

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

### **Decision Notice**

**Date: 28 July 2011**

**Public Authority:** South Ribble Borough Council  
**Address:** Civic Centre  
West Paddock  
Leyland  
PR25 1DH

### **Summary**

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The complainant submitted a request to South Ribble Borough Council ('the Council') for copies of correspondence that the Council had exchanged with another individual regarding a hedge. The Council disclosed some information but withheld the remainder under section 40 of the Act. During the course of the investigation the Council reconsidered the request under the EIR, and withheld the information under regulation 13. The Commissioner has investigated and found that the Council was correct to withhold the information. The Council has however breached regulation 14(3)(a) as it failed to issue a refusal notice citing regulation 13. The Commissioner does not require the Council to take any further action.

### **The Commissioner's Role**

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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.

### **Background**

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2. The complainant made a complaint to the Council about the height of her neighbour's hedge. The Council investigated and issued a remedial notice requiring the hedge to be trimmed in November 2010.

## The Request

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3. On 9 December 2010, the complainant submitted a request to the Council for the following information:

“...all documentation, communications with all parties (to date) and notes of meetings etc held in respect of the above High Hedges Complaints made by [the complainants] against [the hedge owner's name and address]. Please forward copies of the full file of papers relating including the initial complaint, the subsequent appeal and all documentation following the appeal to date including all communications etc. with all parties”.

4. On 11 January 2011, the Council responded to the complainant. The Council disclosed all of the correspondence and papers related to the hedges complaint up until 2 November 2010. This was the date that an inspector's decision letter was issued in respect of the hedges complaint. The Council withheld correspondence with [the owner of the hedge] after that date under the exemption at section 40 of the Act, on the grounds that it constituted personal data.
5. On 1 February 2011, the complainant requested an internal review. The Council responded on 11 March 2011. This upheld the previous response.

## The Investigation

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### Scope of the case

6. On 21 March 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
7. During the course of the investigation the Council accepted that the request should have been handled under the EIR. It reconsidered the request and withheld the information under regulation 13. The Commissioner has considered whether the Council was correct to withhold the information, and also whether it holds any additional information within the scope of the request.

### Chronology

8. On 31 March 2011 the Commissioner wrote to the Council to inform it that he had received a complaint about this request. The Council provided a submission in support of its position along with the withheld

information on 14 April 2011. The Commissioner and the Council exchanged further correspondence about the complaint during July 2011.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Regulation 2**

9. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
10. The Commissioner considers that the information requested falls within regulation 2(1)(c): "measures (including administrative measure), 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 these elements". The complainant has requested correspondence regarding a complaint about the height of a hedge. The Council has issued a remedial notice to [the owner of the hedge]. This constitutes a "measure" that will affect an "element" of the environment – i.e. the hedge – as set out in regulation 2(1)(a). Correspondence relating to this measure would fall into the category of "any information" about it. During the course of the investigation the Council agreed that the withheld information was environmental.

#### **Regulation 5**

11. Regulation 5(1) provides that a public authority will disclose environmental information upon request. In her request for an internal review, the complainant states that she believes additional notes of meetings with [the owner of the hedge] prior to 2 November 2010 have not been disclosed. The Commissioner has asked the Council to address this point. The Council explains that whilst meetings with [the owner of the hedge] were held, these were carried out 'on-site' in order to view the hedges. Consequently no minutes were taken. The Commissioner accepts that on the balance of probabilities, no further information relevant to this part of the request is held. This is because he accepts that it is unlikely that minutes would be taken at a meeting of this nature. The complainant has provided no further arguments on this point.

## Regulation 13

12. Regulation 13(1) of the EIR provides that information cannot be disclosed to the general public (all disclosures made under the EIR are considered to be to the general public rather than just the requester) if that disclosure would breach any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (“the DPA”).

### ***Is the information personal data?***

13. According to section 1(1) of the DPA, personal data can be defined as follows:

*“personal data’ means data which relate to a living individual who can be identified –*

- o *from those data*
- o *from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller or any other person in respect of the individual”*

*and includes any expression of opinion about the individual and any indication of intentions of the data controller or any other person in respect of the individual”.*

14. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
15. The withheld information in this case consists of correspondence that [the owner of the hedge] has exchanged with the Council. The request itself asks for correspondence created by or addressed to [the owner of the hedge], so its contents clearly relate to her. The Commissioner also considers that discussions about the remedial notice and its enforcement are information linked to [the owner of the hedge], and used to inform decisions affecting her.

### ***Would disclosure contravene any of the principles of the DPA?***

16. As the Commissioner is satisfied that the requested information constitutes the personal data of the individual in question, he has gone

on to consider whether disclosure would breach any of the data protection principles.

17. The Council has not specified which of the data protection principles disclosure would breach. The Commissioner considers the first data protection principle to be the most relevant in this case and he has therefore considered whether disclosure would breach that principle.
18. The first data protection principle has two main components. They are:
  - i. The requirement to process all personal data fairly and lawfully; and
  - ii. The requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.

*Would disclosure of the information be fair?*

19. The Commissioner has first considered whether it would be fair to disclose the requested information. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced these against the general principles of accountability, transparency and considered whether there was a legitimate public interest in disclosure.

*Reasonable expectations*

20. The Council has explained that it disclosed documents relating to the hedges complaint up until 2 November 2010. This is because the correspondence up until this point concerned the Council's decision over the hedge and the subsequent appeal. This information was therefore already in the public domain. However, the correspondence exchanged after this point is not publicly available. The correspondence contains discussion between [the owner of the hedge] and the Council about the details and practicalities of compliance with the decision regarding the hedge.
21. The Commissioner is satisfied that the owner of the hedge would have a reasonable expectation that the contents of her correspondence with the Council would not be disclosed to third parties, particularly given the fact that this took place after the public stages of the investigation into the hedge. The Commissioner has reviewed the correspondence and notes that the Council did not inform the complainant that it might be disclosed outside of the Council. The Commissioner considers that the principle that an individual's correspondence will be kept confidential is a widely-held and legitimate expectation. The

Commissioner further notes that [the owner of the hedge] has refused to give her consent to the disclosure of the information when asked by the Council.

*Consequences of disclosure*

22. The Commissioner considers that the disclosure of personal data where that disclosure was not within an individual's reasonable expectations could be distressing to them as it could represent an unwarranted invasion of their privacy.

*Legitimate public interest*

23. In this case, the Commissioner notes that the complainant originally initiated the complaint regarding the hedge which led to the Council's subsequent investigation and decision. The decision regarding the hedge required it to be cut to a height of the 3.2 metres. The decision also contained a recommendation that the hedge be cut back annually to below 2.6 metres as a "preventative action". However, the complainant has noted that this has not been done. She explains that she therefore wishes to ascertain the details and explanation for any arrangement it has reached with [the owner of the hedge].
24. The Commissioner considers that there is a public interest in establishing how the Council enforces its decisions regarding hedges. He also acknowledged that the complainant has a particular interest in establishing the details of the Council's arrangements with [the owner of the hedge] given that she initiated the initial complaint about the height of the hedge. However, the Council has summarised its arrangement with [the owner of the hedge] in its internal review:

"...the cherry laurel hedge has been reduced in height but not to the originally required height of 2.6 metres. It is however below the maximum height of 3.2 metres. The Notice recommends that the hedge is cut back annually to a height of 2.6 metres to allow room for regrowth....the homeowners have offered to cut the hedge twice a year, rather than once a year, firstly no later than 1<sup>st</sup> March and secondly between 1<sup>st</sup> September and 31<sup>st</sup> October and to maintain the hedge below 3.2 metres...In order to be pragmatic the Council has agreed this approach".

25. The Commissioner notes that the Council has explained the arrangement it has reached with [the owner of the hedge]. He considers that this lessens the legitimate public interest in the disclosure of the letters exchanged between [the owner of the hedge]

and the Council. This is especially the case given that [the owner of the hedge] would have had reasonable grounds to assume that this correspondence would be kept confidential. The Commissioner is not persuaded that the legitimate public interest is sufficiently strong to outweigh [the owner of the hedge]'s legitimate expectations of confidentiality. He therefore considers that on balance, disclosure of the withheld information would be unfair, and consequently would breach the first data protection principle. The Commissioner finds that the Council was correct to withhold this information under regulation 13(1).

### **Regulation 14**

26. Regulation 14(3)(a) provides that a public authority should specify any exceptions it relies upon under regulations 12(4), 12(5) or 13 in its refusal notice. In this case the Council initially failed to consider the request under the EIR, and so it did not cite regulation 13(1) to withhold the requested information in its refusal notice. Consequently the Commissioner finds a breach of regulation 14(3)(a).

### **The Decision**

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27. The Commissioner's decision is that South Ribble Borough Council was correct to withhold the requested information under regulation 13(1), although it breached regulation 14(3)(a) by failing to specify this regulation in its refusal notice.

### **Steps Required**

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28. The Commissioner does not require the Council to take any further action.

## Right of Appeal

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29. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 28<sup>th</sup> day of July 2011**

**Signed .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

### **Regulation 2 - Interpretation**

2.—(1) In these Regulations—

“the Act” means the Freedom of Information Act 2000(1);

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

“appropriate records 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(2) 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;

### **Regulation 5 - Duty to make available environmental information on request**

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 13 - Personal data**

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.

(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) section 10 of that 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

#### **Regulation 14 - Refusal to disclose information**

**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.

(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.

(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