in favour of the information being disclosed. The primary argument relates to the criticism laid against the council department in the first instance and the public concerns that this would give rise to.
45. Local politicians and councillors expressed public concerns about the council department's ability to carry out its functions. These are obviously going to raise significant public concerns about the council's effectiveness and its decision making. The Commissioner has also taken into account that the criticism was laid against the planning department.
46. Planning department decisions have the ability to completely change the character of a neighbourhood or town. Any concerns or criticisms which are laid against a planning department's effectiveness are inevitably going to lead to significant public concerns. In this case the concerns related to one of the most important and publicly concerning planning issues surrounding Warrington and its outskirts.
47. There are obviously going to be a great deal of public concern over planning applications for developments of the size outlined overall in this area. The local MP has highlighted a plan she obtained which she considers is going to cause a significant reduction of the green belt surrounding the town. The plan she has published indicates that the

developer had a number of phases planned to develop the area. The application in this case relates only to the first phase of the development.

48. Additionally in this case, by the councils own admission it did find issues with the department, but did not then go on to explain what those issues were or what it was going to do to address the issues.
49. The MP is likely to have caused a significant degree of concern in highlighting that the decision would not be taken locally, and in her statement that the council planning department was not fit for purpose.
50. The Commissioner considers that the concerns expressed about the state of the planning department, together with the general concerns expressed about the intentions of the developer would have raised a significant public need for greater transparency over the issues involved. A disclosure of the review would have highlighted what the issues were, and would, to an extent have responded to the MP's criticisms.

Conclusions

51. The Commissioner has considered the above. He is restricted to making his decision based upon circumstances at the time that the request was received, and at that time the issues were very recent or ongoing but the review itself had been completed and the Chief Executive had identified ways to address some of the findings.
52. There was a clear public desire to understand what had gone wrong and a strong public interest in that being explained to the community at that time due to the obvious concerns which the press stories, the public criticism and the acceptance that there were issues would have raised.
53. The Commissioner accepts that there is a possibility that a chilling effect might occur in the future if information from a review of this sort were to be disclosed generally. However in this case he considers that the findings of the review would be likely to support individual officers to an extent.
54. Additionally the Commissioner considers that the greater public interest rests in the information being disclosed in this case due to the high levels of concern which the circumstances would have generated. The council was in a position where it, and some of its officers were receiving severe criticism from the press and from politicians. It had just carried out an assessment of the issues and had publicly accepted that there were issues which needed to be addressed. A disclosure of the report would highlight those issues and provide an idea of the solutions proposed or taken to respond to those issues.

55. The Commissioner therefore considers that the public interest in maintaining the exception does not outweigh the public interest in the information being disclosed in this case. Regulation 12(4)(e) was not therefore applicable.

Regulation 12(3)

56. In the event that the Commissioner's decision did not agree with application of Regulation 12(4)(e) the council sought to apply Regulation 12(3) to the information identifying individuals within the report.
57. Regulation 12(3) allows the exclusion of personal data from disclosure where that disclosure would breach one of the principles of The Data Protection Act 1998 (the DPA). The relevant data protection principle to be considered in this case is the first data protection principle.
58. Amongst other things the first data protection principle requires that personal data is processed fairly and lawfully. This requires that the individuals had some expectation that the information they provided would be disclosed in response to a request or that it was obvious that that would be the case. Alternatively other factors may make a disclosure of the information fair in spite of the expectations of the individual concerned.
59. The Commissioner has considered the information. He is satisfied that some individuals are specifically identified within the report and its annexes, and that some are identifiable through, for instance, circumstances or their job roles.
60. The Commissioner has considered the nature of the review. It was a review which was led by the circumstances surrounding the failure to reach a decision regarding the planning application by Satnam, and through the political and media concerns expressed about that.
61. Those interviewed by the Chief Executive are unlikely to have considered that their own personal contributions to the review would be disclosed. In this case that would not be the case in any event by the disclosure of this information, which is a summary of the Chief Executive's findings.
62. Employees of an authority, even senior employees, have a general expectation that details of their performance or their disciplinary records will not be disclosed to the outside world. Junior council employees are ultimately responsible to the council rather than to the public. It is the council itself which is accountable to the public. Where there are issues with particular officer's work they are accountable to the council, but in the majority of occasions they are not personally responsible to the

electorate unless their actions are inappropriate to such a degree that an public inquiry is required or criminal charges are brought.

63. Senior council officers are however accountable for the running of their departments must have an expectation that the efficiency of the departments will be reported in order for the council to be responsible and accountable to the public. In such cases there will inevitably be a degree of information disclosed about senior officers' effectiveness which can be inferred from that information. These individuals would inevitably have a clear expectation that that would be the case.
64. In cases such as this, where there are public concerns about the issues at the department and public claims from members of parliament that the department was not fit for purpose there are clearly stronger, more compelling arguments that information on the running of the department should be disclosed. In such cases it should be clear to senior staff that some personal information about their management of the department might be disclosed by virtue of details of how the department is functioning being made available to the public.
65. In this case the Commissioner considers that there must be some degree of expectation that information on the running of the department would need to be disclosed where there are accepted issues with the functioning of the department. As a result of this it would also be expected that some information on the individuals involved in running the department might inevitably be disclosed as a result.
66. Where politicians are publicly requiring that senior officers or managers should be removed from their positions it may also be fair to those individuals to provide information which demonstrates the real issues which have led to the concerns which have been raised.
67. The Tribunal have in the past considered whether there is a pressing social need for personal information to be disclosed which might override the expectations of the individuals concerned. Given the circumstances the Commissioner considers that there is a pressing social need for the council to be as open and transparent as possible about the issues surrounding the department, and this, together with the expectations of disclosure in this case form a case where it is fair to the individuals concerned for the information to be disclosed.
68. The Commissioner notes that a relatively junior case officer is personally identified in the review and comments made about his effectiveness in his role. The person is not named directly however the Commissioner recognises that in reality he might still be identifiable from other information within the public domain. The information itself is however not particularly detrimental to the individual and provides a strong

indicator of the issues which the department faced at that time. The Commissioner therefore finds that information which might allow the individual to be identified should be disclosed in this instance.

69. In conclusion the Commissioner considers that it would be fair to disclose the identities of senior managers held within the review in this case. These are for the most part identified in Annex 2 to the report. It should fall within their expectations that a review of issues within the department might be disclosed and that this would inevitably allow a degree of information about their management of the department and of planning matters to be inferred from that information.
70. Information relating to individuals who do not work for the council (such as employees of Satnam) should be redacted from disclosure as they would have no expectation that their information would be disclosed. There would also be no pressing social need for that information to be disclosed as they have no public accountability and their information has no bearing on the issues which the council identified.

Right of appeal

71. 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

72. 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.

73. 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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