

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

Decision Notice

Date: 26 April 2010

Public Authority: The London Borough of Sutton
Address: Civic Offices
St Nicholas Way
Sutton
SM1 1EA

Summary

The complainant requested information concerning a planning application made by a person who had purchased the complainant's property. The London Borough of Sutton ("the Council") provided all of the information held apart from its correspondence with the complainant which was not required and some redacted information from emails of objection received. It stated that the redacted information from the emails was excepted under regulation 12(5)(f) of the Environmental Information Regulations 2004 ("the EIR") and that the public interest in maintaining the exception outweighed the public interest in disclosing the information. The complainant alleged that not all of the information held had been provided and complained that the Council had incorrectly withheld information. The Information Commissioner ("the Commissioner") decided that it was appropriate to consider the withheld information under regulation 13(1) because it was personal data. The Commissioner decided that the Council incorrectly withheld the names and residential addresses of the objectors but that regulation 13(1) was engaged in respect of the email addresses of the objectors. He found breaches of regulation 5(1), 5(2), 9(1), 14(2), 14(3)(b) and 14(5) of the EIR.

The Commissioner's Role

1. The 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 Commissioner. In effect, the enforcement provisions of

Part 4 of the Freedom of Information Act 2000 ("the FOIA") are imported into the EIR.

Background

2. The Commissioner understands that a buyer acting for a development company contracted to purchase the complainant's property. Unknown to the complainant however, the buyer had put in a planning application to the Council to demolish the existing property and build two detached houses in its place. It appears that the buyer then advised the complainant that he could not complete on the sale because funding had been withdrawn. The complainant is clearly dissatisfied with the way the Council handled the planning application and has alleged, amongst other things, that the Council deliberately delayed dealing with the application. The situation at the time of writing this Notice is that the planning application remains undetermined because the applicant has not submitted revised plans that have been requested by the Council. The request that forms the subject of this complaint relates to the planning application that was submitted by the buyer.

The Request

3. The complainant initially verbally requested access to the planning file relating to his property on 18 August 2008 (For clarity, a verbal request under the EIR is valid). Following this, he wrote to the Council on 19 August 2008 referring to the fact that the Council had refused to provide full access to "the file for [complainant's address]". He wrote:

"In the course of my visit to your office on Monday 18th I asked for access to the file for [complainant's address]. I was refused on the grounds that, prior to the decision on the planning application being taken, this file was exempt from the provisions of the Freedom of Information Act...please explain to me, in the context of the Freedom of Information Act, why, as the owner of [complainant's address], a resident of Sutton and a council tax payer, I am not entitled to have full information about your department's progress with application number [planning application reference]?"

4. The Council responded on 4 September 2008. It stated that its understanding was that the complainant had not made a formal application for access under the Freedom of Information Act 2000 ("the

FOIA"). The Council went on to state that this response therefore expressed its understanding of the Council's policy and was not to be taken as a legal response to a formal information request. It explained that the Council is not required to provide information that is already in the public domain and that this was the case in relation to part 1 of the register, which contains planning application forms, plans and supporting documents. The Council stated that it was not its "policy" to reveal sensitive information or other information that could identify individual objectors prior to the matter being placed in the public domain or the application being determined.

5. On 8 September 2008, the complainant wrote to the Council complaining that it had failed to comply with its obligations under the FOIA. He highlighted that the Council had not cited any exemption. He also questioned how the Council could justify withholding information before a planning application had been determined but disclosing it afterwards.
6. On 10 September 2008, the Council wrote acknowledging receipt of a request for information under the FOIA. It sent a full response on 29 September 2008 stating that it had now decided to handle the request under the EIR. It stated that it had disclosed emails concerning objections to the planning application with redactions for "any details which would identify the writer". It applied regulation 12(5)(f) to withhold this information.
7. Following advice from the Commissioner to the complainant that his complaint would not be eligible until he had asked the Council to conduct an internal review, the complainant wrote to the Council on 23 December 2008. He expressed dissatisfaction with the fact that the Council appeared to be operating a general policy concerning disclosure of planning information. The complainant stated he felt that this was not in accordance with the law. He also complained that the Council's staff had demonstrated a lack of understanding about what legislation applied to the request and had not been "helpful and proactive". He stated that although he had now been provided with the planning file, he was not satisfied that he had been given all of the information held pointing out that the file had not included copies of his own letters or any "attendance notes".
8. The Council responded on 9 January 2009. It stated that it had already considered the complaint about the request and the outcome was communicated in its letter dated 29 September 2008. It stated that its complaints procedure was now exhausted but in any event, it went on to address the points raised. It stated that it did not believe its policy contravened the EIR. It stated that it had assumed that the complainant would not have required copies of his own correspondence

however it could send this if required. It also stated that “attendance notice” is not a term used by the Council. On the subject of staff training, it stated that the distinction between the FOIA and the EIR is not widely understood and this had not affected the outcome of this case anyway. It disagreed that it had not been proactive and helpful.

The Investigation

Scope of the case

9. The complainant initially contacted the Commissioner on 28 October 2008 to complain about the way his request for information had been handled. However, the complaint was rejected at this stage because the complainant had not asked for an internal review. Following completion of the internal review, the complainant complained to the Commissioner again on 5 February 2009. During the Commissioner’s investigation, the complainant stated that the details of his complaint had been set out in his letters to the Commissioner dated 1 December 2008 and 5 February 2009. Having considered these, it is clear that the complainant was dissatisfied with the Council’s handling of the request for several reasons which are summarised below:
 - The Council has admitted that it is its “deliberate policy” not to make certain information on planning applications available. This is not an exemption under the EIR and may not be lawful.
 - The Council still has not supplied documents “missing” from the file. This statement does not refer to documents sent by or to the complainant but refers to “attendance notes”. The complainant described that by “attendance notes” he means any notes of telephone conversations or meetings.
 - The Council failed to be “proactive and helpful” when dealing with the request. In particular it failed to clarify what was meant by “attendance notes” and it only provided information after a complaint and even then, failed to provide all the information held.
 - The Council has admitted that it does not understand the distinction between EIR and FOIA but it had not suggested that it would be taking any action to address this situation.
10. In a further email on 9 March 2010, the complainant also stated that if it was the case that no further information was held including emails,

the complainant would wish to complain that the Council's policies on record keeping must therefore be deficient.

11. During the course of the Commissioner's investigation, the complainant asked the Commissioner to consider the use of the Council's "general policy" and whether it should be making all planning information available in the future. As described above, the complainant also raised concerns about staff training and record keeping at the Council. These issues have been considered separately in the "Other Matters" section of this Notice because they do not fall within the scope of the Commissioner's investigation in accordance with regulation 18 of the EIR.
12. The Commissioner has not considered any breaches in respect of any information that has now been provided to the complainant as he considers that the provision of the information has achieved informal resolution of the issue.
13. For clarity, the matters addressed in this Notice are therefore whether the Council was correct to withhold the redacted information from the three emails of objection it held, whether the Council held further information that it had failed to provide (other than the complainant's own correspondence), and whether it failed to comply with its obligation under regulation 9 of the EIR to provide advice and assistance, described by the complainant as being "helpful and proactive".

Chronology

14. On 28 May 2009, the Commissioner sent an email to the Council asking for information to help him to consider the complaint including copies of the withheld information. When no response was received, the Commissioner wrote again on 12 August 2009.
15. On 12 August 2009, the Council wrote to the Commissioner explaining that it had not received the Commissioner's correspondence. It asked for a copy to be forwarded to it which the Commissioner did on 14 August 2009.
16. On 18 August 2009, the Council responded to the Commissioner. It provided copies of three emails of objection (without redactions) and a copy of its letter to the complainant dated 29 September 2008. The Council explained more about why it had withheld the information.
17. On 14 October 2009, the Commissioner wrote to the complainant advising him that he was considering whether the information being

withheld would actually constitute the complainant's personal data. He explained that if that was the case, the information should be considered under the terms of the Data Protection Act 1998 ("the DPA").

18. On 27 October 2009, the Commissioner wrote to the Council. The Commissioner advised the Council that he was considering whether the withheld information comprised the complainant's personal data. He also asked for the Council's clarification regarding a comment made by the complainant in his letter to it on 23 December 2008 when he had referred to having been provided with a copy of the planning file. He asked the Council to state when a hardcopy was provided. He also asked the Council to provide redacted copies of the emails it had sent to the complainant for the avoidance of any doubt over what information had been redacted. Finally the Commissioner asked for the Council's reassurance that all other information relevant to the request had now been provided.
19. The Council replied on 9 November 2009. It stated that unfortunately it had not retained copies of the redacted emails sent to the complainant. It stated that it assumed it would have redacted the residents' names and addresses. It provided a copy of the planning file in question to the Commissioner and explained more about its "general policy" concerning disclosure of planning information. The Council also explained to the Commissioner that it had not provided copies of correspondence to or from the complainant.
20. On 13 November 2009, the Commissioner telephoned the Council asking it to confirm that the complainant had now been provided with all relevant information apart from correspondence to or from him and the redacted material from the emails of objection. The Council stated that it was difficult to be sure, because of the passage of time, precisely what information the complainant had seen. However it confirmed that it had provided all the information on the planning file to the Commissioner and it had no objection to disclosing this. The Commissioner asked the Council to provide a copy of this information to the complainant for the avoidance of any doubt. The Council confirmed that it was happy to do this. It did this on the same day, copying in the Commissioner.
21. On 23 December 2009, the Commissioner wrote to the complainant setting out his understanding of the complaint. The Commissioner explained that he had concluded that the information being withheld in this case was not the complainant's own personal data and that he was therefore going to investigate the case under the EIR.

22. On 23 December 2009, the Commissioner also wrote to the Council explaining that he had decided to investigate the complaint under the EIR. He asked the Council again to clarify when it provided a hard copy of the file to the complainant as this question had not been addressed. He also asked a number of questions to help him to consider whether regulation 13(1) had been correctly applied in this case.
23. On 13 January 2010, the Council responded to the Commissioner's questions. In relation to the Commissioner's specific request for the Council to confirm when it provided a hard copy of the file, the Council simply reiterated that the file had been inspected on 18 August 2008.
24. From 13 January 2010 until 9 March 2010, the Commissioner was in correspondence with the complainant attempting to clarify the precise details of his complaint. During this correspondence, it also came to light that the complainant claimed that he had only received two emails of objection with redactions rather than the three that were held. He provided copies of the two redacted emails he had received. In an email on 9 March 2010, the complainant also confirmed that he had been sent a hardcopy of the contents of the file. He stated that he could not recall the exact date but confirmed that it was after the Commissioner's letter to him dated 5 December 2008 suggesting an internal review.
25. On 15 March 2010, the Commissioner wrote to the Council. He asked for clarity regarding when the Council had provided a hard copy of the file to the complainant. He also advised the Council that the complainant had stated he had not received one of the emails held and he asked the Council to provide this with any information that could identify the objector redacted. The Commissioner also asked the Council a number of questions designed to establish whether any further information was held in accordance with further information provided by the complainant.
26. On 15 March 2010, the Council emailed the Commissioner and provided a copy of the missing third email with redactions. It incorrectly claimed that it had already provided a copy of the redacted emails to the Commissioner. In fact, when it had been asked for them, it had claimed in its letter dated 9 November 2009 that it had not retained these (it appears this statement was also incorrect).
27. On 17 March 2010, the Council replied to the Commissioner. Regarding the date when a hard copy of the file had been provided, the Council stated that it believed the complainant was mistaken about the date and it confirmed that a copy of the planning file had been provided to the complainant along with its letter dated 29 September 2008. The Council also stated that it believed it had sent a copy of the missing

third email to the complainant on 29 September 2008 but it agreed to send a further copy of this email with redactions. It confirmed that no further information was held.

Analysis

Substantive Procedural Matters

Was the information environmental?

28. Given the nature of the planning application as described in the Background section of this Notice, the Commissioner was satisfied that all the information on the planning file would fall within the scope of regulation 12(1)(c) of the EIR because it is information on a plan affecting the environment (in this case, the land).

Did any of the withheld information constitute the complainant's personal data?

29. Regulation 5(3) of the EIR provides that the duty to disclose environmental information under regulation 5(1) does not apply where the information is the personal data of the applicant. This is because such information should be considered under the DPA according to the right of Subject Access under section 7.
30. Personal data is defined by the DPA as any information relating to a living individual who can be identified. The Commissioner considered that some of the information on the planning application could be both the applicant's personal data and that of the complainant, the homeowner. However, the Commissioner felt that it was important to distinguish between the different types of information held rather than to treat all the information as "relating to" the complainant simply because the planning application concerned his property. The Commissioner's view is that although details about the nature of the objections could constitute the complainant's own personal data if it could be argued that the objections affected the progress of his house sale, the actual information withheld in this case was limited only to the email addresses, residential addresses and names. The Commissioner did not consider that this information in isolation would constitute the complainant's own personal data in the circumstances of this case.

Did the Council hold any more information that it has not provided to the complainant?

31. The complainant alleged that further information was held by the Council which he referred to as "attendance notes". He clarified that he meant records of telephone conversations and meetings. He also indicated that he believed further emails should have been held.
32. Firstly, the Commissioner would like to clarify that his investigation is limited only to the consideration of what recorded information the Council held at the time of the request (on 18 August 2008). The Council has stated that it now holds additional information relating to the planning application but that falls outside the scope of this investigation. Secondly, in cases where there is a dispute over whether more information was held at the time of a request, the Commissioner will determine whether this was the case on the balance of probabilities.
33. The complainant explained to the Commissioner that in particular he would have expected the Council to hold records of visits and meetings (with himself or the applicant). He also expected the Council to hold more emails and records of telephone conversations.
34. The Council has assured the Commissioner that other than the redacted material from the objections and correspondence with the complainant, it has provided all the information held relating to the planning application. The Council confirmed that it had consulted with a senior member of the Development Control Department and the Planning Area Manager at the Council. Following this, it had been confirmed that there were no other paper or electronic documents held other than those on the file. The Council explained that only "relevant information" is placed on file and it is therefore possible that it once held other informal notes. However its policy is to retain only documents that are relevant. The Council confirmed that if such documents had existed, they would have been deleted or destroyed and no record would have been made of this.
35. In view of the above, the Commissioner accepts that on the balance of probabilities, no further information was held at the time of the request.

Exception - Regulation 13(1)

36. The Council sought to withhold the information under regulation 12(5)(f) of the EIR, arguing in its letter to the complainant dated 29 September 2008 that the objectors would not have expected disclosure

and had not consented. However, the Commissioner has decided that it was more appropriate to consider withholding the information under regulation 13(1) of the EIR. This exception provides that third party personal data is excepted if its disclosure under the EIR 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?

37. The Commissioner has considered the three emails that have been withheld in this case and notes that from each one, the name, residential and email address of the objector has been redacted. The Commissioner was satisfied that this information relates to the objectors and that they could be identified from the disclosure of this information. He therefore accepts that the information is the personal data of the objectors.

Would disclosure contravene the first principle of the DPA?

38. The first Principle of the DPA is most relevant in this case and provides that personal data should only be disclosed in fair and lawful circumstances and in particular should not be disclosed unless at least one of the conditions in Schedule 2 is met (the most relevant here is condition 6). The Commissioner’s approach is to focus initially on the issue of fairness. He considers that by addressing this, he will have considered the issues raised by condition 6 as well except for the question of whether disclosure would be necessary. The Commissioner will consider the “necessity test” if he is satisfied that disclosure would be fair.

Was it fair for the Council to disclose the information?

39. In considering whether a disclosure is fair under the first Principle, the Commissioner considers that it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject, with principles of accountability and transparency.

Reasonable expectations

40. The Commissioner considers that it is necessary to review any relevant legislation and guidance that specifically deals with the disclosure of planning information which existed at the time of the request. Article 8 and Article 25 of the Town and Country Planning (General Development Procedure) Order 1995 (SI 419 1995) and Paragraph 6 of Schedule 1 of the Town and Country Planning (Electronic Communications) (England) Order 2003 (SI 956) appear to comprise the relevant

legislation. The Commissioner notes that there is no express provision in either about the publicising of the personal information of objectors but the legislation requires that the following should be included on the Register:

- the name and address of the applicant
 - the date of the application
 - the address or location of the land to which the application relates
 - the description of the use, operations or other matter included in the application
 - the decision, if any, of the local planning authority in respect of the application and the date of such decision and
 - the reference number, date and effect of any decision of the Secretary of State on an appeal in respect of the application
41. Alongside the legislation there is also PARSOL guidance (Planning and Regulatory Services Online) and in particular the “Planning and Building Control Information Online – Guidance Note for Practitioners” (August 2006). The ICO was consulted on and provided substantial input into this guidance. It reiterates that local authorities have a legal duty to make available certain details relating to planning applications (as a public register) and the above Regulations (SI 956 2003) then allow this information to be made available on the internet. The PARSOL guidance stipulates that, in the case of objectors, their telephone number, email address or signature should not be placed on the website. It is also considered good practice for both applicants and objectors to be made aware that the information that they provide may be published on the internet.
42. Given that there is no express legal requirement to publish personal data relating to objectors and that the PARSOL guidance is simply “guidance” it is inevitable that practice at local level regarding what information is proactively made available relating to planning applications will vary. It is therefore necessary to examine the particular circumstances of this case.
43. The Council explained to the Commissioner that it operated a general “policy” relating to the disclosure of planning information. It explained that this was not a written policy and it provided the following further details:

"In the case of decisions made by the Development Control Committee, prior to the agenda being published and put into the public domain it would have withheld details of objections letters and any officers' working notes expressing thoughts or opinions that would not necessarily be complete and could therefore be misleading. Formal responses to consultations or other factual information would be made available. In the case of delegated decisions, the same rules apply except that we do not reveal details of objection letters until the decision is made".

44. The Council stated that it operated the above policy in relation to objection letters because it did not believe it was correct to provide this information without the objectors' specific consent. When the Commissioner asked the Council to explain whether anything is said to the objectors that would give them an expectation of disclosure, the Council confirmed that the objectors were advised that their correspondence may become public as the following sentence was included in its letter of consultation:

"Please note that any correspondence received may be inspected and copies made by members of the public in accordance with the Local Government (Access to Information) Act 1985".

45. The Commissioner carefully considered the above circumstances. He accepts that the Council operates a "custom" whereby it does not disclose certain information relating to planning applications at certain points in the process. However, he also notes that it includes a clear statement on its letters of consultation that would have made it clear that it ought to be within the objectors' reasonable expectations that the objection letters could be made publicly available. The Commissioner understands that none of the objectors raised concerns regarding their emails being disclosed to the public.
46. In view of the above, the Commissioner considers that it would have been within the reasonable expectations of the objectors that the information could be disclosed to the public.

Consequences of disclosure

47. The Council has argued that it was right to withhold the redacted information because this protects the objectors from intimidation from the applicant.
48. The Commissioner can appreciate that in general this may be a valid concern. He notes in this regard that Parliament did not make any express legal provision for the details of objectors to be disclosed,

perhaps with similar concerns in mind. The Commissioner is not aware of any evidence that the applicant has exhibited any behaviour which might have made the possibility of intimidation more likely or that the objectors had raised any concerns of this nature. In short, there is nothing to suggest that the risk of intimidation was anything more than a remote possibility.

49. However, the Commissioner accepts that there was some possibility, however unlikely, that disclosure could have resulted in intimidation of the objectors. He also considers that the disclosure of the information could have led to attempts to contact the objectors, from persons other than the applicant. The Commissioner considers that such contact could be unwanted and may therefore represent an invasion of the objectors' privacy. Again however, he notes that none of the objectors raised such concerns and some weight must therefore be attached to this.

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

50. Even though the Commissioner accepts as described above that it is possible that the disclosure could result in intimidation or unwanted contact, it may still be fair to disclose the information if it can be argued that there is a more compelling public interest in disclosure.

Names and addresses of objectors

51. The Commissioner considers that there is always some value in the disclosure of information held by public authorities for the sake of promoting general accountability and transparency. This in turn helps to promote a sense of democracy and public participation. He also notes that in general, planning information attracts a strong presumption in favour of disclosure because planning activities often impact upon the environment.
52. The Commissioner is aware that, although practice on a local level varies, many public authorities do, as a matter of routine, publish objections to planning applications with names and addresses as a result of the high degree of transparency that generally surrounds planning information and the sense that this promotes fairness in the system. In support of this, the Commissioner notes that the Planning Inspectorate (the body responsible for considering appeals) has published information on its website stating that it does not accept anonymous objections and if any person asks for their name and address to be withheld, the objection will be made available to all

parties with these redactions (including the Inspector) and less weight may be given to their objection as a result.

53. The Commissioner also recognises that there is a particular legitimate interest in the public, including planning applicants, accessing certain information identifying the objector where this information would result in an understanding of the importance and weight to be attached to that objection. This promotes understanding and public participation in the planning process. There is also a legitimate interest in transparency regarding planning applications to help to reduce the likelihood of abuse of the planning system as a result of malicious objections where the identity of the objector may be fabricated. Withholding names may also result in incorrect assumptions being made about the identity of objectors which could result in misunderstandings. Disclosure would have the effect of promoting trust and fairness in the system.
54. The Commissioner considers that the above represent strong arguments in favour of disclosing the names and addresses of objectors and in the circumstances the arguments for withholding it are relatively weak. In view of this, the Commissioner has decided that the legitimate interest in disclosing the information outweighed the interests of the objectors. As a result, he finds that disclosure of the information would have been fair.

Email addresses of objectors

55. As noted above, the Commissioner accepts that there is always some value in disclosing information held by public authorities to promote accountability and transparency. However, in the case of email addresses, the Commissioner does not consider that there is any more compelling argument that would justify the disclosure of this information. He notes that the PARSOL guidance (mentioned in paragraph 41 of this Notice) advises withholding email addresses and that the Planning Inspectorate removes email addresses before publishing objections on the internet. The Commissioner therefore considers that regulation 13(1) was engaged in respect of the email addresses because disclosure would not have been fair.

Was disclosure of the names and addresses necessary?

56. The Commissioner does not consider that there were any other mechanisms in place that could achieve the same or similar effect as disclosing the information. As a result, he considers that the disclosure was necessary to satisfy the legitimate interests identified and that regulation 13(1) was not engaged.

Exception – 12(5)(f)

57. As already stated, the Council originally applied the exception under 12(5)(f) to withhold the information. The Commissioner has not gone on to consider this exception in any detail as part of this Notice because the arguments supporting it have already been considered under regulation 13(1). The Commissioner is satisfied that even if the exception under 12(5)(f) was engaged, upon application of the public interest test, the Commissioner would reach the same conclusion that the names and residential addresses should be disclosed.

Procedural Requirements

Duty to provide environmental information

58. As the Commissioner has decided that the names and addresses were incorrectly withheld, he finds that the Council breached regulation 5(2) of the EIR for failing to make environmental information available within 20 working days and 5(1) for failing to make it available by the date of its internal review.

Refusal notice

59. The complainant originally requested the information verbally on 18 August 2008. As described in the chronology section of this Notice, the Council did not acknowledge in writing that it had received a valid request for information until 10 September 2008 and it did not issue a refusal notice under the EIR until 29 September 2008. In view of this, the Council breached regulation 14(2) of the EIR requiring it to issue a refusal notice within 20 working days of a valid request. In its refusal, the Council referred to regulation 12(5)(f) but it failed to address the public interest associated with this exception and this was not rectified by the date of the Council's internal review (which the Commissioner takes to be its letter dated 9 January 2009). This represented a breach of regulation 14(3)(b).
60. The Commissioner also notes that the Council did not refer to the complainant's right to request an internal review or his right to complain to the Commissioner in its refusal dated 29 September 2008. It therefore breached regulation 14(5).

Duty to provide advice and assistance

61. The complainant has complained to the Commissioner that the Council was not "proactive and helpful" and that this is a duty under the EIR. He has explained that in particular it failed to clarify what was meant

- by "attendance notes" and it only provided information after a complaint and even then, failed to provide all the information held.
62. Regulation 9(1) of the EIR provides that a public authority should provide advice and assistance, "so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants". The provision of advice and assistance is covered in part III of the regulation 16 "Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004" ("the Code") under paragraphs 8 to 23.
63. Paragraph 16 of the Code provides:
- "Where the applicant does not describe the information sought in a way which would enable the public authority to identify or locate it, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested".*
64. When the complainant pointed out that he had expected the Council to hold "attendance notes", it wrote back incorrectly quoting the term used as "attendance notices". It stated simply that the term was not used by the Council. The Commissioner agrees with the complainant that this was an unhelpful response in the circumstances and one which was not in accordance with the Code as described above. A telephone call to the complainant would have cleared up this issue. The Council therefore breached regulation 9(1) in this respect.
65. The Commissioner notes that the complainant also referred specifically to the fact that the Council only provided information after his complaint and that even then it failed to provide all of the information held. The Commissioner has not considered these issues as representing breaches of regulation 9(1) as these issues relate to the authority's duty under regulation 5(1). As described in the Scope section of this Notice, the Commissioner has not considered whether a breach of regulation 5(1) occurred in respect of information that was subsequently disclosed because this issue was informally resolved.

The Decision

66. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- Although the Council did not cite the most appropriate exception under the EIR, which in the Commissioner's view was regulation 13(1), the Commissioner considers that in the circumstances the Council was correct to withhold the email addresses of the objectors.
- The Council did not breach the EIR for failing to identify that it held any more information other than that already provided, withheld, or not required by the complainant (i.e. correspondence with the complainant).

67. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The Council incorrectly withheld the names and addresses of the objectors and therefore breached regulation 5(1) and 5(2).
- The Council breached regulation 14(2) for failing to issue a refusal notice under the EIR within 20 working days of the request.
- The Council breached regulation 14(3)(b) for failing to set out its considerations in respect of the public interest test associated with regulation 12(5)(f) by the date of its internal review.
- The Council breached regulation 14(5) for failing to refer to the complainant's rights to request an internal review and to complain to the Commissioner in its refusal notice.
- The Council breached regulation 9(1) for failing to provide advice and assistance that would have been reasonable in the circumstances

Steps Required

68. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

- Disclose the names and residential addresses of the objectors contained within the three emails of objection

69. The public authority must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

70. 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.

Other matters

71. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Record keeping

72. The complainant has complained to the Commissioner that if the Council does not hold the information he expected it to hold, its record keeping must therefore be inadequate. However, the fact that the Council did not record information that the complainant expected it to record, or did not hold this information at the time of the request, does not in itself demonstrate that the Council's management of its records was inadequate.
73. Recommendations regarding good practice in relation to records management are provided by the Code of Practice issued under section 46 of the FOIA¹. Whilst there is no evidence of a failure to conform in this instance, the Commissioner wishes to emphasise the importance of good records management practice and directs the Council to observe the recommendations of the section 46 code.

Training on the EIR

74. The complainant has expressed concern to the Commissioner that the Council's staff may not be adequately trained and this is supported by the comment in the Council's letter dated 9 January 2009 that the distinction between the EIR and the FOIA is not widely understood.

75. Paragraph 1 of the EIR Code of Practice states:

"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do, they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued

¹ The section 46 code of practice is published online here:
<http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided”².

76. While the Commissioner can accept that in respect of some information, it can be difficult to determine whether or not the EIR or the FOIA applies, he does not consider that this was a case that should have presented any such difficulty. The Commissioner has published a number of Decision Notices on his website dealing with the application of the EIR to various types of information and it ought to be clear that information relating to plans affecting or likely to affect the environment falls under the scope of the EIR. The Commissioner has also published guidance on his website at www.ico.gov.uk. The Commissioner recommends that the Council gives consideration to these issues and takes any action that may be appropriate to help it to improve its future request handling.

Handling requests separately/internal reviews

77. The Commissioner has noted that when the Council initially responded to the complainant under the EIR, it merged details of its refusal notice with details of its response concerning the complainant’s background complaint regarding the planning application. This continued in the internal review. The Commissioner recommends that public authorities keep correspondence about requests separate from responses to other complaints for clarity.
78. The Commissioner also notes that the Council’s initial response under the EIR and its internal review were conducted by the same officer. The Commissioner would recommend that internal reviews are conducted by a different officer, preferably a more senior officer. The Commissioner considers that this would be best practice in line with the EIR Code which states that internal review procedures should be “fair and impartial”.

The Council’s general policy/disclosure in the future

79. While the Commissioner welcomes and encourages openness where appropriate, it is a decision for the public authority to make concerning whether it pro-actively discloses such information in the future. However, when the Council receives a specific request for information that it wishes to withhold, it will have to justify its reasons for doing so

² The EIR Code of Practice is published online here:
http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

in accordance with the relevant legislation. This should be considered on a case by case basis rather than in accordance with a general policy. Guidance material to help public authorities to respond to requests for information is available on the Commissioner's website.

Right of Appeal

80. 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.

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 26th day of April 2010

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 –

“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

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(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 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

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 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.