

22 JUN 2010

Upholding information rights

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Mr Richard Ward
Head of Legal and Democratic Services
Eastleigh Borough Council
Civic Offices
Leigh Road
Eastleigh
Hampshire
SO50 9YN

21st June 2010

Case Reference Number FS50261661

Dear Mr Ward

Freedom of Information Act 2000: Section 50(1)
[REDACTED]

Please find enclosed a Decision Notice issued under section 50(1) of the Freedom of Information Act 2000. This Decision Notice relates to a complaint from [REDACTED] dated 5 May 2009.

The complaint has been carefully considered, and in this case the Commissioner has found in favour of the council. The enclosed Decision Notice sets out the reasons for this decision. This has been sent to Ms Bernie Topham, Chief Executive of Eastleigh Borough Council.

If you disagree with any aspect of the attached Decision Notice you have the right to appeal to the First-Tier Tribunal (Information Rights). Contact details for the First-Tier Tribunal (Information Rights) are included in the Decision Notice.

(cont)



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Information Commissioner's Office

The Decision Notice includes the details of both the public authority and the complainant. This is to ensure that there is no doubt as to the request for information to which the Notice relates. The Commissioner will publish the decision on the ICO website, but will remove all names and addresses of complainants.

Although public authorities may choose to reproduce the Decision Notice, the Commissioner expects similar steps to be taken. The Commissioner considers that these may be necessary in order to comply with the requirements of the Data Protection Act.

I hope the above information is useful.

Yours sincerely

pp Ian Walley
Senior Complaints Officer



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Environmental Information Regulations 2004

Decision Notice

Date: 21 June 2010

Public Authority: Eastleigh Borough Council
Address: Civic Offices
Leigh Road
Eastleigh
Hampshire
SO50 9YN

Complainant:
Address:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Summary

The complainant requested emails sent or received by senior members of the borough council relating to planned housing developments in the area. The council initially applied the exemption in Section 36 of the Act (prejudice to the effective conduct of public affairs), however the Commissioner wrote to the council stating that in his view the information was environmental information and should have been considered under the Environmental Information Regulations 2004. The council therefore reconsidered its position and applied the exception in regulation 12(4)(e) (internal communications).

The Commissioner has decided that the council was correct to apply regulation 12(4)(e) to the majority of the information, and that the public interest rests in maintaining the exception in this case. However he has also decided that some information does not engage the exception as it was not contained in internal communications; it had been received from other councils. Hence the Commissioner's decision is that this information should be disclosed.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

2. The complainants request relates to planned housing developments. He is a member of the Partnership for Urban South Hampshire (PUSH) and wished to have background details of some of the initial decisions which had been made by a group consisting of councils leaders and chief executives which discussed the PUSH's website states that PUSH is "a partnership of local authorities in South Hampshire dedicated to sustainable, economic-led growth and improving prosperity and the quality of life for everyone who lives, works and spends their leisure time in South Hampshire. It comprises of the eleven local authorities in South Hampshire and key external partners:

The Councils involved are:-

Hampshire County Council
Portsmouth and Southampton City Councils,
East Hampshire, Eastleigh, Fareham, Gosport, Havant, New Forest, and
Test Valley Borough/District Councils and Winchester City Council."

3. PUSH's stated objectives include building an average of 4,000 new homes per year from 2006 to 2026, at least 30% of which should be affordable housing. Additionally, senior officers and political leaders from each of the above authorities met and corresponded on a regular basis to establish areas for future development where the housing and further infrastructure is best placed. The complainant's request relates to correspondence between the leader of the borough council and other authorities and between the leader and the chief executive of the council relating to a decision to allocate land around the area of Hedge End in Hampshire as a Strategic Development Area (an 'SDA').

The Request

4. On 5 May 2009 the Complainant wrote to the council and requested
"What records do you possess of communications and what are the content of any such communication
 - a) By the Chief Executive of your authority to the Leader of your Council relating to a SDA at Hedge End – before making the proposal to the PUSH Executive
 - b) Any written or electronic communication from your Leader to the Chief Executive prior to that proposal being made to PUSH by the Chief Executive
 - c) Any written or electronic communications between Leader and other District Council Leaders on this proposal prior to the proposal emanating from the 3 Chief Executives in 2005.
5. The council responded on 9 June 2009. In that letter it stated that the qualified person's decision was that the information was exempt under Section 36 of the Act.
6. The complainant wrote back to the council on the 23 June 2009 requesting that the council review its decision to withhold the information. He also drew attention to the fact that the council had not provided any record of any public interest test which it had carried out when making its decision. In that letter the complainant also made a second request, however this did not form part of his complaint to the Commissioner.
7. The council wrote back on 8 July 2009 stating that it did not have an appropriate person available to review the council's decision as all staff able to do so were involved in the council's initial decision. It therefore suggested that he complain directly to the Commissioner, which he subsequently did.

The Investigation

Scope of the case

8. On 24 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

He specifically asked the Commissioner to consider whether the information which he requested should have been disclosed to him.

Chronology

9. The Commissioner wrote to the council informing it of the complaint on 3 August 2009
10. The council responded with its initial arguments on 27 August 2009. It provided arguments that section 36 of the Act applied due to the requirement for the parties to be able to correspond and discuss the issues freely and frankly.
11. On 2 December 2009 the Commissioner wrote to the council indicating that a preliminary assessment of the case had highlighted that the information in question would be environmental information. That email asked the council to therefore reconsider the request under the Regulations.
12. The council responded on 14 December 2009 applying regulation 12(4)(e) to the information.

Analysis

Substantive Procedural Matters

13. The Commissioner notes that the council initially refused the request for the information because it considered it exempt under section 36 of the Act. However the Commissioner considered that the information was environmental information which falls under the scope of the Regulations.
14. The Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR.

Regulation 2(1)(c) provides that –

“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 –

(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'

The factors referred to in (a) include -

' 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'

15. The information in question is correspondence on a plan to develop land in an area to the North of Hedge End, Hampshire. It is therefore environmental information which should have been considered under the Regulations rather than the Act.
16. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.
17. The Commissioner also notes that the complainant made his request on 5 May 2009. The council's initial response was made on 9 June 2009. It did not inform the complainant that it needed further time to consider his request as required under regulation 7(1). This date falls outside of the 20 day period required by the Regulations and so the Commissioner decision is that the authority breached regulation 14(2).

Exemptions

Regulation 12(4)(e)

18. Regulation 12(4)(e) provides an exception for information which is an internal communication. It is provided in the legal annex to this Decision Notice. As a class based exception, it is not necessary to show that a disclosure would cause prejudice or harm in order for the exception to be engaged. The council merely needs to show that the request would involve the disclosure of internal communications.
19. The Commissioner has considered the information which has been withheld from the complainant and notes that it comprises of:
 - a. A series of emails internally between parties at the council.
 - b. Emails initially from external organisations which were forwarded between parties internally at the council with additional comments added.

c. An email sent to officers internally at the council but also copied to external people or organisations.

20. i) The Commissioner is satisfied that where a) is applicable the information engages regulation 12(4)(e).

ii) where b) is the case, the forwarding email, including comments etc will fall within the scope of the exception, however external emails to the council copied in within that chain do not fall within the exception.

iii) One email dated 15 July 2005 was generated by council staff and sent between council staff. It was however also copied to individuals in other councils when it was sent. The Commissioners decision is that Regulation 12(4)(e) is still engaged however as it is clearly an internal communication even though it was also copied to other individuals in external organisations.

21. The Commissioner is therefore satisfied that emails falling within i) and iii) and the internal emails from ii) above were internal communications and therefore engage the exception in regulation 12(4)(e). The external emails copied with the internal communications in ii) above are not internal communications and do not therefore engage regulation 12(4)(e). As no alternative exception has been applied in this case the Commissioner considers that this information must therefore be disclosed.

22. As regards the information which does engage the exception Regulation 12(2) requires a public interest test to be carried out. The test to be applied is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest

Public interest arguments in favour of disclosing the requested information

23. The Commissioner has considered the following factors in favour of the information being disclosed.
24. The public interest in disclosing information which is necessary to fully understand decisions which will have a major impact on the region. A planned 80,000 homes are eventually planned for the PUSH area overall.
25. The general public interest in transparency and accountability – Decisions taken on a project of this size will have a major impact on

the environment for the foreseeable future, including the likelihood of a major reduction in greenbelt land in Hampshire.

26. Through disclosure the public would have a greater understanding of the issues which were considered relevant to the decision makers, including any strategic or political factors which might have influenced the decisions which were taken which should in fact sit outside of the normal considerations for decisions of this sort.
27. The general public's response to consultations would be better informed if they aware of some of the issues which the group discussed. They could for instance address their concerns to areas where there was ongoing deliberation or where arguments were not as clear or as strong as others. This would enhance the ability of the public to take an active part in the decision making process from an informed point of view. The Commissioner considers that this is conducive to the aims of the Aarhus Convention for greater public participation in decision making.
28. There is also a public interest in knowing whether a public statement of position made by politicians and/or senior council officers meets with the actual positions they have taken at the negotiating table. Clearly if a politician or council leader enjoys votes on the basis of his, or his party's stated intention to support or fight a particular project then there is a public interest in knowing if, and how strongly that position is demonstrated during negotiations.

Public interest arguments in favour of maintaining the exemption

29. The Commissioner has considered the factors relevant to whether the public interest rests in favour of maintaining the exception.
30. He firstly recognises that there is a public interest in members of the council being able to discuss strategy and tactics in confidence in order that they might seek to achieve the best results for their particular area. In order to do this, senior members of the council need to be informed about, and be able to contribute to evolving policy and strategy as matters move forward. There is an argument that a fear of disclosure may lead council staff not to record their discussions on such matters, or to write to each other discussing controversial issues.
31. If council leaders are unable to inform relevant staff within the council of their thinking or of things that they have, or intend to suggest then this risks mistakes and misunderstandings occurring.

32. The Commissioner dismisses this argument however. The Tribunal has previously found in such cases that adequate record keeping is simply a case of good management. Nevertheless the Commissioner considers that a disclosure of such information whilst negotiations are still ongoing could cause damage to the ability to continue to negotiate on level grounds. The Commissioner therefore considers that there is a distinct possibility that council staff would be less full and frank in the future if he were to order the disclosure of information whilst negotiations continued.
33. The Commissioner also recognises that there is a public interest in officers and members being able to "think the unthinkable" and put forward and consider suggestions which would not otherwise be entertained. This is the "safe space" argument – that individuals should be provided with a degree of space in which to put forward suggestions for discussion, free from the public eye, in order that they may discuss such matters openly, frankly and without fear of repercussions.
34. Following this argument, internal emails are likely to report on discussions which have occurred at meetings between the parties. This might include the opinions or statements of other council leaders as well as providing insight into the thinking, strategies and plans of the leaders in handling the negotiations. In general information of this nature would be withheld in order that the overall decisions would be published with the appearance of joint responsibility. Joint responsibility allows council leaders greater scope to negotiate and to accept particular plans with less fear of it affecting their individual political careers. They are therefore more likely to think the unthinkable and allow political "deals" which better suit the environmental or developmental needs of an area as a whole, rather than simply protecting their own area because of their own political interests. In the majority of occasions withholding information of this sort would be unlikely to meet the public interest in openness and transparency however the Commissioner has considered the likely results of ordering greater transparency in this case.
35. A disclosure which shows that particular leaders were willing to allow the development of particular areas over others as part of ongoing negotiations could be extremely damaging to their political career. This would particularly be the case if the people most affected by his or her stance are the electorate; people who voted him or her into office in the first instance. If the Commissioner were to order disclosure leaders may therefore be more likely to support or make decisions based on the likelihood of it affecting their political support in their constituency rather than choosing the best environmental option or the best option for the development of the area.

36. Disclosure would therefore be likely to harden and entrench leaders' positions in the future in order that they can demonstrate to their electorate that they supported their area strongly. This would be likely to make decisions involving council leaders or senior political figures much harder to reach as there would be less willingness to negotiate and/or agree positions which are detrimental to their own position. When announced as a joint decision less personal blame can be laid personally against them, and so they are freer to negotiate in such meetings.
37. The Commissioner considers that this is an important factor. If this information were to be disclosed it is likely that it would be harder for groups of this nature to reach decisions based on "best practice". Elected members of the group may be more concerned with being seen to be strongly protective of their area in order to protect their own political interests. This would make decision making much harder for the group, and would make it more likely that the best practical or best environmental options are overlooked in favour of decisions which incur less political consequence to individual leaders. On many occasions decisions would therefore go against smaller rural communities rather than larger urban centres because of their greater voting power. Additionally factors such as the likely demographics of a particular area might become a factor, such as the existing political leaning of an area.
38. The Commissioner recognises that the above argument takes little account of the fact that some leaders would negotiate ethically, whatever the consequences to them personally for their actions. Nevertheless the above argument demonstrates a political reality which would be likely to be acted upon by some leaders if information of this sort were to be regularly disclosed. The Commissioner recognises that such matters would be likely to be used to gain political capital by rivals. Consequently there is a strong likelihood that disclosure would affect some leaders' contributions to meetings in this respect.
39. The risk is therefore that such forums would effectively degrade into a political point making exercise rather than a decision making exercise based on a full and unbiased consideration of the facts. Alternatively leaders may distance themselves from involvement in such forums in order that less personal blame can be attached. This would lessen democratic involvement in the process as less directly elected officials would take part in the decision making process.
40. Further to this, discussions between colleagues internally within councils may divulge information which would disrupt the relationship with other members of the group if any personal comments or

strategies undermining those authorities' positions or other group members were to be disclosed. In negotiations it will fairly often be the case that members will discuss other party's weaknesses or areas where pressure which would be most productive if brought to bear. A disclosure of such information, even after decisions have been taken, could sour relationships and make future negotiations much harder.

41. The Commissioner also notes that the information records discussions when matters are still ongoing and unfinished. Discussions may therefore not highlight arguments which are relevant to the final decisions which are made. Often during negotiations parties may purposely appear to be supporting a particular strategy in order that they can use this as a bargaining factor later in the negotiations. A disclosure of information of this nature might therefore be misleading when considered against the overall strategy which was being employed.
42. When final decisions are reached the reasons for those decisions would, in general be disclosed along with the decision. Therefore a degree of explanation would be provided at that time that the decision is unveiled. At that time the proper consultation exercise would be carried out and the decisions of the councils properly questioned.
43. The Commissioner also notes that decisions made would still be subject to the normal planning rules and consultations which are required under planning law, although he does not consider that this in itself would undermine any argument for disclosure.

Balance of the public interest arguments

44. The Commissioner has carefully weighed the balance of all of the public interest arguments provided above. The Commissioner considers that a clear record of decision making is an essential factor in decisions of this importance. However he also dismisses the argument that a disclosure in this case would lead to less information being recorded and more decisions taken orally. Issues surrounding this sort of argument have been fully voiced and dismissed by the Information Tribunal in case Lord Baker v the Commissioner and the Department for Communities and Local Government (EA/2006/0043).
45. He also believes that transparency and accountability are an important element in ensuring that the correct decisions for an area are made. Politicians are voted into power based on the electorate's expectations of the intentions of that person. This will be based, at least in part, on statements and promises which the proposed representative has made to the community on particular issues. Clearly there is a very strong

public interest in the electorate being able to establish that those statements and promises are followed through by the individual once they are in power. Their actions can be scrutinised and they can be held to account for those actions by members of the public.

46. However the Commissioner also recognises that in cases such as this the parties to the negotiations, and in particular elected members, must have the ability to discuss strategy and negotiate on a semi-confidential basis when developing policy in some cases. In *Scotland Office v the Information Commissioner (EA/ 2007/0070)* the Information Tribunal recognised that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.
47. In *Department for Education and Skills v the information Commissioner and The Evening Standard* the Tribunal recognised the importance of this argument stating "Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy" (para 75, point iv).
48. A failure to recognise this would increase the difficulty of already complex negotiations and make the outcome more prone to political pressures having a negative effect on the outcome as highlighted above - it would warp and slow the decision making process. This is also not in the public interest. The Commissioner notes that PUSH's objectives were ongoing at the time of the request. The council also argues that there is a stated intention by one party to revisit all of the proposals if it got into power and therefore it considers that the matters discussed still retained their relevance at the time of the request.
49. Based on his consideration of all of the relevant facts and circumstances of this particular case the Commissioner's decision is that the public interest in maintaining the exception outweighs the public interest in disclosing the information in this instance.

The Decision

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

- The council was correct to exempt some of the information under the exception in 12(4)(e) of the Act.
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
 - In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.
 - The council breached regulation 14(2) in that it did not provide a response to the complainant within the 20 working day period stipulated in that regulation.

Steps Required

52. The Commissioner requires the authority to disclose the external emails which were copied to and from council staff but which were generated by organisations other than the council. These are highlighted in point ii) of paragraph 20 above.
53. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

54. 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.

Right of Appeal

55. 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 21st day of June 2010

Signed 

**Lisa Adshead
Group Manager**

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

Legal Annex

Exceptions to the duty to disclose environmental information

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.

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

...

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

(e) the request involves the disclosure of internal communications.