

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

Decision Notice

Date: 28 February 2011

Public Authority: Basildon District Council
Address: The Basildon Centre
St Martin's Square
Basildon
Essex
SS14 1DL

Summary

The complainant requested information from Basildon District Council ("the Council") relating to the removal of specific traveller sites. The Council initially withheld the information using section 43 of the Freedom of Information Act 2000 ("the FOIA"). At the internal review stage, it sought to withhold the information using the additional exemptions under section 31, 38 and 41. The Information Commissioner ("the Commissioner") investigated and decided that the request should have been handled under the Environmental Information Regulations 2004 ("the EIR"). As a result, the Council sought to withhold the information using the exceptions under regulations 12(4)(d), 12(5)(a), 12(5)(e) and 12(5)(f). The Commissioner decided that the Council had correctly withheld some information using regulation 12(5)(a). He considered the Council's use of the other exceptions in relation to all the information that was not excepted under regulation 12(5)(a), however, he found that none of the other exceptions were engaged. He found breaches of regulation 5(1), 5(2), 14(2) and 14(3) of the EIR. He requires the disclosure of all the withheld information other than that found to be excepted under regulation 12(5)(a) within 35 days.

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 FOIA are imported into the EIR.

Background

2. The Council explained to the Commissioner that the request concerns the eviction of travellers from unauthorised sites in Hovefields Drive and Dale Farm. It said that the background to the matter was long, complicated and controversial, beginning at different points in time as various parts of the district's Green Belt land were turned into traveller sites without planning permission. As unauthorised development took place, the Council served enforcement notices requiring the land to be returned to Green Belt. Other steps were also taken where possible to prevent further unauthorised development of Green Belt land.
3. The requirements of enforcement notices vary according to the specific case but will commonly include steps requiring putting an end to the use of the land as a traveller site, including the removal of portacabins, mobile homes, caravans, buildings and structures, paving and returning the land to Green Belt by re-seeding grass. A number of notices were subject to appeals which were dismissed. As Notices were not complied with, the Council took the decision to use its powers under section 178 of the Town and County Planning Act 1990 to secure compliance with the enforcement notices by taking direct action to clear the sites.
4. The Council explained that the decisions it took in relation to the enforcement came under close scrutiny from the outset and resulted in a lengthy judicial review challenge. The Court of Appeal ruled in 2009 that the Council's decision was lawful. Subsequently the House of Lords refused permission to appeal and this meant an end to planning challenges against the Council.
5. The Council stated that it appointed a contractor to enforce the details of the enforcement notices. At the time of the request in April 2010, the Council had not yet undertaken any enforcement action. It was not until June and September 2010 that the Council undertook enforcement action relating to unauthorised sites on Hovefields Drive. At the time of writing this Notice, further enforcement action is planned relating to a large site at Dale Farm.

The Request

6. On 5 April 2010, the complainant wrote to the Council requesting information in the following terms:

"I am writing to request from you under the Freedom of Information Act a copy of any contractual or pre-contractual papers that relates to the specifics of the undertaking to be conducted by Constant & Co with regards to Dale Farm, Crays Hill, and Hovefields, Wickford".

7. On 6 April 2010, the Council replied to the complainant. It stated that it held the information requested but added that it was subject to an exemption under section 43 of the FOIA because disclosure would prejudice the interests of the contractor. The Council did not undertake the public interest test associated with this exemption.

8. On 6 May 2010, the complainant wrote to the Council stating that she would like to clarify her request as follows:

"My request...DOES NOT refer to any financial or administrative aspects of the contract.

My request refers exclusively to the specific aspects of the undertaking, i.e., to the OBJECT of the contract, which indicates how, when and under which conditions the contractors will carry out bailiff services for undertaking Enforcement Action at Dale Farm and Hovefields".

9. On 14 May 2010, the Council replied stating that it had conducted an internal review. It stated that it believed it had been correct to withhold the information and it also felt that the exemptions under section 31, 38 and 41 applied in addition to section 43. It did not provide any rationale for relying on these exemptions and it did not deal with the associated public interest tests.

The Investigation

Scope of the case

10. On 8 July 2010, the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly withheld the information she requested. She also complained specifically about the Council's failure

to adequately explain why the exemptions apply or to deal with the public interest test where appropriate.

11. During the course of the Commissioner's investigation, some relevant information was disclosed as described in paragraph 21 of this notice. This notice does not address the complaint relating to this information as this particular issue was informally resolved by the disclosure. The notice only concerns the withheld information described in paragraph 20.

Chronology

12. Following a standard letter on 9 August 2010 asking for copies of the withheld information, the Commissioner telephoned the Council on 14 September 2010. The Commissioner noted that the Council had not provided a copy of the withheld information as requested. He also briefly discussed the background to the request. The Council explained that since the request, one eviction had already taken place but there was still another large site where eviction had yet to take place.
13. On the same date, the Commissioner also telephoned the complainant. The complainant confirmed that she still wished to pursue her complaint despite the fact that some evictions had already occurred. She also stated that she would remain interested in the information even once all the evictions had taken place.
14. On 15 September 2010, the Commissioner wrote to the Council. He explained that it was his view that the request should have been handled under the EIR rather than the FOIA. He asked the Council to reconsider the request under the EIR and reiterated his request to have copies of any information that the Council wishes to withhold.
15. On the same day, the Commissioner wrote to the complainant to set out his understanding of the request.
16. On the same day, the complainant replied confirming that the Commissioner had correctly understood her complaint.
17. On 14 October 2010, the Council replied to the Commissioner. It provided background information. In relation to the EIR, the Council stated that it accepted that the information was environmental but it added that a number of exceptions would apply. The Council stated that it had not gone into detail about this because it proposed that a better way forward was to provide a statement to the complainant setting out how the Council intends to undertake such operations in general.

18. On 21 October 2010, the Commissioner telephoned the complainant. He put the Council's proposal to the complainant. The complainant confirmed that she wished to be provided with all the information she had requested.
19. On 28 October 2010, the Commissioner wrote to the Council. He advised the Council that the solution it had proposed had not been accepted by the complainant. He pointed out that the Council's full response under the EIR, together with copies of the withheld information, was overdue. The Commissioner referred to his formal powers under section 51 of the FOIA (imported into the EIR) to issue an Information Notice.
20. On 12 November 2010, the Council provided its full response to the Commissioner along with copies of the withheld information which consisted of the following:
 - Extracts from the "method statement" supplied by the contractor relating to the unauthorised sites on Hovefields Drive
 - Extracts from the "method statement" supplied by the contractor relating to the Dale Farm site
 - The contractor's risk assessment for both sites
 - The contractor's health and safety policy
21. It stated that it wished to apply the exceptions under regulation 12(4)(d), 12(5)(a), 12(5)(e) and 12(5)(f). It explained that its position was that the public interest favoured withholding the information. The Council also stated that it was able to disclose relevant information from the invitation to tender and the contract. It stated that it would supply this information directly to the complainant.
22. On 13 December 2010, the Commissioner telephoned the Council and pointed out that he had noticed that the withheld information did not contain the date of the planned operations. He asked the Council to clarify whether this information was held at the time of the complainant's request.
23. The Council telephoned the Commissioner on 16 December 2010 and confirmed that the dates were not known at the time of the complainant's request and therefore it did not in fact hold this information.

Analysis

Substantive Procedural Matters

24. The Commissioner considers that the request should have been handled under the EIR. This is because the complainant requested information relating to plans that will affect or are likely to affect an element of the environment (in this case, the land). This brings the information within the scope of regulation 2(1)(c).

Exceptions

Regulation 12(5)(a) – health and safety

25. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
26. The Council argued that all of the risk assessment and some information from both of the method statements and the health and safety policy was excepted under this exception.
27. It has been established in various cases heard before the Information Tribunal that the word “would” in this exception means that the risk of an adverse effect must be “more probable than not”. The Council explained to the Commissioner that in its view, disclosure of the information in question would almost certainly endanger public safety. The crux of the Council’s argument was that disclosure would assist those planning to disrupt the planned eviction, thereby increasing the risk of injury and violence.
28. Beginning with the risk assessment which the Council seeks to withhold in its entirety, the Commissioner appreciates that the information concerns plans relating to a difficult and sensitive operation and focuses in particular on the possible risks in carrying out the operation and what steps would be taken to mitigate and manage those risks. Ultimately, in light of the nature of the information, the Commissioner was prepared to accept that the exception had been correctly applied to this information. The Commissioner accepts that disclosure of the information, revealing all the operational risks identified as well as what steps have been prepared to manage those risks would have increased the risk to public safety because disclosure would have revealed the planning for the operation and particularly any weaknesses in the planning. This would have assisted any persons

planning disruption and would have increased the danger to public safety during the eviction process.

29. In relation to the method statement extracts, the Council informed the Commissioner that it wished to redact various parts of both of the method statement extracts which reveal operational detail. In common with the risk assessment, the information concerns the possible problems that may be encountered and reveals the detailed plans to deal with those problems. The Council again argued that disclosure would have assisted those wishing to resist the operation because it would have presented an opportunity to plan around the Council's response to potential problems and identify any weaknesses in the planning of the operation. Ultimately, as the withheld information concerns operational detail, the Commissioner was prepared to accept that the exception had also been correctly applied to this information.
30. In relation to the health and safety policy, the Council itself conceded that it did not consider that disclosure of the policy would have a significant impact in terms of endangering public safety although it was particularly concerned about part of the document. Having considered the Council's argument, the Commissioner was ultimately not satisfied that the Council had appreciated that the likelihood of the adverse effect must be shown to be "more probable than not" and substantially more than a remote possibility. For this reason, the Commissioner has decided not to accept the Council's decision to withhold this part of the document using the exception.

Public interest arguments in favour of disclosing the requested information

31. There is always some public interest in the disclosure of information for its own sake. This is because disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
32. The Council also specifically acknowledged the concerns of those living on the sites regarding how the enforced eviction may be undertaken and what affect this will ultimately have on their lives. Indeed, there is a strong public interest in ensuring that the planned eviction is carried out properly and safely.

Public interest arguments in favour of maintaining the exception

33. The Council put the following arguments to the Commissioner in favour of maintaining the exception:

"The Council is particularly concerned that information could be revealed which could jeopardise the operation which has yet to be undertaken (and potentially future operations which could be undertaken by this authority or elsewhere in the country). These concerns are very real and genuine. Our aim is to undertake a humane, safe and lawful operation which minimises the impact to all concerned but we cannot ignore the fact that there will be people who will undoubtedly resort to violence against our Contractors and others perceived to be connected with it. This not only puts those individuals at risk but also others living on the site or surrounding areas. In terms of public interest if the Council gave advance notice of exactly how the operation was to be undertaken it would be easy for someone to plan how best to resist and thwart our plans to uphold the law. That cannot be in the interest of the public at large. Having detailed plans which put other partner agency staff at risk also puts further multi-agency working at risk and also cannot be in the public interest".

34. For clarity, the Commissioner would like to point out that he can only take into account public interest arguments that are inherent in the exception itself i.e. those that are about not causing a danger to public safety. He therefore can only take into account the Council's argument that disclosure of the information would thwart its attempts to uphold the law and jeopardise the current and future site clearance operations to the extent that this would have also endangered public safety.

Balance of the public interest arguments

35. The Commissioner carefully considered the relevant arguments above in favour and against disclosure of the information. Ultimately, the Commissioner decided that there was a stronger public interest in ensuring that public safety is not prejudiced during the course of the operation, particularly in view of the fact that at the time of the request, no enforcement action had taken place and detailed plans had not been finalised.
36. The Commissioner appreciates that there is a strong public interest in ensuring that the operation is carried out safely but he believes that this would be best achieved by not disclosing the level of operational detail that has been requested by the complainant in this particular case. The Commissioner appreciates that it is important for the Council to reassure the public that it has thoroughly planned an appropriate

eviction and he notes that the Council has now disclosed information from its contract and the invitation to tender showing the areas that it asked the contractor to address. In the Commissioner's view, disclosure of broader, outline details of the operation in this way represents a more proportionate approach in terms of bringing about transparency without prejudicing public safety by disclosing every operational detail.

37. For the above reasons, the Commissioner considered that the public interest in maintaining the exception outweighed the public interest in disclosure of the information in all the circumstances of the case.
38. For clarity, as the Commissioner considers that the risk assessment and parts of the method statement extracts were correctly withheld using regulation 12(5)(a), the remainder of this notice only concerns the application of other exceptions to the information that was not excepted under regulation 12(5)(a).

Regulation 12(5)(e) – Commercial confidentiality

39. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
40. For clarity, the Council said that this exception applied to all of the withheld documents in their entirety although as explained in paragraph 38 above, the Commissioner has excluded from his considerations below the information that he has found was correctly withheld using regulation 12(5)(a). For clarity, his considerations in respect of regulation 12(5)(e) relate to the parts of the method statement extracts which were not exempt under regulation 12(5)(a) and the whole of the health and safety policy.

Is the information commercial or industrial in nature?

41. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The Council

argued that the information was commercial in nature because it comprises of documents that were submitted as part of a competitive procurement process. The Commissioner can appreciate that the method statements concern the approach to be taken by the contractor and as such, this information could be of use to competitors. He is therefore prepared to accept that this information is commercial. However, because of its general nature, the Commissioner was not prepared to accept that a health and safety policy could be classified as “commercial information”.

Is the information subject to confidentiality provided by law?

- 42. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
- 43. The Council did not present any argument to the Commissioner relating to the confidentiality of the information. The Commissioner was therefore not prepared to accept that the information is confidential in nature.

Is the confidentiality required to protect a legitimate economic interest?

- 44. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
- 45. As has been set out in previous decisions by the Commissioner, and made clear by his publicly available guidance¹, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. The Council did not present evidence to the Commissioner demonstrating that it had consulted the contractor about the request and that the arguments given genuinely represented the contractor’s own concerns about disclosure. Therefore, the Commissioner was not prepared to accept that this element of the exception had been satisfied.

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/commercialdet_rimentof3rdparties.pdf

46. As the Commissioner considers that the exception has not been demonstrated to be engaged, he has not gone on to consider the public interest test associated with this exception.

Regulation 12(5)(f) – adverse effect to third party

47. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information. For the exception to be met, three other elements must also be satisfied as follows:
- The supplier of the information was not under, and could not have been put under, any legal obligation to supply the information to the public authority or any other public authority
 - The supplier of the information did not supply the information in circumstances allowing the public authority to disclose it apart from under these regulations
 - The supplier has not consented to the disclosure
48. The Commissioner noted that the Council relied on this exception in respect of all of the documents even though it was essentially making the same arguments that it had made in support of regulation 12(5)(e) in terms of adverse effect. In view of this, the Commissioner has not found it necessary to revisit the conclusions he has reached in respect of this exception. He finds that the exception has not been demonstrated to be engaged and he has not therefore gone on to consider the associated public interest test.

Regulation 12(4)(d) – Incomplete information

49. The exception under regulation 12(4)(d) specifies that information is excepted if it relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
50. When asked to specify what information this exception had been applied to, the Council referred to the operational details in the method statement extracts and risk assessment which the Commissioner has already decided were excepted under regulation 12(5)(a). It also referred to a reference in paragraph 96 of the method statement extract relating to Dale Farm. As this information had not been withheld under regulation 12(5)(a), the Commissioner considered whether it was excepted under regulation 12(4)(d).
51. The information concerns the estimated number of mobile homes on the site which the Council has argued clearly represents “incomplete data”. The Commissioner was not persuaded that an estimate could be

said to be “incomplete” information simply by virtue of being an estimate that may turn out to be incorrect in the future or which is subject to change. As far as the Commissioner can see, the information represented the estimation of the contractor based on the information available at that time and in view of this, the Commissioner would regard that estimation as being “complete” information. The Commissioner was therefore not prepared to accept that regulation 12(4)(d) had been correctly engaged in relation to this information and he has not therefore gone on to consider the associated public interest test.

Procedural Requirements

52. The Council failed to disclose information which was not excepted under the EIR within 20 working days or by the date of its internal review. This was a breach of regulation 5(1) and 5(2).
53. As the Council failed to deal with the request under the EIR, it therefore failed to cite exceptions within 20 working days or by the date of its internal review. This was a breach of regulation 14(2) and 14(3).

The Decision

54. 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:
 - It correctly withheld the risk assessment and information from both method statement extracts using the exception under regulation 12(5)(a).
55. 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 all the information that was not excepted under regulation 12(5)(a) using the exceptions under regulation 12(5)(e), 12(5)(f) and 12(4)(d).
 - As the Council failed to disclose information which was not excepted, it breached regulation 5(1) and 5(2).
 - The Council failed to handle the request under the EIR and it therefore breached regulation 14(2) and 14(3).

Steps Required

56. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
- Disclose to the complainant copies of all of the withheld information apart from that which the Commissioner has found to be excepted under regulation 12(5)(a) of the EIR
57. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

58. 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

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

Quality of responses

60. The Commissioner has noted the poor quality of the Council's initial response and internal review of the request. He notes in particular that when the Council sought to rely on section 43 of the FOIA initially, it made little attempt to provide rationale for its decision and failed to consider the public interest test associated with the exemption. He also noted that in the internal review, the Council sought to rely on three additional exemptions but gave no rationale for doing so and again, failed to consider relevant public interest arguments. The Commissioner would like to highlight that the Code of Practice issued under Regulation 16 of the EIR (the "EIR Code") contains recommendations regarding the manner in which internal reviews should be conducted. Paragraph 61 of the EIR Code advises that internal review procedures,

“....should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR, including decisions taken about where the public interest lies. It should be possible to reverse or otherwise amend decisions previously taken.”

61. The issues described above may suggest that the Council's responses were not afforded an appropriate level of consideration or that relevant staff at the Council have not been adequately trained or both. The Commissioner trusts that the Council will carefully consider these issues and ensure that it provides sufficiently detailed responses in accordance with its obligations under the FOIA or the EIR in the future.

Right of Appeal

62. 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 sent.

Dated the 28th day of February 2011

Signed

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

Legal Annex

Environmental Information Regulations 2004

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

- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data

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;
- (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 –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 3. has not consented to its disclosure

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).