

Freedom of Information Act 2000 (Section 50) *Environmental Information Regulations 2004*

Decision Notice

Date: 27 October 2009

Public Authority: Wokingham Borough Council
Address: Shute End, Wokingham
Shute End
Wokingham
Berkshire
RG40 1WH

Summary

The complainant made various requests for information relating to urban verges and licence to plant authorisations from Wokingham Borough Council (the council). The council responded by refusing to disclose the information on the grounds that the requests were vexatious under section 14 of the Freedom of Information Act (the Act). During the course of the investigation the Commissioner invited the council to reconsider the requests under the Environmental Information Regulations 2004 (the EIR) and issue a revised response. However, notwithstanding its agreement to do this and a number of reminders it has failed to do so. The Commissioner requires that the council now provide the complainant with the information requested or issue a refusal notice in accordance with regulation 14.

The Commissioner's Role

1. 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 Requests

2. On 20 March 2007 the complainant sent an email to the council in which she requested various information including, under 'Part 2' of her request, the 'council's authority/consent to allow (two of her neighbours) to dig up the verge,

- erect a porch, a barrier fence and plant shrubs, and in respect of one of her neighbours the 'council's authority/consent to allow (the erection of) a large workshop containing oxyacetylene tanks and carry out vehicle repairs on the premises'.
3. The council did not specifically respond to this request.
 4. On 30 May 2007 the complainant made a further request by email in which she requested copies of the licence to plant authorisations for two of her neighbours' properties.
 5. The council responded on 5 June 2007 and attached a 'sample' copy of one of its standard licences to plant but refused to disclose copies of the actual completed application forms on the grounds that they contained 'sensitive personal data' which it said was covered by the Data Protection Act 1998 (the DPA).
 6. On 20 June 2007 the complainant responded in an email in which she invited the council to reconsider its position.
 7. On 17 July 2007 the council replied by email in which it confirmed that while it held the requested information it was not prepared to disclose it, as having reviewed previous communications it was of the belief that the request was vexatious under section 14 of the Act.
 8. On 20 July 2007 the complainant responded to the council disputing that her request was vexatious and invited the council to reconsider its position.
 9. On 19 June 2007 the complainant made a third request by email to the council in which she asked for a copy of the 'Highway Inspector's report' in connection with the licences to plant granted to her two neighbours as described in paragraph 4 above.
 10. On 6 August 2007 the complaint sent a further email to the council requesting a response to her earlier email to which she had not received a reply.

The Investigation

Scope of the case

11. On 20 June 2007 the complainant contacted the Commissioner by sending a copy of her email to the council of the same date to complain about the way her request for information had been handled. The complainant specifically drew the Commissioner's attention to the fact that she did not believe that the council were justified in refusing to provide the information sought in her first two requests on the grounds that it contained 'sensitive personal data'.

12. The council subsequently sent an email to the complainant dated 17 July 2007 in which it indicated that her previous requests were vexatious under section 14 of the Act.
13. The complainant has agreed to the scope of this case being limited to the three requests made on 20 March 2007, 30 May 2007 and 19 June 2007 as described above.
14. During the course of the Commissioner's investigation a number of matters were deemed to be covered by the DPA as they related to the complainant's personal data. These are not addressed in this Notice.

Chronology

15. On 22 October 2008 the Commissioner wrote to the council in relation to the complainant's various requests and in particular the one made on 30 May 2007 for copies of the Licence to Plant authorisations. He asked the council whether it still wished to apply section 14 of the Act and if so, to answer the following six questions:
 - i. An outline of what the council considered to be the complainant's issue and why it had arisen
 - ii. The approximate date when the issue was raised
 - iii. An explanation of how the council attempted to resolve the issue and the approximate date on which it considered it to be resolved from its perspective
 - iv. The approximate number communications which had been received on the issue after the council had resolved the matter
 - v. A copy of the correspondence in which the council informed the complainant that it consider the issue to be resolved
 - vi. A few pieces of correspondence from the complainant following the council's resolution of the matter
16. The council responded on 24 December 2008 confirming that it wished to apply section 14 of the Act as in its opinion the request was vexatious. By way of background it explained that the complainant had been in correspondence with the council for over a decade in relation to a grass verge or service strip running in front of two of her neighbours' properties. It said that the complainant used the grass verge as a right of way which impacted significantly on her neighbours' privacy. In an attempt to resolve the matter the council's former Chief Executive visited the site in question and made a decision to install a new footpath on the opposite side of the road. This was to allow the complainant to exit the area without having to use the grass verge and therefore avoid any impact on the privacy of her neighbours. The council went on to say that as the complainant failed to use the new path and continued to walk across the grass verge, the neighbours applied for and were granted a Licence to Plant. The council also said it had 'classed' the complainant as 'vexatious' under the Act and had informed her that it would not deal with any further requests or complaints from her in relation to the grass verge. In relation to the specific request dated 30 May 2007 for the Licence to Plant authorisations the council pointed out that these were personal

contracts with the neighbours and as such contained their personal data which they had specifically requested should not be disclosed.

17. The Commissioner spoke to the council over the telephone on 6 January 2009 to clarify the outstanding requests and then sent it a letter (by post and email) on 16 January 2009 summarising the outstanding issues and requesting it to reconsider its position within four weeks. In relation to the three outstanding information requests dated 20 March 2007, 30 May 2007 and 19 June 2007, to which the council had sought to apply section 14 of the Act, the Commissioner asked the council to provide him with copies of the requested information and at the same time to reconsider the requests under the Environmental Information Regulations 2004 (the EIR). The Commissioner pointed out that the information sought constituted a measure affecting the state of the elements of the environment and was therefore covered by the EIR.
18. The Commissioner sent an email to the council on 3 March 2009 with a copy of his earlier letter dated 16 January 2009 and requested a response as soon as possible as the earlier deadline has expired.
19. On the 7 April 2009 the Commissioner phoned the council for a progress report and was advised that it was dealing with the outstanding requests under the EIR and would respond in the near future.
20. On 27 April 2009 the Commissioner sent a further email to the council referring to his earlier conversation on 7 April and requesting a response to his letter dated 16 January 2009 on or before 5 May 2009.
21. On the 8 June 2009 the Commissioner sent another email to the council requesting a response and on 24 June 2009 (following a non-response to a request for a call back) advised the council in an email that if it did not respond to his letter dated 16 January 2009 on or before 8 July 2009 he would issue an Information Notice under section 51 of the Act.
22. On 1 July 2009 the council responded and said that it had tried (without success) to make contact with the complainant to discuss her complaints and arrange a file viewing. In view of this it said it would write to her straight away and if no response was received assume that she no longer required the requested information.
23. The Commissioner then sent emails to the council dated 9 and 28 July requesting copies of the recent correspondence with the complainant and confirming his understanding that the complainant did not intend to withdraw or abandon her various information requests. To date no response has been received and the complainant has confirmed that she wishes to proceed with her complaint.

Analysis

24. The council initially considered and responded to the complainant's requests under the Act. However, following the letter from the Commissioner dated 16 January 2009 the council agreed (as evidenced by its telephone conversation on 7 April 2009) that the matter was covered by the EIR and said it would issue a revised response which to date it has failed to do so.
25. The Commissioner is of the view that the information requested is covered by the EIR because documents such as consents/authorities to dig up verges, Licences to Plant and Highway Inspector's reports are effectively 'measures' as defined by Regulation 2(1)(c) that effect or are likely to effect the elements and factors referred to in Regulation 2(1)(a) namely 'soil' and 'land'.

Exemptions

26. Regulation 12(1) of the EIR states that a public authority may refuse to disclose requested environmental information if an exception to disclosure applies under regulations 12(4) or 12(5) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. Regulation 12(2) of the EIR requires that a public authority apply a presumption in favour of disclosure.
28. Regulation 12(3) of the EIR states that to the extent to which 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.

Procedural Requirements

29. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request. (For a full text see the Legal Annex attached to this Notice).
30. Regulation 14 of the EIR requires a public authority to inform a complainant in writing as soon as possible and no later than 20 working days from the date of the requests if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (and appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner. (The full texts of all relevant regulations are included in the legal annex attached to this notice).

31. In this case the Commissioner invited the council to reconsider the information requests under the EIR in a letter dated 16 January 2009. However, despite its agreement to do this during a telephone conversation on 7 April 2009 and notwithstanding repeated requests from the Commissioner it has failed to respond.

The Decision

32. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR.
33. The council has breached regulation 5(2) by failing to provide a response compliant with Regulation 5 or Regulation 14 of the EIR within twenty working days of the receipt of the request or at all.

Steps Required

34. The Commissioner requires the council to take the following steps to ensure compliance with the Act.
35. The council must confirm or deny to the complainant if the information requested is held and either disclose this information to her in accordance with Regulation 5 or provide her with a valid refusal notice in accordance with the requirements of Regulation 14 of the EIR.
36. The council must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

37. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

38. 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 27th day of October 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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) 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 legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 2(2) Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

Regulation 2(3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

Regulation 2(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and

(d) "personal data".

Regulation 2(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

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 the 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 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(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 –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests 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; or
- (g) the protection of the environment to which the information relates.

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other

information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

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.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.