

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 01 August 2013

Public Authority: South Cambridgeshire District Council
Address: South Cambridgeshire Hall
Cambourne Business Park
Camborne
Cambridge
CB23 6EA

Decision (including any steps ordered)

1. The complainant has requested a copy of pre-application advice, and any other communications connected to it, in respect of a specific plot. The Commissioner's decision is that the council has correctly applied the exception for personal data at regulation 13 of the EIR. The Commissioner has also decided that the council breached the procedural provisions at regulation 14(2) and 14(3). However, the Commissioner does not require any steps to be taken.

Request and response

2. On 30 November 2012 the complainant made the following request for information:

"...I would request that you forward a copy of the pre application advice given to [named individual] or other parties in respect of the plot at [specific address] upon receipt of this email.....All emails, notes of telephone conversations, meetings and other notes, letters and any other communication either with [named individual] or any other parties connected with pre application advice by SCDC or anybody outside SCDC or anybody outside SCDC of which you hold material with regard to the plot at [specific address] between 1 June 2012 and 30 November 2012."

3. The council responded on 3 December 2012 stating that it had not yet been able to do the pre-application response but that providing the individual agrees, a copy of the response letter would be forwarded to the complainant by the end of the week and that if the individual does not consent to this, the FOI request would be actioned accordingly.
4. On 16 December 2012, the complainant then extended the time that the request is to cover as follows:

“We would be obliged if you would forward to us pre application advice and other advice or communications in relation to the above plot given by SCDC between 1 June 2012 and today (16th December 2012).”
6. On 19 December 2012, the complainant then sent the following:

“As I have not received a further response on my email of 30/11/12 since 03/12/12 please treat the email of 30/11/12 as a request under FOI legislation. Also I have not received an acknowledgement of my email of 16/12/12 please treat this email as a request under FOI legislation. To bring both of the unactioned requests above up to date please extend the dates to which the requests relate up to today’s date i.e. 19/12/12 when dealing with these requests.”
7. The council responded on 18 January 2013 stating that the only pre-application correspondence regarding the plot since 1st June 2012 relates to that submitted by the individual and refused to provide the information citing the exemption at section 41 of the Act.
8. On 20 January 2013 the complainant requested an internal review. The council provided its response on 7 February 2013. It revised its position stating that the request should have been dealt with under the EIR and that the exception for personal data at regulation 13 applies.

Scope of the case

9. The complainant wrote to the Commissioner on 19 February 2012 to complain about the way her request for information had been handled. She specifically requested that the appropriate legislation and the time for compliance be reviewed, along with the application of the exception and exemption.
10. In its internal review, the council divided the information within the scope of the request into 2 parts as follows:

A - The request for application advice with supporting information

B – Copies of internal and external communications relating to A.

The planning applicant provided his consent for disclosure of information A and the Commissioner understands that this has been provided to the complainant. Therefore it is not considered in this decision notice.

11. As the Commissioner considers that EIR is the appropriate legislation, this decision notice considers the council's application of regulation 13. For the avoidance of doubt, section 41 of the FOIA is not considered.
12. The Commissioner also considers whether the council complied with the request within the statutory timeframe.

Reasons for decision

Is the information environmental?

13. Environmental information must be considered separately under the terms of the EIR. Regulation 2(1)(c) of the EIR provides that information on plans, activities, measures etc. affecting or likely to affect the elements of the environment will be environmental information. Included in the listed elements at Regulation 2(1)(a) are land and landscape. The requested information is pre-application advice on a proposed development. It is clear to the Commissioner that this is information on a measure likely to affect the land and landscape and should therefore be considered under the EIR.

Regulation 13(1) – Third party personal data

14. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

15. Personal data is defined by the DPA as any information relating to a living and identifiable individual. 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. The withheld information comprises of an internal email containing information about the planning applicant, correspondence between the planning applicant and a named planning officer, an exchange of emails between the planning officer and an officer of the Highways Authority containing information about the planning applicant and his proposals for development, notes relating to a private meeting between the planning officer and planning applicant

and the pre-application advice letter to the planning applicant. These documents specifically contain information relating to the planning applicant or information from which the planning applicant can be identified. As a result, the Commissioner is satisfied that these documents are the personal data of the planning applicant concerned as defined in the DPA.

Would disclosure breach the Data Protection Principles?

16. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subject, the potential consequences of disclosure and balanced the rights and freedoms of the data subject with the legitimate public interest in disclosing the information.

Nature of the information and reasonable expectations

Consent

17. Whether or not the disclosure of information was within the reasonable expectations of an individual is not merely about consent although seeking the views of the individual concerned will often be a reliable indicator of what was expected, which is a useful starting point. In its internal review response, the council stated that the individual did not consent to disclosure of the pre-application advice information. The council also sent the Commissioner a copy of correspondence from the individual in which consent is explicitly refused. It is therefore clear that in this case the individual has clearly expressed that he did not expect the information to be publicly available. The next step is to consider whether or not this was a reasonable expectation to have had in the circumstances.
18. The council explained that the withheld information concerns a preliminary enquiry made prior to submitting a formal planning application. It explained that pre-application enquiries are not made available to the public, unlike official planning applications which are available on the council's website, and therefore it is reasonable to assume that the applicant would not expect this information to be made public. It further explained that pre-application documentation is only put in the public domain if an official planning application is subsequently made.

19. The complainant pointed out that the council's guidance on pre-application advice on its website states the following:

"The provisions of The Freedom of Information Act bind the council, as a public authority, and therefore it should be assumed that information supplied to the Council is likely to be disclosable under the above Act, if you want information to remain confidential, you should state clearly why. Information sent to the Council "in confidence" may still be disclosable under the above Act. Before sending such information you are advised to take legal advice if there are fears that disclosure would prejudice you in some commercial way....

The Freedom of Information Act 2000 requires us to make all documents available to members of the public, if requested. Pre-application advice can only be treated as confidential if there are clearly demonstrable issues of commercial sensitivity or other significant reasons why this information may not be made public (Any enquiry in this category should be clearly marked as confidential). If a planning application is made as a result of the pre-application advice, all documentation may be publicly available, as they will form background papers to the application."

20. She asserted that as the council clearly publicise that information provided may be disclosable, it is not a reasonable expectation that the information would not be disclosed and so the individual could not suffer any unfairness.
21. The Commissioner has considered the guidance on the council's website. He notes that the first paragraph from the quotation in paragraph 19 above refers to information sent to the council which is not being considered in this decision notice as such information has been disclosed. He considers that the first paragraph should not shape the applicants expectations in relation to information generated by, or received from, the council. In relation to the second paragraph, he notes that the council states that pre-application advice can only be treated as confidential if there are 'clearly demonstrable issues of commercial sensitivity or *other significant reasons why this information may not be made public*' and that the applicant informed the council of the reasons he considered to be significant when refusing his consent for this information to be released (as detailed in paragraph 24). He has also taken into consideration the council's explanation that the web pages make reference to the general principles of the FOIA and the council's custom of only making pre-application advice publicly available if an official application is made to the council. In these circumstances, he considers that the applicant would have had a reasonable expectation that the pre-application advice documentation under consideration would not enter the public domain.

Consequences of disclosure

22. The complainant has stated that she cannot see what unfairness the complainant would suffer and that the council has not specified what this could be.
23. In its internal review response, the council stated that disclosure would be an unwarranted interference with the data subject's privacy.
24. In its response to the Commissioner's enquiries, the council stated that the individual objects to the disclosure on the basis that it was professional advice purchased by him, in relation to his hypothetical concepts and ideas for developing the plot should he buy it. The council also provided the Commissioner with correspondence from the individual demonstrating that, in the individual's view, disclosure of the requested information may prejudice any future applications that may be made.
25. Having viewed the withheld information, the Commissioner considers that disclosure would amount to a loss of privacy which has the potential to cause damage and distress.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

26. In considering 'legitimate interests in disclosure', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
27. The complainant has stated that she believes there is a legitimate interest in releasing the information and referred to three specific planning applications all of which received objections from residents and the local parish council and, in her view, demonstrate a high level of public interest in the proposed development. She also stated that as her property adjoins the plot she has a significant interest in the shaping of any proposed development.
28. The council referred to a previous decision notice¹, in which regulation 13 was found to apply to pre-application advice, which stated that there may be a legitimate public interest in obtaining access to this type of information because;

"Access would enable the public to gain a better understanding of how planning decisions are reached and when planning permission is

¹ http://www.ico.org.uk/~media/documents/decisionnotices/2009/FER_0221965.PDF

required. It would also promote the advantages of this pre-application service and transparency of the Council's activities."

However, that decision notice then states;

"It is the Commissioner's view that this public interest is already met by the fact that formal planning applications are made available to the public. Requests for planning permission and any decisions reached are in the public domain, enabling these official applications to be scrutinised and challenged. Disclosure of these documents, in this case, is not necessary to meet this public interest and would be an unwarranted interference into the rights and freedoms of the data subject concerned (the planning applicant). As stated previously, the planning applicant would not expect their personal data in this situation to be released into the public domain. The planning applicant would only expect their personal data to be disclosed to the public once an official application is made to the Council and for this disclosure to be limited to the personal data submitted in conjunction with this official application."

29. The council stated that it agreed with the individual that;

"...the time for public consultation and public release is when a planning application has been formally submitted, until that point the information is personal and no public interest can be served, since there is nothing to have an interest in...Objectors to any planning permission application have ample time and opportunity to make their feelings known in the process as well so it is fair to all parties."

30. The council also explained that pre-application planning advice is not taken before the council's planning committee and has no relevance to the application a specific committee is considering. It said that the recipient of pre-applicant advice may consider that it is from the council, as it will be on council headed paper and signed by the council's officer, but it is not and cannot be relied upon as the opinion of the council acting as the Local Planning Authority and that its web pages make this clear in a disclaimer statement which also appears on the pre-application request form.

31. Whilst the Commissioner believes that there is a legitimate public interest in planning matters, he considers that this is met by the publication of formal planning applications and does not consider it necessary to know what pre-application advice has been provided.

Conclusion on analysis of fairness

32. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individual concerned to release the requested information. Disclosure would not have been within the reasonable expectations of the individual and the loss of privacy could cause unwarranted distress. He acknowledges that there is a legitimate interest in planning matters but this interest is met by the disclosure of information as part of the planning process. Therefore he does not consider that any legitimate interests in disclosure outweigh the individual's reasonable expectations and right to privacy.
33. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question. The Commissioner has therefore decided that the council was entitled to withhold the information under the exception at regulation 13(1).

Regulation 14: Refusal to disclose information

34. The effect of Regulations 14(1) and 14(2) of the EIR is that if a public authority is going to refuse a request for environmental information the refusal must be made in writing and shall be made as soon as possible and no later than 20 working days after the date of receipt of request. As the request was made on 30 November 2012, and information existed at that time within the scope of the request, but the council did not respond until 18 January 2013, it breached Regulation 14(2).
35. As the council initially failed to identify that the requested information was environmental information it issued a refusal notice citing exemptions under the FOIA. Regulation 14(3) of the EIR states that if a request for environmental information is refused by a public authority it should issue a refusal notice which specifies the exception(s) being relied on. As the council dealt with the request under the incorrect regime, the refusal notice did not specify the exception(s) being relied on under the EIR, in breach of regulation 14(3) of the EIR.

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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