

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

Decision notice

Date: 24 August 2016

Public Authority: City of York Council

Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested two reports in respect of concerns he had raised with the Council. Both concerns arose out of planning issues, however the Commissioner has determined that only one of the reports in question is in itself environmental information. The other report will be referred to as the 'internal audit report'. The Council provided a redacted copy of the internal audit report. Information was withheld from it under sections 40(2) – personal data, 41 – information provided in confidence and 30(2) – confidential sources. In respect of the second concern raised by the complainant the Council said that no report had been produced and that therefore it did not hold the requested information.
2. The Commissioner's decision in respect of the internal audit report is that only a limited amount of the redacted information can be withheld under either section 40, or section 41. Section 30(2) has been applied to some of the personal data also withheld under section 40. As the Commissioner concluded that this information can be withheld under section 40 it has not been necessary to consider the application of section 30(2) to the same information.
3. In respect of the request for the other report, the Commissioner accepts that no formal report was produced. However the Commissioner has identified other information held by the Council, which taking account of the circumstances in which the request was made, can be objectively described as a report. The Commissioner is satisfied that the information in that document is captured by the request.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information from the internal audit report identified by the Commissioner in the confidential annexe that accompanies this notice.
 - To issue a response under the EIR in respect of the report into the complainant's second concern. That report is identified by the Commissioner in the confidential annexe.
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 18 September 2015 the complainant met with officers from Veritau, a company which had been commissioned by the Council to investigate two separate concerns raised by the complainant. The purpose of that meeting was to discuss Veritau's findings. At the meeting the complainant was allowed to look at a copy of an internal audit report that had been produced in response to one of his concerns and document relating to his other concern. He was also allowed to make notes. The internal audit report concerned the level of affordable housing provided as part of a particular development. The complainant's other concern related to totally different property and the planning permission granted for work to that property.

7. On 20 September 2015 the complainant emailed one of the officers he had met with and made a request for information under the FOIA in the following terms:

"I would like to comment on what emerged from the meeting and conclusions reached.

You have concluded that incompetence and system failure rather than fraud were responsible for my complaint.

I have spoken to the Press and am advised that your report subject to the normal protocols should be available to me and hereby request this report.

I would also request a copy of the legal advice given to officers that led [named individual] being able to Blackmail CYC. Ludicrous was the judgement of my legal friends.

The [named property] decision was very surprising but this policy change will be very useful

Please supply a copy of the [named property] Report.”

8. All parties recognise that the first part of the request relates to the internal audit report in respect of the affordable housing concern. It is also understood by all parties that the other part of the request relates a report which the complainant believes was produced by Veritau in response to his second concern over the planning permission for work on a particular property.
9. The Council responded on 20 November 2015. The Council provided a redacted copy of the Internal Audit Report. The redacted information was withheld under section 40(2) – third party personal data, section 41 – information provided in confidence and section 30(2) – confidential sources.
10. The Council denied holding any legal advice matching the description in the request.
11. The Council said that it did not hold a copy of the [named property] Report.
12. On the same day, 20 November 2015, the complainant asked the Council to carry out an internal review of the redactions made to the Internal Audit Report and to seek out the [named property] Report. The Council provided the outcome of its internal review on 18 December 2015. The review focussed solely on the complainant’s right of access to the Internal Audit Report. The Council maintained that it had been correct to withhold the information under the exemptions cited. The Council did not deal with the complainant’s concerns regarding the [named property] Report.

Scope of the case

13. The complainant contacted the Commissioner on 7 January 2016 to complain about the way his request for information had been handled.
14. The Commissioner contacted the complainant to clarify the issues that he wished to pursue. From his response the Commissioner understands that the complainant wishes to challenge both the redactions made to

the internal audit report and the Council's claims that it does not hold the [named property] Report. He does not however wish to pursue his request for any legal advice on which the internal audit report is based.

15. The Commissioner will start by looking at whether the [named property] Report is held by the Council before looking at the exemptions applied to the internal audit report.

Reasons for decision

[Named property] Report – information held

16. Under both FOIA and the EIR a public authority has an obligation to provide applicants with the information that has been requested, subject of course to the application of exemptions and other procedural provisions. Under FOIA this obligation is provided by section 1 and under the EIR by regulation 5(1). Obviously information cannot be provided if it is not held.
17. In this case the Council has claimed that it does not hold any document titled [named property] Report. It has explained the complainant made an allegation that fraud had been committed when seeking planning approval for work to the named property. Veritau looked into the concerns but found there was no substance in the allegation of fraud and therefore no formal fraud or fact finding investigation was conducted. It follows that no formal report was ever produced.
18. The Council has also carried out a search of its fraud investigation management information and its electronic filing system 'Documentum' as well its manual files. It has interrogated these filing systems using search terms relating to the issue, the name of the property and the names of the individuals concerned. The Commissioner is satisfied that if the Council held a formal fraud investigation report about the named property these searches would have unearthed it. Therefore taking account of the searches that have been carried out, together with the explanation that the need to produce a formal report never arose following the preliminary investigation, the Commissioner is satisfied that the Council does not hold a formal fraud report on the named property.
19. The Council has however provided the Commissioner with a copy of a document which is an email between Veritau officers in which the findings of the preliminary investigation are set out. It is not titled 'The [named property] Report' and the complainant acknowledges that this is a name he coined. However it clearly relates to his concerns. The Council accepts that it was this document that the Veritau officers

referred at the meeting with the complainant, explaining that it was used as an aide memoire. The complainant has advised the Commissioner that the 'report' he was allowed to view at the meeting was brief, around three or four pages long. This fits with the document provided by the Council. The Commissioner is therefore satisfied that this is the document the complainant was allowed to view at the meeting and is the one he is seeking.

20. The Oxford English Dictionary's definition of a report includes "An account given or opinion expressed on some particular matter," although it goes on to refer to such accounts often being formal accounts, the definition does not exclude less formal ones. Therefore the Commissioner finds that although the document shown to the complainant during the meeting was not a formal report, this does not preclude it from being captured by the request.
21. Having viewed the document the Commissioner finds that it sets out in bullet points the nature of the allegations made, explains the enquiries that had been made and the facts that have been established as a result and then explains how the case was concluded. The Commissioner is satisfied that as such it could objectively be described as report.
22. Furthermore the Commissioner considers that it is appropriate to take account of the context in which the request was made when interpreting what information the complainant was seeking. When he made his request he specifically referred to the meeting he had had two days earlier at which he viewed the document in question. As the request was made via one of the Veritau officers who attended that meeting that officer would have been aware of what had transpired at that meeting. It is clear that the Council understood the request to relate to a 'report' on the concerns raised by the complainant about the named property and in light of the above the Commissioner considers that the request can be interpreted as relating to the document he viewed at the meeting as this can be objectively described as a 'report' which relates to the named property
23. An applicant cannot always be expected to understand the terminology used by a public authority and that in this case the Council would interpret the phrase 'report' as relating only to formal ones.
24. The Commissioner finds that what the Council has referred to as an aide memoir is the report referred to in the request. The Council is therefore required to provide a fresh response to this element of the request based on this interpretation of the request. The document is identified more accurately in the confidential annexe which accompanies this notice.

25. The question then arises as to under which access regime the fresh response should be provided. The Commissioner has viewed the withheld information. She is satisfied that the report deals with possible actions that may be required to resolve a diversion from the approved planning consent. As such she finds that it is information relation to a measure likely to affect the elements of the environment and so falls within the definition of environmental information provided by regulation 2(1)(c) of the EIR. The Council is therefore required to provide the fresh response in accordance with its obligations under the EIR. This could include for example disclosing the requested information under regulation 5(1), or withholding the information and issuing the complainant with a refusal notice under regulation 14 setting out which of the exceptions under regulations 12 or 13 that the Council is relying on to refuse the request.
26. The Commissioner notes that during her investigation the Council has explained that now it understands what information is being sought, it is happy to consider what information from the report can be disclosed. The Commissioner welcomes this approach.

Internal Audit Report

27. The Commissioner initially considered whether the complainant's right of access to the internal audit report should also have been considered under the EIR. The report considers concerns raised over the level of affordable housing provided as part of a particular development. The Commissioner has considered a number of cases involving affordable housing and in particular affordable housing viability statements. Generally the level of affordable housing required will impact on the physical character of a development. However having studied the report itself and carefully considered the Council's submission the Commissioner is satisfied that the report, taken as a whole, is not environmental information. This is because the report deals with which property or properties were provided as affordable housing within a residential development, the size and shape of which had already been determined. That is, the matters under consideration did not affect the number or size of houses to be built, but simply which ones were to be designated as affordable housing. The decisions being scrutinised related only to the tenure of the property or properties being built. The Commissioner is therefore satisfied that the report does not relate to a matter effecting the environment and therefore the request correctly falls to be considered under FOIA. This decision is based on the very particular circumstances of this case.
28. The Commissioner will now consider whether the Council is entitled to withhold the requested information under the FOIA exemptions it cited.

Section 40(1) – personal data of the applicant

29. Section 40(1) provides that information is exempt if it constitutes the personal data of the applicant. Personal data is defined as information which both identifies and relates to a living individual.
30. The rationale behind section 40(1) is to ensure the provisions of the Data Protection Act 1998 (DPA) remain the most appropriate means for individuals to access data about themselves. In particular section 7 of the DPA provides individuals with a right to request information about themselves.
31. As already discussed, it was the complainant who raised concerns over the matters addressed by the report. The report names the complainant and sets out his concerns and therefore inevitably contains his personal data. That personal data is therefore exempt and the Council is not obliged to provide it when responding to a freedom of information request. However the Commissioner considers that it is only necessary to redact the information from the report which would allow the complainant to be identified. The confidential annexe which accompanies this notice sets out the redactions which the Commissioner considers are appropriate and what information the Council is required to release.
32. Section 40(1) is an absolute exemption, i.e. it is not subject to any public interest test.

Section 40(2) – third party personal data

33. Section 40(2) provides that a public authority can withhold information if it is the personal data of someone other than the applicant and its disclosure would breach the DPA.
34. The Council explained to the Commissioner that it has redacted information that would allow the identification of third parties from the report in order to avoid breaching the first data protection principle. This states that the processing of personal shall be fair and lawful. The term 'processing' includes the disclosure of personal data. The first principle continues by stating that processing shall not take place unless at least one of the conditions in Schedule 2 can be satisfied. In the case of sensitive personal data at least one of the conditions in Schedule 3 also has to be satisfied. In broad terms, the requirement to satisfy a Schedule 3 condition provides greater protection and safeguards in respect of how sensitive personal data can be used and when it can be disclosed. So far as is relevant, sensitive personal data includes information about the alleged commission of an offence.
35. The Commissioner is satisfied that the full report contains a significant amount of personal data about third parties. This includes that of those

named by the complainant when he raised his concerns. It also includes other council officers who Veritau spoke to when investigating those concerns or who are identified as having some role in the handling of the planning application in question. Given the nature of the allegations considered by the report some of that personal data can be considered sensitive personal data.

36. The Information Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness or whether a Schedule 2 or 3 condition can be satisfied.
37. 'Fairness' is a difficult concept to define. It involves consideration of:
- The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

38. The Commissioner will start by looking at the disclosure of any personal data relating to the developer's representative. She notes that the Council has already disclosed a heavily redacted copy of the report. Nevertheless the version that has been disclosed does reveal that allegations of fraud have been made, that those allegations concern the level of affordable housing provided as part of a development and the drafting of a section 106 agreement (which in this case obliged a developer to provide a specified level of affordable housing). It should also be stressed that the report's general conclusion that there is no evidence of impropriety has also been released and the Commissioner notes that this is fully supported by the full version of the report.
39. It can be argued that despite the report's conclusions the reputation of the developer's representative may be tainted by those who would say there is "no smoke without fire". The Commissioner would also accept that the developer's representative would have no expectation that he would be associated with such allegations or be in any way the subject of an internal audit investigation when carrying out his legitimate business. Therefore there is some force in the argument that disclosing his personal data would be unfair. However the developer's interests have to be balanced against the legitimate interests of the public in having access to this information. It is clear from the parts of the report already disclosed that mistakes were made in the handling of this planning application. The public have an interest in understanding the

consequence of the mistake, how it arose and whether the Council has learnt any relevant lessons. Disclosing additional information would also serve to reassure the public, more fully than has been achieved by the redacted version already released, that the allegations were not substantiated.

40. However even if the Commissioner found that the disclosure was fair she would need to satisfy herself that one of the conditions in Schedule 3 of the DPA could be satisfied before the developer's personal data could be disclosed. As already mentioned, the conditions in Schedule 3¹ serve to provide a high standard of protection for sensitive personal data. Having looked at the conditions in Schedule 3 the Commissioner finds that none of them can be met. Therefore the Commissioner finds that information constituting the personal data of the developer's representative named in the report cannot be disclosed without breaching the first data protection principle.
41. Having regard for the value in disclosing a fuller version of the report, as discussed at paragraph 39, the Commissioner has considered whether it is possible to anonymise the report so that it does not reveal the identity of the individual in question. If it is possible to redact the report in such a way that the individual cannot be identified from its contents, or from its contents together with other information which is available to the public, including someone who is motivated to try and discover their identity, the information ceases to be personal data and can be disclosed without regard for the DPA. The Commissioner is satisfied that this is possible and the confidential annexe includes a copy of the report redacted in such a way that would not reveal the individual's identity.
42. When anonymising the report the Commissioner has had regard for what information is available from the Council's website which might assist in identification. She notes that the information already released easily allows the public to narrow which development the report relates to down to a limited number. The additional information which the Commissioner proposes should be released will not allow the particular development to be identified and so stops short of allowing the named individual to be identified.
43. The Commissioner acknowledges that the complainant would be able to identify the developer's representative as well as the other individuals referred to as it was the concerns he raised which led to the investigation. However for the very reason that he already knows the identity of the individuals and would therefore not need to rely on the

¹ <http://www.legislation.gov.uk/ukpga/1998/29/schedule/3>,
<http://www.legislation.gov.uk/2000/417?title=The%20Data%20Protection%20%28Processing%20of%20Sensitive%20Personal%20data%20Order%20>

disclosure of further information from the report to identify them, the Commissioner has disregarded his knowledge when considering the issue of anonymisation.

44. The Commissioner has gone onto consider the disclosure of personal data relating to the council officers who were involved in handling the planning application. The Council maintains that disclosing the identity of these individuals would breach the first principle as it would be unfair and not in their reasonable expectations.
45. In considering the Council's position the Commissioner has had regard for the fact that the information relates the professional lives of these individuals and that a number of them, i.e. those directly involved in the planning process would be use to the high level of transparency which normally surrounds the planning process. However the information in question is contained in the report of an internal audit investigation. The Commissioner accepts that those concerned are less likely to anticipate such information would be disclosed. The fact that the investigation concerned allegations of fraud would also shape their expectation that their names would not be disclosed. It is important to note here that not all the council officers referred to by name or position in the report can be considered to be subject to the complainant's allegations and therefore the Commissioner would not accept that all the information is necessarily sensitive personal data about all the officers identified. Nevertheless the Commissioner is satisfied that because of the circumstances in which the report was produced the council officers in question would not have expected their identities to be revealed.
46. Again the Commissioner has had regard for the value in disclosing information on how the mistake arose, its consequences and what lessons were learnt. She has therefore considered whether the report can be anonymised in such a way as to allow the disclosure of further information. Following the approach taken when considering the identity of the developer's representative, she has concluded that it is possible to do so and the confidential annexe includes a copy of the report redacted in such a way that would not reveal the identity of the officers involved.
47. One of the individuals identified in the report holds a very senior position within the Council. Therefore the Commissioner considers that it would be fair to disclose their personal data. Nor can she identify any reason why the disclosure of this individual's name would be unlawful. Before ordering the release of this information however it is necessary to consider whether any of the relevant conditions can be satisfied. The Commissioner does not consider the information to be sensitive personal data as the complainant's allegations do not relate to this individual. Therefore although the disclosure has to meet a Schedule 2 condition

there is no requirement for it to meet any of the conditions from Schedule 3.

48. The sixth condition from Schedule 2 allows personal data to be processed where it is necessary for the purposes of legitimate interests pursued by the data controller, or by a third party to whom the data are disclosed, except where the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. The data controller is the person holding and controlling the use of the data, in this case the Council. The data subject is the individual the information is about. When considering a disclosure under the FOIA, the third party to whom the information is to be disclosed is taken to be the general public. In essence therefore the test established by the sixth condition is one of weighing the legitimate interests in making the information public against the harm that such a disclosure would have on the individual in question. The test is very similar to that considered when assessing whether a disclosure would be fair as set out in the third bullet point to paragraph 37.
49. The Commissioner finds that there is a legitimate interest in disclosing the information as previously discussed in paragraph 39. That is in providing as full an account as possible of the mistake made and its consequences. When considering the rights and freedoms of the individual concerned the Commissioner has had regard for that fact that the actual role played in the events addressed by the report was a very limited one. Taking account of the seniority of the individual in question the Commissioner does not consider that identifying the individual's involvement would be unwarranted. The Commissioner is therefore satisfied that the identity of this individual can be disclosed without there being any breach of the first principle. This information does not engage the exemption provided by section 40(2) and the Council are required to disclose it.

Section 41 – information provided in confidence

50. Section 41 of the FOIA provides that information is exempt if it was provided by another person and its disclosure to the public would constitute a breach of confidence.
51. The Council has applied this exemption to two sets of information. Firstly it has been applied to the information provided by the complainant when raising his concerns. The second set of information is that which records the developer's discussions with the Council throughout the planning process. Having viewed the withheld information the Commissioner is satisfied that both sets constitute information provided to the Council.

52. When considering whether disclosing the information provided by a third party would constitute a breach of confidence, the Commissioner takes into account whether:
- the information has the necessary quality of confidence
 - the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
53. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible. The complainant has been briefed about the outcome of the internal audit investigation during the meeting he had with Veritau officers and the Commissioner understands he had sight of the report itself. During the meeting he was allowed to make notes. The Commissioner therefore finds that the information provided by the developer's representative no longer has the quality of confidence. However as this information has already been found to be exempt under section 40(2) on the basis that it is the personal data of the individual concerned, the Commissioner does not require the disclosure of any information in addition to that set out in the confidential annexe.
54. In respect of the information provided by the complainant himself, the fact that he has had access to this information would not mean that it had lost its quality of confidence and the Commissioner is therefore required to consider whether the tests in the second and third bullet points are satisfied.
55. As a general rule the Commissioner would accept that those raising concerns with a public authority may expect their role in alerting the organisation to a potential problem to remain confidential. Such confidentiality may be required to prevent the public being discouraged from bringing such matters to the attention of the Council. However in this particular case it is less clear that the complainant seeks the protection of confidentiality. In any event the Commissioner has already determined that the Council is entitled to make certain redactions under section 40(1) in order to remove information which would identify the complainant as the person whose allegations led to the investigation. Once that information has been removed the Commissioner is satisfied that disclosing the remainder of the report would not be detrimental to the complainant. The Commissioner is satisfied that apart from the information which she has already found to be exempt under section

40(1), no other information is exempt under section 41 on the grounds that the council owes the complainant a duty of confidence.

Section 30(2) – confidential sources.

56. In broad terms section 30(2) provides that information is exempt if it both relates to obtaining information for one of a number of different types of investigations and relates to obtaining information from confidential sources. The reason such information is exempt is to protect those who volunteer to provide information to public authorities, such as informants, who would be reluctant to do so if they feared they would be identified as the source of the information. The Council has applied the exemption to protect the identity of the complainant. However as the Commissioner has already concluded that this information can be withheld under section 40(1) it has not been necessary to consider the application of section 30(2) to the same information.

Other matters

57. Although not forming part of the formal decision notice the Commissioner wishes to comment on the information withheld under section 40(1). The Commissioner found that information constituting the personal data of the complainant is exempt under section 40(1). The Council should now consider the complainant's right of access to this information under section 7 of the DPA.

Right of appeal

58. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. 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

Rob Mehan
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