Tribunals Service
Information Tribunal

Case No. EA.2007/0020

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER REGULATION 18 OF THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

Determined on the papers on the 20th August 2007

Promulgation date: 10th September 2007

BEFORE THE INFORMATION TRIBUNAL

Peter Marquand, DEPUTY CHAIRMAN
Paul Taylor and Malcolm Clarke, LAY MEMBERS

B E T W E E N :

MRS IRIS DAINTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

LINCOLNSHIRE COUNTY COUNCIL

Additional Party

Written Representations:

For the Appellant: **In person**
For the Respondent: **Gerry Facenna, Counsel**

For the Additional Party: Anya Proops, Counsel

DECISION

The Tribunal allows the appeal in part for the reasons set out below. However, the Tribunal has decided that the majority of the information sought by Mrs Dainton is personal data, the disclosure of which would breach the Data Protection Act principles. Therefore, they are exempt from disclosure under the exception contained in Regulation 13 of the Environmental Information Regulations.

SUBSTITUTED DECISION NOTICE

The Tribunal allows in part the appeal and substitutes the following Decision Notice in place of the Decision Notice dated 15.02.07

IN THE MATTER OF THE ENVIRONMENTAL INFORMATION REGULATIONS

INFORMATION TRIBUNAL APPEAL No: EA.2007/0020

SUBSTITUTED DECISION NOTICE

Dated: 10th September 2007

Public Authority: The Lincolnshire County Council
County Offices
Newland
Lincoln
LN1 1YS

Name of Complainant: Mrs Iris Dainton

Substitute Decision:

For the reasons set out in the Tribunal's determination, the substituted decision is that Lincolnshire County Council did not deal with the Complainant's request in accordance with Regulation 5 of the Environmental Information Regulations 2004 in that Lincolnshire County Council failed to disclose to the Complainant the following information:

1. Section B of the "Public Rights of Way Evidence Form" and accompanying materials where those do not amount to personal data as set out in paragraph 19 of the Reasons for Decision.

Action required:

Lincolnshire County Council shall provide a copy of the said information to the Complainant within 28 days from today, unless the information has already been provided to the Complainant.

Dated 10th September 2007

Peter Marquand, Deputy Chairman,
Information Tribunal

REASONS FOR DECISION

Background

1. Mrs Dainton asked for copies of statements obtained from individuals by Lincolnshire County Council ("the Council") concerning an application to modify the definitive map maintained by the Council. Under the Wildlife and Countryside Act 1981, certain Local Authorities, such as the Council, are required to keep such a Definitive Map recording rights of way. Where a right of way is not shown on the Definitive Map or there is an error in the route or the type of right of way, the Wildlife and Countryside Act provides a mechanism to amend the Definitive Map. Of relevance to this case is the application for a Modification Order. Mrs Dainton's request concerned the statements that had been obtained by the Local Authority from various individuals concerning a potential right of way in South Somercotes over property that she occupies.

The Request for Information

2. By letter dated the 18th May 2005 Mrs Dainton requested from the Council the following information:

> "*I understand that some people have been approached by your department to make statements as to their supposed use of the route. I believe that I am entitled to know the content of these statements. I would therefore ask you please to make copies of these available to me.*"

3. By letter dated the 24th May 2005 the Council refused to provide the information sought, relying upon the Data Protection Act 1998 ("the DPA"). In addition, it was explained to Mrs Dainton that the procedure under the Wildlife and Countryside Act 1981 would allow her to have access to the information she was seeking if the Council made a Modification Order. This was repeated by the Council on the 31st May 2005, when Mrs Dainton had made a further request. Mrs Dainton exhausted the Local Authority's complaints procedure and referred the matter to the Information Commissioner. The Information Commissioner issued a Decision Notice dated the 15th February 2007. In the intervening period the Council had contacted the makers of the statements and obtained permission for disclosure to Mrs Dainton from thirteen of the nineteen individuals and those statements have been provided to her.

4. In relation to the remaining six statements, the Commissioner concluded that they were appropriately withheld. The reasons can be summarised as follows:

    1. The information sought was environmental information and therefore appropriately dealt with under the Environmental Information Regulations 2004 (EIR).
    2. The Council was in error in relying on section 40 of the Freedom of Information Act (the exemption in relation to data protection).
    3. Regulation 12(5)(f) of EIR was engaged as the individuals who supplied the information were:
        (i) Under no legal obligation to provide it;

(ii) Did not supply it in circumstances such that that or any other Public Authority was entitled (apart from under the Regulations) to disclose it; and

(iii) They had not consented to the disclosure of the information.

4. Regulation 12 requires the application of a public interest test and the Commissioner decided that the public interest in maintaining the exception outweighed the public interest in disclosure, in particular that there were no good reasons for circumventing the particular procedure laid down in the Wildlife and Countryside Act 1981.

The Appeal to the Tribunal

5. Mrs Dainton appealed to the Tribunal by notice dated 10th March 2007. The grounds for the appeal can be summarised as follows:

1. There is nothing in the Wildlife and Countryside Act 1981 that prohibits the Council from making the statements available. The Council's practice is contrary to procedures followed by other authorities.
2. It is a breach of natural justice not to make the statements available.
3. The statements were provided in the knowledge that they would be disclosed and therefore the Commissioner was incorrect to rely upon the exemption in Regulation 12(5)(f) of EIR.

6. The Tribunal joined the Council as an additional party and the Council initially supported the Information Commissioner's position that Regulation 12(5) (f) of EIR had been correctly applied. However, following a Case Management Conference the Council made an application to amend its Reply in order to rely upon Regulation 13 of EIR, namely the exception to the obligation to disclose information where such disclosure would result in disclosure of personal data, within the meaning of the DPA. The Council's submissions were that at the time of the proceedings involving the Information Commissioner it relied on a personal data exemption (albeit that it was then using the Freedom of Information Act exemption) and that the Tribunal ought to consider the issue of personal data disclosure when determining the

appeal. The Information Commissioner was happy to agree to the proposed amendments.

7. Mrs Dainton, by letter of the 12th June 2007 objected to the Council's application. Mrs Dainton pointed out that during the Directions hearing on the 4th June 2007 the Council twice said it would not be relying upon such an exemption. Mrs Dainton submitted that reliance on the DPA by the Council was "*a pretext for declining (her) application*".

8. The Tribunal decided the Council ought to be allowed to rely on the exception in Regulation 13 on the basis that if there was likely to be a disclosure of personal data it would be inconsistent with the Tribunal's own obligations to act in a manner that is compatible with individuals' human rights under the Human Rights Act 1998 to order such disclosure. The Tribunal should not allow a disclosure that would have an impact upon individuals' private lives, which would otherwise be protected by the provisions of the Data Protection Act 1998. Previous similar decisions have been made (see Bowbrick v. The Information Commissioner EA 2005/0006, dated 28th September 2006), where exceptional cases such as this were referred to at paragraph 51.

9. With the agreement of all the parties, the appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents. In addition, the Tribunal was provided with copies of the six statements, but these were not made available to Mrs Dainton. This was in order to preserve the confidentiality of the disputed information. Although the Tribunal may not refer to every document in this Decision, we have considered all materials before us.

The Issues

10. The Tribunal has concluded that the relevant issues in this appeal are as follows:

a. Whether EIR is the correct regime for determining Mrs Dainton's appeal?
b. Does Regulation 13 of EIR apply, namely are the witness statements personal data and therefore exempt from disclosure?

c. Does Regulation 12(5)(f) apply and therefore is the information exempt, in particular bearing in mind the required public interest test?

The Tribunal's Jurisdiction

11. The Tribunal's remit is governed by EIR Regulation 18, which applies the relevant enforcement and appeals provisions of the Freedom of Information Act (FOIA). The relevant section is 58 and this is set out below:

> "*58.— Determination of appeals.*
>
> *(1) If on an appeal under section 57 the Tribunal considers—*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based*."

12. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which it is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether EIR has been correctly applied. In cases involving the public interest test in Regulation 12(1)(b) a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts that will involve a finding that the Decision Notice was not in accordance with the law.

Issue (a) – Is EIR the Correct Regime?

13. The Commissioner and Council both submit that EIR is the correct regime. At the Directions hearing and in her letter dated 12th June 2007 Mrs Dainton was not clear of her position on this and therefore the Tribunal has considered the point. The Tribunal's view is that the subject matter of this appeal does come within the definition of Environmental Information in Regulation 2(1)(a).

This states:

> "*environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –*
> *(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements;*
> *(b) …"*

The information sought concerns the route of the path and information concerning its use. Accordingly the information concerns the landscape and therefore, comes within the definition.

Issue (b) – Is the Information exempt under Regulation 13 EIR on the basis that it is personal data?

14. Regulation 5(1) EIR requires a Public Authority to make environmental information available on request and Regulation 5(2) requires there to be a presumption in favour of disclosure. However, the obligation to disclose environmental information is subject to Regulation 12(3), which states:

> *"To the extent that the information requested includes personal data of which the applicant is not the data subject,*

the personal data shall not be disclosed otherwise than in accordance with Regulation 13."

Regulation 13 states:

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

(2) 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 these Regulations would contravene –

(i) any of the data protection principles; or

(ii) [not relevant]; and

(b) In any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded…"

It is not necessary to set out the remainder of the Regulations.

15. As can be seen from Regulation 13(2), if one of the Data Protection Act principles is breached, then the first condition will be met regardless of which definition of "data" in section 1(1) of the DPA, the information in question falls into. In this case the Tribunal has not been provided with evidence of the form (i.e. electronic or paper) in which the six statements were held by the Council when Mrs Dainton's request was made. The Tribunal has been provided with the scanned images and it is clear that the statements were originally paper documents. Nevertheless, as stated above, it does not matter in what form the

statements were held if one of the data protection principles would be breached by the disclosure.

16. The six statements (referred to as from now on as the "Evidence Forms") follow similar formats and are based on completion of a pro-forma. They have the following features:

1. They are headed "Lincolnshire County Council – Public Rights of Way Evidence Form". They also include the statement at the heading "Evidence given cannot be treated as confidential and may be made available for inspection or produced in Court". This is in capitals and marked with an asterisk.
2. Section A of the form requires details of the person completing the form, such as surname, forename, age, address and telephone number.
3. Section B requests a description of the route of the path/way in question. This comprises of questions 7-13.
4. Section C has questions which concern the use of the path/way by the person who is completing the form. There are questions asking for "Yes"/"No", tick box answers and questions for free text responses as well as the dates upon which the person has used the path/way. For example: "How frequently did you use the path/way?" and "Did anyone ever attempt to turn you back or say that you had no right to use the path/way?"
5. Section D is headed "Status" and requests the opinion of the person completing the form on the status of the path/way. For example "Do you believe this path/way to be public?"
6. Section E requests further information and asks for the signature of the person completing the form and for the form to be dated.
7. The form is accompanied by a map and a request to mark the course of the path/way on the map in section B.
8. Of the six statements some individuals have attached correspondence and other information which they think will be helpful.

Mrs Dainton has not seen the six Evidence Forms in question but has seen other similar completed Evidence Forms. The first point for the Tribunal to consider is whether the answers to the questions on the Evidence Forms are personal data within the meaning of the Data

Protection Act. Section 1(1) of the Data Protection Act defines "personal data" and states it:

> *"means data which relate to a living individual who can be identified –*
>
> *(a) from those data, or*
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession, the data controller,*
> *(c) and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

17. The Court of Appeal in the case of Durant v. FSA [2003] EWCA Civ. 1746 considered the meaning of "personal data" and Auld LJ, paragraph 28 of the Judgment stated:

> "…*It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity…"*

18. The Council's submissions are that the information recorded on the six statements is personal data. Mrs Dainton's submissions are that the information is not biographical and she submitted that the Evidence

Forms did not require an individual to reveal any "personal data", which FOIA was intended to protect, such as racial ethnic origin and other matters she set out in a list taken from the definition of "sensitive personal data", which is in section 2 of the Data Protection Act 1998.

19. The Tribunal's conclusion is that apart from section B on the Evidence Forms, the answers provided by individuals do amount to their personal data. The definition of personal data is wider than "sensitive personal data" as submitted by Mrs Dainton. As we have indicated above, the answers to the questions on the Evidence Forms are about the particular person who has completed it, their use of the path/way, what has happened to them whilst using the path/way and their opinion of the status of the path/way. If the questions on the Evidence Forms are answered strictly by the person completing it, we do not view the information in section B as being personal data. This section asks for a description of the path/way and for it to be put on a map. Similarly, we do not regard the map to be personal data. Some of the six individuals who have completed the forms have included correspondence and further appendices. We do not consider maps that have been appended to be personal data nor do we consider a copy of a conveyance dated the 20th August 1951 to be personal data. The Tribunal does otherwise consider the correspondence to be personal data as it records the writer's views on various matters and information about individuals.

20. Having concluded that the majority of the evidence forms are personal data, it is necessary for the Tribunal to consider whether the disclosure of the information would amount to a breach of any of the data protection principles.

21. The data protection principles are set out in Schedule 1 of the DPA. The relevant principle is:

> *"1. 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."*

22. The principles are further elaborated in Part II of Schedule 1:

> *"1. (1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*
>
> *(2) Subject to paragraph 2, for the purposes of the first principle data are to be treated as obtained fairly if they consist of information obtained from a person who –*
>
> *(a) is authorised by or under any enactment to supply it, or*
>
> *(b) is required to supply it by or under any enactment or by any convention or other instrument imposing an international obligation on the United Kingdom.*
>
> *(2)(1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless –*
>
> *(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and*
>
> *(b) [not relevant]*
>
> *(2) [not relevant]*
>
> *(3) The information referred to in sub-paragraph (1) is as follows, namely –*
>
> *(a) the identity of the data controller,*
>
> *(b) [not relevant]*
>
> *(c) the purpose or purposes for which the data are intended to be processed, and*
>
> *(d) any further information which is necessary, having regard to the specific circumstances in*

which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

[The remainder is not relevant]."

23. Mr Christopher Miller is the Principle Rights of Way and Access Officer for the Council. He provided a statement for the Tribunal. He explained that in relation to the relevant right of way, the Council received an application dated the 2nd March 2004 from South Somercotes Parish Council to modify the definitive map by adding a footpath, part of which ran within the boundaries of Mrs Dainton's property. An Assistant Definitive Map Officer took statements (the Evidence Forms), and six of these are the ones in dispute. As detailed above, each of the Evidence Forms includes the statement *"Evidence cannot be treated as confidential and may be made available for inspection or produced in Court".* Mr Miller does not detail what individuals were told would happen to the information that they were providing. However, one of the six disputed Evidence Forms contains the following in an attachment:

> *"… I am happy for this statement to be used as supporting evidence and read out at a public inquiry into the claimed public footpath named above. However, I do not wish to attend such an inquiry and would therefore be unable to answer questions on my statement."*

As indicated above, when asked by the Council for their agreement to the Evidence Forms being supplied to Mrs Dainton, five out of the six specifically refused permission. One individual did not respond.

24. These evidence forms were obtained by the Council as part of its investigation following the receipt of the application referred to above. Section 53, in conjunction with Schedule 14 and 15 of the Wildlife and Countryside Act 1981 obliges authorities such as the Council to investigate the matter stated in the application and after consulting with every local authority whose area includes the land to which the application relates, decide whether or not to make a Modification Order in relation to the application.

25. The evidence from Mr Miller is that it was by no means the case that a Modification Order will always be made following an application. There may be insufficient evidence to meet the relevant evidential standard. If the Council does make a Modification Order, it is not final until confirmed by the Secretary of State. In addition, once the Council has made a Modification Order, it must give notice of the Order to various people, including any landowners who are affected by the order. At this stage objections are taken and paragraph 3(8) of Schedule 15 states:

> *"Any person may require the authority to inform him what documents (if any) were taken into account in preparing the order and;*
>
> *(a) as respects any such document in the possession of the authority, to permit him to inspect and take copies".*

26. The Countryside Agency has produced a document entitled "A Guide to Definitive Maps and Changes to Public Rights of Way" dated November 1993, a copy of which had been provided to the Tribunal. Page 35 of that document makes it clear that when an authority such as the Council makes an order,

> *"… this is the initial stage, not the end of the process. The right to object comes when the order is made and advertised. The conclusion of the process comes when a decision is made to confirm the order (with or without modifications) or not to confirm it."*

Further on, on the same page it states:

> *"There is no legal requirement to consult the owner and occupier of any of the affected land or any organisations representing users of rights of way. In practice many authorities do find it helpful to carry out such consultations. They are encouraged to do so by the Department of the Environment, Food and Rural Affairs …"*

Mrs Dainton provided materials about the practice of other local authorities. For example, Buckinghamshire County Council, which includes in its guidance note on completion of Evidence Forms the following:

> *"The information given on this form may be copied to landowners or objectors and become available for public inspection."*

Gloucestershire County Council's website, when referring to what happens in the stage between the making of an application and before a Modification Order is made, states: "As part of this process, for example, a summary of the user evidence will be sent to affected landowners and they will be given the opportunity to make comments."

27. In his statement, Mr Miller states:

> *"It is right to say that the evidence forms filled out by individuals who wish to submit evidence in support of an application contain a statement at the top of the form that "evidence may be made available for inspection or produced in Court". It is also right to say that the form does not explicitly indicate when disclosure would be likely to take place. However, I consider that this statement should be read as being implicitly subject to the requirements of the statutory scheme. In other words, it should be construed as confirming that disclosure will occur only once the Modification Order has been made. It follows that, so far as the issue of consent is concerned, I do not believe that persons submitting evidence under cover of these forms would understand themselves to be authorising disclosure to members of the public in advance of the date of disclosure required under the statutory scheme."*

28. Mr Miller also states that he has contacted other Councils concerning their procedures, namely that copies of any user evidence forms are not provided until a request is made for them following the making of a Modification Order. He states:

> *"83% of those contacted answered that they followed the same or similar procedures. In respect of the four authorities who took a different approach, I do not feel it is my place to comment on the practises different authorities choose to adopt in handling applications, but I believe that Lincolnshire County Council adopts the majority held view of best practice and I feel that these figures confirm this."*

29. The Council's submissions were that it would not be fair to disclose the statements at the stage prior to making a Modification Order because that was not consistent with the statutory scheme. It also could not be said that the individuals had consented, given the statutory scheme and that it would be unlawful for the Council to disclose the statements because the statutory scheme did not give them the power to do so until the Council had made a Modification Order. Mrs Dainton's submissions were that the information was not confidential and that given the statement on the Evidence Forms about the information being made available for inspection or produced at Court, the individuals completing the forms would anticipate their production. Mrs Dainton's submissions were that the information would eventually be made public, whether those who provided it wanted it or not and that the practice of other local authorities supported her position.

30. The Tribunals conclusion on this point is that provision of the Evidence Forms (excluding section B) to Mrs Dainton would breach the first data protection principle, specifically because the requirement of fairness would not have been met. The Tribunal does not have any direct evidence of what individuals were told would happen to the information that they provided. However, there is good evidence of what they would have been told if they had asked the Council and what they might have expected: namely that their statements would only be disclosed following the making of a Modification Order. Similarly, if any of the individuals had reviewed the statutory regime that is what they would have expected to have happened. The Tribunal considers that there may be other similar circumstances when an individual is prepared to provide information on the basis that it is only to be disclosed in the event that it becomes necessary to use that material in order to commence some form of legal proceedings, but not otherwise.

Individuals providing evidence/information are likely to be prepared to provide fuller details in such circumstances, even if that might cause them difficulty later on with another resident in the area, if they have the reassurance provided by a formal legal process. For example, if the Council did not make a Modification Order people would no doubt prefer it if information that may be prejudicial to their relationship with their neighbours was not released: if the Order is not made why cause unnecessary trouble? It seems possible that this was the position taken by the individual whose extract from his statement is referred to in paragraph 22 above.

31. The refusal of consent by five of the individuals supports the conclusion that the disclosure is not what those individuals anticipated. The statement on the Evidence Forms about making them available for inspection or at Court must be read in the light of the statutory regime and the practice of the Council. The fact that other Councils follow different procedures does not make their practice automatically unfair: it depends on what they tell individuals at the time they obtain the information. It has to be remembered that for the purposes of EIR and Regulation 13, the fact that the right to the information exists under EIR has to be disregarded and therefore in the light of the statutory regime and the practice followed by this Council, we do not consider it would be fair to disclose the information before the statutory right under the Wildlife and Countryside Act 1981 arises. It will be misleading to those who provided statements and inconsistent with the purposes to which the Council intended to put the information.

32. We do not find it necessary to address the question of "lawfulness".

33. The Tribunal's conclusion is therefore that the information on the six Evidence Forms is covered by the exception in Regulation 13, EIR apart from the information in section B, where this does not include any personal data. For the avoidance of doubt, the Tribunal does not believe this to be the case except in relation to Evidence Forms which refer to further attachments in section B. Those attachments are personal data, except where set out in paragraph 19 above. The exception in Regulation 13 is a mandatory one "the Public Authority shall not disclose" [our emphasis] and it is not subject to a public interest test.

Issue (c) – Is the information exempt under Regulation 12(5)(f)?

34. Given our conclusion above, it is not necessary for us to consider this exception apart from in relation to the information in section B of the Evidence Forms. Specifically the requirements of Regulation 12(5)(f) are:

> *"(5) For the purposes of paragraph 1(a) a Public Authority may refuse to disclose information to the extent that its disclosure would adversely affect –*
> *…*
> *(f) the interest of the person who provided the information where that person –*
> *(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other Public Authority;*
> *(ii) did not supply it in circumstances such that, that or any other Public Authority is entitled apart from these Regulations to disclose it; and*
> *(iii) has not consented to its disclosure;"*

35. The position of the Information Commissioner and the Council was that there may be an adverse affect by disclosure of the Evidence Forms, for example, by exposing the makers of the statement to the risk of recriminations by Mrs Dainton. Their refusal to provide consent was evidence of their strong interest in ensuring statements are not disclosed. In part of her submissions Mrs Dainton, responding to the risk of pressure being put on people states:

> *""Pressure", "personal recriminations" and "damage to local community relationships" are all part of everyday life where any community is involved and where people have differences of opinion. There are legal routes that can be taken if the scale of events is out of hand and legislation is already in force to protect peoples' interests."*

However, Mrs Dainton's point is that the Council has produced no evidence to substantiate their submissions.

36. In relation to the information on section B of the evidence form, the Tribunal's conclusion is that Regulation 12(5)(f) cannot be said to apply to it. In addition, even if there were concerns that an individual's handwriting might be identified then the Council can provide a transcript of the information on the Evidence Form. This avoids the risk of the deduction of the identity of the individual who completed the form (and therefore a breach of Regulation 13). As to the information in section B, the Tribunal does not see how the route of the path/way could amount to something that would adversely affect those individuals' interest. In Burgess v. the Information Commissioner EA 2006/0091, dated 7th June 2007, the Tribunal, at paragraph 37, considered the meaning of "would adversely affect" referring to the case of Hogan v. Oxford County Council EA 2005/0026 and 0030, dated 17th October 2006. The principles were that:

    a. "Would" means "more likely than not"; and
    b. The adverse affect must be "real, actual or of substance".

In relation to section B, there is insufficient evidence to satisfy the first or second element of the test.

37. It is not necessary therefore to go on to consider the public interest factors or the application of Regulation 12(5)(f) to the remainder of the evidence form or accompanying material given our conclusions on the application of Regulation 13.

CONCLUSION

The Tribunal allows the appeal in relation to section B of the Evidence Forms, as set out in paragraph 19 above, but in relation to the remainder, dismisses the appeal, although on different grounds from the Information Commissioner. Those grounds are that Regulation 13 EIR is engaged in that the information requested is the personal data of third parties and therefore must not be disclosed to Mrs Dainton.

Peter Marquand
Deputy Chairman

Dated 10th September 2007