

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

Date: 24 September 2009

Public Authority: Winchester City Council
Address: City Offices
Colebrook Street
Winchester
Hants SO23 9LJ

Summary

The complainant requested details consisting of the names and addresses of the freeholders of land relating to an agricultural holding, which had been supplied to the public authority by the applicant of a prior notification planning application, in connection with enforcement action. The Council refused to provide the information citing Regulation 12(3) of the EIR. The Commissioner found that Regulation 13(2)(a) was engaged and that the public authority was right not to disclose the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 10 July 2007 the complainant requested the following information:

Full details supplied to your dept of all the land holdings, addresses and areas etc by the applicant claiming to make up a holding of more than 30 hectares

Details of the original enforcement notice issued during the 1990s.

Would you also please advise when I may see the enforcement files relating to this property at your offices.”

3. The public authority replied to the complainant on 13 August 2007 confirming that they would be dealing with the request under the EIR. They confirmed that they could not allow access to the enforcement file but provided some of the information requested. They also advised the complainant that some documents may be edited or withheld as they contained third party personal information and that disclosure in their current form would be a breach of their duties under the Data Protection Act 1998.
4. The complainant wrote again to the public authority on 13 and 15 August 2007 acknowledging receipt of some documents and seeking the release of others, namely a list of land declared as part of the holding in the Prior Notification application. The public authority responded to the complainant on 23 August 2007 upholding the decision not to disclose the remaining information, citing Regulation 12(3) of the EIR.

The Investigation

Scope of the case

5. On 26 October 2007 the complainant wrote to the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of Regulation 12(3) to the withheld information.

Chronology

6. The Commissioner wrote to the complainant on 13 February 2009 setting out his understanding of the case and the complainant responded on 17 February 2009 confirming his request for the list of the remaining area of the holding which had been supplied to the public authority.
7. The Commissioner wrote to the public authority on 26 February 2009 and they replied on 2 March 2009 confirming that the outstanding information was personal data and exempt from release under regulation 12(3) of the EIR.
8. The Commissioner wrote to the complainant again on 30 March 2009. He also provided relevant guidance and similar case studies, and confirmed his understanding of the complaint. The complainant responded on 30 March 2009 reiterating his belief that the information should be released.

9. Further correspondence with the complainant on 8 May 2009 and his response on 26 May 2009 have given more background to the complaint.

Findings of fact

10. The Prior Notification process is detailed in the Town and Country Planning (General Permitted Development) Order 1995. It is not a full planning application but affords various permitted development rights depending on the size of the holding. It requires those intending to construct an agricultural building to notify the local planning authority (LPA) in advance of their intention to construct the building. There is no requirement to provide details of where the whole of the agricultural holding is located, which may not be the site for the proposed development. The application form contains a question about the extent of the area of the holding because if the holding is less than 5 hectares, a full planning application would have to be submitted. Whilst a map is provided to show where the proposed planning development would take place, the holding may be made up of various parcels of land under the stewardship of the applicant but not necessarily on the same site.
11. The complainant claims that a particular prior notification form declared a site as 9.3 hectares and that he complained that it was in fact less than 5. As a result, the public authority requested details of the holding (which the applicant subsequently claimed was 30 hectares) and the land which makes up the holding, including the name and address(es) of the owner-occupier(s). This is the information that is sought by the complainant.
12. The public authority maintains that the information was however provided to it as a result of an enforcement investigation by the public authority following complaints concerning a (closed) Prior Notification application.
13. The complainant has made allegations of maladministration against the public authority in its approval process of Prior Notification forms. He believes the list of land contained in the holding should form part of the planning file, not the enforcement file.
14. The Commissioner asked the public authority why the information was held on an enforcement file and they responded that the details were provided in response to enquiries made by the Planning Enforcement team in May 2006. These arose as a result of complaints by the complainant and others. The public authority stated that the information was not held on the Prior Notification file as that determination was issued on 11 October 2004 and the matter was therefore concluded. They further stated that information arising from an enforcement investigation is never placed on a planning file. The complainant claims that by including the information in the enforcement file the public authority can cover up their alleged failures in the planning process.

Analysis

Procedural matters

Exception

Regulation 13(2)(a) – third party personal data

15. The public authority cited Regulation 12 (3) as the reason for refusing to disclose the information requested. This provides that information should only be released in accordance with Regulation 13. The Commissioner therefore considered this. Regulation 13(2)(a) provides an exception for information which is the personal data of a third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act (DPA). In order to rely upon the exception provided by regulation 13(1) the requested information must constitute personal data as defined by the DPA section 1(1) which defines personal data as:

... 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 of, the data controller, 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.

16. The public authority argued that the requested information constitutes the personal data of the owner/occupiers of the land.
17. The information withheld is the name and address of the owner/occupiers. The Commissioner is therefore satisfied that it constitutes the personal data of the owner/occupiers.

The first data protection principle

18. The public authority refused to disclose the information to the complainant as they considered it third party personal data and disclosure would breach the Data Protection Act. There are two parts to the first data protection principle:
1. Personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in the DPA Schedule 2 is met.

Is the processing fair and lawful?

19. The Commissioner agrees that the relevant data protection principle is the first principle which requires any processing to be fair and lawful. The Commissioner has considered the withheld information and the reasonable expectation that this information would not be disclosed.

20. The Commissioner's guidance on the application of the exception for third party personal data¹ suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that: 'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'
21. Clearly names and home addresses constitute data relating to home or family life, although with agricultural holdings this may include a work element. It is not clear whether the data subjects were notified of the query made to the prior notification applicant to verify the size of the holding. The reply set out details of the land under the control of the applicant (the holding) and included details (names and addresses) of the owner-occupiers of (parts of) the land. When asked by the public authority, the applicant objected to releasing the information citing privacy concerns for the third parties who are owner-occupiers of the land. They also expressed concern over potential criminal interest in the holding as releasing the information would make it available to the public at large and they were not aware who had asked for it.
22. The information listing the third party owner-occupiers of (parts of) the land is not required for the Prior Notification process. It was provided following enforcement action to confirm the size of the holding. There is no indication that the third party(ies) were aware of the enforcement action so would not know that it could be more widely disclosed. The Commissioner is satisfied that there are no compelling arguments favouring disclosure and therefore concludes that the overriding of the expectations of the third party(ies) cannot be justified in this case and that the processing would not be fair.
23. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
24. The Commissioner is therefore satisfied that the information requested was correctly withheld by the public authority under regulation 13(2)(a) of the EIR.

The Decision

25. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

¹ Personal information detailed specialist guidance

Steps Required

26. In light of the above, the Commissioner requires no steps to be taken.

Right of Appeal

27. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 24th day of September 2009

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) 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 - Personal data

Regulation 13(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.

Regulation 13(2) The first condition is –

(a) in a case where the information falls within any 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) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; 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(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

Data Protection Act 1998

Schedule 1: Data Protection Principles

First principle:

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.

Schedule 2: Conditions relevant for purposes of the first principle: processing of any personal data

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.