

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

### **Decision Notice**

**Date 22 May 2008**

**Public Authority:** Hampshire County Council  
**Address:** The Castle  
Winchester  
Hampshire  
SO23 8UJ

### **Summary**

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The complainant asked the council for copies of reports written by the River Hamble Harbour Authority staff.

The council withheld the requested information under regulations 12(4)(b) (manifestly unreasonable), 12(4)(d) (material still in the course of completion), 12(4)(e) (internal communications) and 13(1) (personal data).

The Commissioner found that the council had incorrectly applied the exceptions at 12(4)(b), 12(4)(d), 12(4)(e) and 13(1) to the information. A proportion of the information is excepted under 13(1). The Commissioner also found that the council breached regulations 5(2) and 14(4).

After the Commissioner informed the council that he was minded to order disclosure, the authority released some of the withheld information. The Commissioner decided that the remainder should also be released after redaction of third party personal data.

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

1. The Environmental Information Regulations (the 'Regulations') 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 Regulations shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part IV of the Freedom of Information Act 2000 (the "Act") are imported into the Regulations.

## The Request

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2. On 22 November 2006 the complainant requested the following information:
  - (i) the log books of the River Hamble Harbour Authority patrol boats for the financial year 1 April 2005 to 31 March 2006
  - (ii) the raw data on which the accounts of the River Hamble Harbour Authority for 2005 – 6 are based.
3. The complainant made a separate request on the same date asking for:
  - (iii) the job descriptions of staff employed by the River Hamble Harbour Authority
  - (iv) any reports by staff of the Harbour Authority about their work (excluding published reports to the Harbour Management Board or the Harbour Authority) during the financial year 2005 – 6
  - (v) all reports and newsletters (including published committee reports in the name of the Environment Director) written by the Assistant Harbour Master for the environment in the financial year 2005 – 6.
4. The council dealt with parts (ii) and (iii) under the Act. Its response to those parts of the requests were the subject of a separate decision notice - case reference FS50150536 – issued on 2 January 2008. The council dealt with parts (i), (iv) and (v) of the requests under the Regulations. Its response to these parts of the requests are the subject of this decision notice.
5. On 15 December 2006 the council withheld parts (i) (iv) and (v) of the requested information.

Part (i) was withheld under regulations 13(i) (personal data) and 12(4)(b) (manifestly unreasonable).

Part (iv) was withheld under regulations 12(4)(b) (manifestly unreasonable), 12(4)(d) (material still in the cause of completion) and 12(4)(e) (internal communications).

Part (v) was withheld under regulation 12(4)(b) (manifestly unreasonable).
6. On 16 December 2006 the complainant asked the council to review its decision to withhold the information that he had requested. On 12 January 2007 the council upheld its decision to except the information under the Regulations.

## The Investigation

### Scope and chronology of the case

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7. The information comprises logs and reports concerning the usage and condition of the harbour environment. It is the Commissioner's view therefore, that it is information on measures affecting natural sites, namely coastal and marine areas under regulations 2(1)(a), (c) and (d). The annex to this notice provides the text definition of environmental information as at regulation 2.
8. The complainant wrote to the Commissioner on 16 January 2007 to complain about the council's withholding of the information.
9. On 24 August 2007 the Commissioner requested copies of the information from the council in order to ascertain whether the Regulations had been applied appropriately.
10. On 14 January 2008 the Commissioner advised the council that on the basis of the arguments and documentation that he had examined, he was minded to order release of the information. As an alternative to his issuing a formal decision notice, he asked the council to inform him within ten days if it would agree to informal resolution of the complaint.
11. Instead of responding to his proposal that the information might be informally released, the council decided to arrange a meeting to explore matters with the complainant. It informed the Commissioner that it expected the meeting with the complainant to be arranged within the next fortnight or so. The council said it would get back to the Commissioner after that meeting.
12. The Commissioner advised the council that he had not asked the authority to explore matters with the complainant. The Commissioner clarified that informal resolution meant informal and early release of the information to the complainant.
13. The council stated its intention to proceed with its exploration with the complainant.
14. The council met the complainant and said it would give him log reports covering four weeks as opposed to the year that he had requested. It stated that if after looking at these he still wanted the logs for the year, his request would be resisted by the authority. The council warned the complainant that if the authority was ultimately ordered by the Commissioner to release the information, it would recover a charge from the complainant for doing so.
15. The council proceeded to outline how that prospective charge would be accrued. It maintained that there were 1,233 A4 pages from which to redact personal data. (Its refusal notice had stated a figure of 500). The council alleged that the time taken for redacting personal data from the log reports would cost £475. To this it would add a photocopying charge of £51 pounds making a total charge of £526.

16. On 1 February 2008 the Commissioner emailed the council pointing out that the council had already been formally notified that it cannot charge for redacting information. He had recently served a formal decision notice – reference FS50150536 - concerning the same complaint against the authority. His notice had referred directly to the council's attempt to charge for redaction and clearly stated that the authority had been wrong to do so. The council failed to provide the Commissioner with any explanation as to why it had apparently failed to heed that formal advice.
17. The complainant later contacted the Commissioner to state that the sample logs he had been given by the council had been excessively redacted. They contained deletions beyond that required to redact personal data.

## Analysis

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18. In considering whether or not environmental information should be released a public authority should apply a presumption in favour of disclosure (regulation 12(2)). Regulation 12(2) therefore weights the public interest in favour of release. There are, however, exceptions to that presumption, and those of relevance to this complaint are set out in the legal annex. In addition, regulation 12(1)(b) provides that a public authority may refuse to disclose environmental information requested if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## The log reports of the River Hamble patrol boats for the financial year 2005 - 6

19. The council relied on two exceptions in order to withhold the patrol boat log reports.

### **Regulation 12(4)(b) (manifestly unreasonable)**

20. In its refusal notice the council stated the number of log reports to be approximately 500. The council's reason for applying the 12(4)(b) exception was stated to be that the time needed to review and extract environmental information from the log reports was estimated as being beyond the appropriate limit.
21. In the Commissioner's view, neither the request nor the handling of the request requires the *extraction* of environmental information. Consequently, the council's argument that the request is unreasonable because of the extraction is unfounded. It follows that its argument based on time required to carry out the extraction also fails.
22. The council also attempted to take the cost of reviewing information into account. The charging regime does not allow this. Neither does it include time taken to redact a document where the process of redaction is only to blank out exempt information leaving information which is to be disclosed. The task of extracting information from a document containing information which has not been requested is allowed but that was not the case in this instance.

23. In the Commissioner's opinion the request is reasonable in terms of search complexity and quantity of information required. His view is supported by DEFRA in its Guidance to the Environmental Information Regulations where the types of request that might be considered manifestly unreasonable are explained. To fit the criteria the amount of information sought must be considerable. It must involve for example extensive scans of historic files or significant searches of very large databases. The log reports examined by the Commissioner are each contained on a single side of A4 paper and comprise between two and seven paragraphs in total. In its refusal notice the council stated the number of log reports to be approximately 500. In the Commissioner's view the information requested in this instance is not considerable and it requires no searching.
24. In the Commissioner's view, the council failed to demonstrate that the request was manifestly unreasonable and he therefore considered that the exception at 12(4)(b) was not engaged.

### **Regulation 13(1) (personal data)**

25. The council also relied on the exception at 13(1) to withhold the log reports. The council's reason for its application was that the reports contained references to personal data, namely individuals, boats by name, photographs and dates and times.
26. The Commissioner is satisfied that names of individuals and names of private boats from which their owners may be identified constitute personal data as defined within the Data Protection Act 1998 (the DPA). This includes names of private boats in photographs.
27. Personal data relating to third parties is exempt from disclosure under the Regulations if either of the conditions referred to at 13(2)(a) and 13(2)(b) are satisfied. Regulation 13(2)(a) is divided into two parts (i) and (ii). The condition in Regulation 13(2)(a)(i) is satisfied where disclosure of the information requested would result in breaches of any of the data protection principles set out in Schedule 1 of the DPA.
28. The first data protection principle requires that personal data shall be processed fairly and lawfully. When considering compliance with the first data protection principle it is necessary to consider what the reasonable expectations of a person would be in relation to how their personal information would be used and to whom it may be disclosed. Having reviewed examples of the log reports, the Commissioner is satisfied that private individuals recorded within them would not expect their personal data to be disclosed to the public. Such disclosure would be unfair and would contravene the first data protection principle.
29. The Commissioner has therefore decided that references to private individuals and names of private boats (including names in photographs) should be redacted from the log reports before disclosure. The Commissioner does not expect many photographs will require name redaction - only one photograph in the sample he examined would require this.

30. He has decided that it is not unfair to disclose the names of Harbour Authority officers who are public facing or who have senior roles. Neither is it unfair to disclose the names of craft belonging to the public authority or to commercial concerns. The names of such Harbour Authority officers and the names of craft owned by the public authority and by commercial concerns should therefore not be redacted from the log reports.
31. The council was incorrect to claim that the exception at 13(1) applied to dates and times. Dates and times by themselves are not personal data. The Commissioner has therefore decided that dates and times in the reports should not be redacted from the log reports.
32. It is not necessary to consider the public interest test in these circumstances.

### **The reports by staff about their work during the financial year 2005 - 6**

33. The council employed three exceptions in order to withhold the reports written by staff about their work.
34. Upon receiving and then refusing the request, the council did not delineate or clarify with the complainant the sort of reports he was seeking. At the close of the Commissioner's investigation, the council considered that the reports concerned were the Harbour Authority Service Delivery Plan 2005 – 6, the Service Delivery Progress Report dated 29 September 2005 and notes of the Marine Director's Annual Report.

#### **Regulation 12(4)(b) (request is manifestly unreasonable)**

35. The council relied on regulation 12(4)(b) in order to withhold the reports.
36. Whilst the council's refusal notice declared that the request for the reports was manifestly unreasonable, it failed to provide any explanation as to how or why this was so and it provided no argument to support the case for exception under 12(4)(b).
37. In the absence of any explanation or argument to support the council's case that the request was unreasonable, the Commissioner considered that the exception under 12(4)(b) was not engaged.

#### **Regulation 12(4)(d) (material still in the course of completion)**

38. The council also relied on regulation 12(4)(d) to withhold the reports. It did not indicate which of the reports were withheld due to their being incomplete.
39. If a public authority relies on 12(4)(d) to withhold information it is required by regulation 14(4) to specify the estimated time in which the information will be finished or completed. The council did not specify the estimated time in which the withheld information would be completed. In failing to do so the council breached regulation 14(4).

40. In its refusal notice, the reason provided by the council for its application of the exception at 12(4)(d) was the same reason submitted for its application of 12(4)(e) (internal communications). In effect the council restated the exception at 12(4)(e) but renamed it as 12(4)(d).
41. The public interest argument submitted by the council to support withholding the information under 12(4)(d) was similarly confused with the argument it submitted in support of 12(4)(e). The argument submitted for both exceptions was the need to debate internal issues without the inhibitory constraints of doing so in the public domain. This is an internal communications argument for withholding under 12(4)(e). It has no relevance to 12(4)(d). In support of the exception at 12(4)(d), the council also added that publication may inhibit the free and frank exchange of views. Again, this is an internal communications argument applicable to 12(4)(e) but not 12(4)(d).
42. The Commissioner considered it unlikely that all the reports written by staff in the year 2005 – 6 would have been incomplete at the time of the request and asked the council to clarify this.
43. Also, in order to achieve an informal resolution to the complaint he asked the council in his letter of 14 January 2008 to clarify whether the exception still applied as if the reports were complete disclosure might be facilitated.

#### **Regulation 12(4)(e) (internal communications)**

44. The council's reason for applying 12(4)(e) was that the scope of the request included draft reports or reports that constituted internal communications. The council did not identify which reports or what parts of the reports might be caught by the exception.
45. Whilst the exception at 12(4)(e) does not depend explicitly upon an adverse effect to a particular interest, the public interest test requires consideration of whether release would harm the public interests protected by the exception.
46. In its refusal notice, the council stated that the factors relevant to the public interest in disclosing the information were openness and transparency, accountability and a presumption in favour of disclosure. It declared that the public interest factors relevant to maintaining the exception were that some information was confidential and that some was at a draft stage requiring further consideration before presentation to the Harbour Board. However, the council did not explain how confidentiality, normally engaged by exception 12(5), was considered in this instance to be relevant to the exception at 12(4)(e). Neither did it provide any explanation as to how the public interest might be harmed by disclosure of the reports. The council cited the general necessity for an authority to debate internal issues without the inhibition of doing so in the public domain but failed to provide any specific argument in relation to the information in question.
47. The Commissioner therefore asked the council in his letter of 14 January 2008 to provide a fuller explanation as to the reasons why the particular internal communication needed to be protected. He also asked the council to provide him



with a marked copy of the information indicating the specific sections it believed were subject to the exception at 12(4)(e).

48. In his letter the Commissioner informed the council that on the basis of the arguments and documentation it had supplied to date he was minded to order disclosure of the requested information subject to the redaction of personal data.
49. The council did not supply the Commissioner with the clarifications or arguments he had requested to support its engagements of 12(4)(b), 12(4)(d) and 12(4)(e). It decided instead to disclose the reports to the complainant.

### **The Assistant Harbour Master's reports for the financial year 2005 - 6**

#### **Regulation 12(4)(b) – request is manifestly unreasonable**

50. The council relied on regulation 12(4)(b) to withhold the reports written by the Assistant Harbour Master.
51. The council stated that the request was manifestly unreasonable because the reports were available elsewhere, namely on the authority's website. In refusing the information the council provided the applicant with the relevant web link to the reports.
52. The Commissioner notes that the complainant had asked the council to supply the information in a particular format, namely by email. Regulation 6(1)(b) provides that if the information is already publicly available and easily accessible to the applicant then the authority does not need to supply it in another format. That being the case, the council was correct to indicate the alternative web based source. However, the council was incorrect to apply the 12(4)(b) exception to the information. In the Commissioner's view the request was not manifestly unreasonable.

### **The Decision**

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53. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Regulations.
  - The council incorrectly applied regulations 12(4)(b), 12(4)(d), 12(4)(e) and 13(1) in order to withhold the requested information.
  - A proportion of the information was correctly exempted by virtue of regulation 13(1).
  - The council failed to specify the reason for its application of regulation 12(4)(b) in order to withhold the reports by staff. In failing to do so the council breached regulation 14(3).



- The council failed to specify the time in which the information withheld under regulation 12(4)(d) would be completed. In failing to do so the council breached regulation 14(4).
- The council decided to disclose some of the requested information fourteen months after receipt of the initial request. The council breached regulation 5(2) by its failure to provide the information within 20 working days.

## Steps Required

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54. The Commissioner requires that the council shall within 35 days of the date of this decision notice provide the complainant with a copy of the following information:
- The log reports of the River Hamble Harbour Authority patrol boats for the financial year 2005 – 2006.
  - Names, addresses and telephone numbers of private individuals are to be redacted prior to disclosure. Names of privately owned boats including names in photographs are also to be redacted.
  - Any comments about staff conduct that might be used in a disciplinary context are to be redacted.
  - Names of Harbour Authority staff who are public facing or who have senior roles should not be redacted.
  - Names of craft owned by the public authority or commercial concerns should not be redacted.

## Failure to comply

55. 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

56. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
- The council wrongly warned the complainant that he would incur a financial charge of several hundred pounds if he continued with his request and if an order for disclosure was made. The authority based the proposed charge on the time taken to redact personal data.

- It is of concern that the council had already been notified by the Commissioner in a previous Decision Notice – reference FS50150536 - that it could not charge for time taken to redact a document.
  - The council's responses to the complaint and investigation have raised questions concerning the authority's knowledge and understanding of its responsibilities under the Act and under the Regulations.
  - In relation to the material still in the course of completion (paras 38 – 43), the Commissioner considers that if a request was made now the exception would not apply.
57. In light of the concerns that have arisen, this case will be referred to the Commissioner's Good Practice and Enforcement Team which will consider whether any further action is appropriate.

### **Right of Appeal**

58. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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 22<sup>nd</sup> day of May 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal annex

### Regulation 2 states that:

..."environmental information" has the same meaning as in Article 2(1) of the EC Directive 2003/4

namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

### Regulation 5 states that:

(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.

(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 6 states that:

(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

### Regulation 12 (1) and (2) state that:

(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.
- (2) A public authority shall apply a presumption in favour of disclosure.

**Regulation 12 (4)** states that:

- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -
- (a) it does not hold that information when an applicant's request is received;
  - (b) the request for information is manifestly unreasonable;
  - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (e) the request involves the disclosure of internal communications.

**Regulation 13** states that:

- (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.
- (2) The first condition is -
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -
    - (i) any of the data protection principles; or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
  - (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<sup>[7]</sup> (which relate to manual data held by public authorities) were disregarded.
- (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 that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**Regulation 14** states that:

- (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).
- (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.

(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.

**Section 21** of the Freedom of Information Act provides that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.