

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

### **Decision Notice**

**Date: 4 March 2010**

**Public Authority:** Leeds City Council  
**Address:** Civic Hall  
Calverley Street  
Leeds  
LS1 1UR

### **Summary**

---

The complainant complained about the Council's response to a number of requests he made regarding a planning application. He complained that he did not consider that Leeds City Council ("the Council") had provided all the information it held and about the fact it had applied the exemption under section 40(2) of the Freedom of Information Act 2000 ("the FOIA") to information about a particular planning officer. The Information Commissioner ("the Commissioner") considered some of these requests as part of his investigation. The Commissioner noted that two of the requests were not responded to by the Council and he requires the Council to respond to these. Regarding the remaining requests, the Commissioner considers that the Council should have dealt with the requests under the Environmental Information Regulations 2004 ("the EIR"). Regarding the information originally withheld under section 40(2) of the FOIA, the Commissioner found that this information was not actually held. Regarding the remaining requests, the Commissioner was satisfied that no information was held in relation to one of the requests and in relation to the other, he was satisfied that the information that was held had already been provided. However, he found that the Council breached regulation 5(2), 11(4), 14(2) and 14(3)(a) of the EIR.

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

---

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

## Background

---

2. A planning application was submitted for an extension to the complainant's neighbour's property. The complainant objected to the application and, in March 2004, he was visited by a Council officer ("Officer A"), who, the complainant alleges, gave the impression that the application would not be granted. However, the application was in fact granted. The complainant has subsequently made a number of complaints to the Council regarding the planning application, including that he was misled by the Council officer who visited him. He also disputes the Council's claim that Officer A did not approve the application. The requests that form the subject of this complaint concern this planning application.

## The Request

---

3. Following a letter from the Council dated 12 November 2007, the complainant wrote to the Council on 21 November 2007 requesting information in the following terms which the Commissioner has numbered as requests 1-10 for ease of reference:
  1. "When [Officer A] was employed as a divisional planning officer did he have the delegated authority to which you refer?"
  2. "Are you suggesting that, when [Officer A] was employed to provide an additional resource to the Council, to enable it to get through its work load, as a former divisional planning officer, he did not have the appropriate delegated authority at the time the above planning application was approved?"
  3. "Does the Council still from time to time employ the consultancy services of [Officer A] and if not, why?"
  4. "What was [Officer B]'s job title at the time the above planning application was approved?"
  5. "Are you suggesting that [Officer B] approved the application alone?"
  6. "Why, despite the contents of Fabian Hamilton's letter of 20<sup>th</sup> September 2005, is the Council insisting that [Officer A] did not approve the above planning application? Why should the matter be an issue? What does the Council consider it has to lose or gain by admitting that he approved the planning application? It would surely not go to such great lengths simply to score a point would it?"
  7. "Has any representative of the Council directly or indirectly communicated with Fabian Hamilton and discussed all of or any part of his letter of 20<sup>th</sup> September 2005 to me? If so, please provide copies of any relevant written communications."
  8. "Copies of all the Council's documents, internal or public, confirming the approval of the relevant planning application and bearing the signature(s) of the relevant planning officer(s)."

9. "As [Officer A] was apparently not an employee of the Council at the time, the name of this business, the address from which it traded or trades and its telephone number."
10. "...Copies of the agendas, notes and minutes relating to the liaison meetings which I, my wife and our objections to the planning permission were discussed."
4. An officer from the Council's Legal, Licensing and Registration department wrote to the complainant on 17 December 2007 acknowledging receipt of the request. He stated that the request had been passed to another department to deal with as all the matters raised concerned that department apart from one. Presumably referring to request 10, the officer stated that with regard to documents relating to meetings that took place, he believed that he had provided all the information that was necessary and that he did not consider there was anything further to add.
5. On 8 January 2008, an officer from the department who had been passed the request wrote stating that it had considered the requests under the FOIA. It appears that the Council did not respond at all to requests 1 and 2. In relation to request 3, the Council confirmed that it continued to employ the services of Officer A. In relation to request 4, the Council provided an email showing Officer B's job title at the time the planning application was approved. In relation to request 5, it confirmed that Officer B had delegated authority to approve the application and had approved it on 20 April 2004. It provided a copy of an email dated 20 April 2004 showing that Officer B gave his approval. It appears that this email also represented the Council's response to request 6. In relation to request 7, the Council stated that it had not located any information relating to this request. In relation to request 8, it appears that the email dated 20 April 2004 was the Council's response to this request. Finally, in relation to request 9, the Council stated that this information was exempt under section 40 of the FOIA. It stated that this information constituted personal data, the disclosure of which would breach the Data Protection Act 1998 ("the DPA").
6. The complainant replied on 13 February 2008. He stated that he was not satisfied with the email provided dated 20 April 2004 because it was "unconvincing" and did not represent "a formal and permanent copy of the documentation requested". He also stated that all the other information provided had been "inadequate and unacceptable" and asked the Council to review its handling of the requests.
7. The complainant wrote to the Council again on 14 March 2008 to complain that he had not received the Council's response to his appeal.
8. On 4 April 2008, the complainant sent another letter to the Council. He referred to the fact that it had become apparent to him that the Council had sent a letter dated 17 December 2007 (referred to in paragraph 4 of this Notice) which he had not received and that a copy of this had been faxed to him. He expressed dissatisfaction with that letter. The complainant pointed out that the Council had still not conducted the internal review that he had requested on 13 February 2008.

9. On 11 April 2008, the Council responded agreeing that it should have conducted an internal review and it apologised for not having done so.
10. The Council supplied a copy of its internal review to the complainant on 8 May 2008. Referring to the email dated 20 April 2004 which it had supplied on 8 January 2008, the Council stated that this was the only documentation held in relation to the decision. It stated that section 40(3)<sup>1</sup> applied in relation to the request for information concerning Officer A as it had previously explained (it appears that this was a reference to request 9). It reiterated that it held no information relating to request 7. The Council stated that it considered it had now responded in full to the issues raised but if the complainant remained dissatisfied it would initiate stage 2 of its complaints procedure.
11. The complainant replied on 29 May 2008 expressing dissatisfaction with the delay and he also asked the Council to confirm that it had now responded in full to his letter dated 21 November 2007.
12. On 29 May 2008, the Council replied stating that it considered that it had responded in full to the requests made in the letter dated 21 November 2007.

## The Investigation

---

### Scope of the case

13. On 8 July 2008, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant listed various items of correspondence and asked the Commissioner to let him know if any of the information should be handled under the DPA rather than the FOIA. The nature of the complaint that the complainant wished to make was not apparent from the form submitted.
14. Before the Commissioner's investigation under the FOIA began, the Commissioner decided to treat requests 7 and 10 as Subject Access requests under section 7 of the DPA as he considered that the information requested would constitute the complainant's personal data. These requests have therefore not been considered in this Notice as they have formed the subject of a separate complaint under the DPA.
15. During the Commissioner's investigation under the FIOA, the Commissioner clarified with the complainant that the nature of the complaint was that he did not accept that he had been provided with any of the information he had requested apart from that relating to requests 3 and 4.
16. Although the complainant was not satisfied that he had been provided with a response to request 5, the Commissioner considers that the Council did provide a sufficient response. The Council provided an email showing that Officer B

---

<sup>1</sup> The correct exemption to cite under the FOIA would have been section 40(2).

approved the application which represented all the information it held concerning approval of the decision. For absolute clarity, the Council has confirmed that it intended to communicate by the provision of this email that Officer B was the only officer who approved the application. As the Commissioner accepts that the Council has responded to request 5, he has not considered this request in the Analysis and Decision sections of this Notice.

17. In view of the above, the Commissioner's investigation concerns requests 1, 2, 6, 8 and 9 only.

### **Chronology**

18. On 23 September 2008, the Commissioner wrote to the complainant and the Council to inform both parties that he had received the complaint.
19. On 11 November 2008, the Council wrote to the Commissioner. The Council stated that having considered its responses, it believed that the only information that it had not provided to the complainant was information relating to Officer A and this information was exempt under section 40 of the FOIA. It also added that it considered that the relevant principle in Schedule 1 of the DPA was the first Data Protection Principle and the relevant condition in Schedule 2 was condition 6. The Council explained that it would normally disclose the work contact details of an employee or a consultant but that in this case, it understood that the complainant wished to contact Officer A to "interview" him and the risk of prejudice to Officer A therefore outweighed the legitimate interest in disclosure. The Council also stated that it felt there were grounds for concluding that these particular requests were vexatious.
20. On 10 August 2009, the Commissioner wrote to the complainant. He stated that he understood the complainant wished the Commissioner to consider the requests made in his letter dated 21 November 2007. He reminded the complainant that requests 7 and 10 had been considered separately. He also explained that the nature of the complaint was not clear and he asked for the complainant's clarification.
21. The complainant responded on 31 August 2009. He stated that he noted the Commissioner's comments in respect of requests 7 and 10. In relation to the remaining requests, the complainant stated that he wished to complain that the information had not been provided.
22. On 18 September 2009, the Commissioner wrote to the complainant stating that he understood that the Council was relying on the exemption under section 40(2) in relation to requests 1, 2 and 9 and that the complainant wished the Commissioner to consider whether the Council had correctly relied on this exemption. He also pointed out that it appeared that the information requested in request 3 and 4 had in fact been provided. In relation to request 6, the Commissioner reminded the complainant that the FOIA only provided access to recorded information held by public authorities. He asked the complainant whether he could be more specific about what recorded information he would expect to receive in respect of this request.

23. The complainant replied on 22 September 2009. Referring to requests 1, 2 and 9 relating to Officer A, the complainant explained that he did not consider that any of this information was exempt. He did not dispute that the information in request 3 and 4 had been provided. In relation to request 6, the complainant explained that he was seeking information to help prove that Officer A did in fact approve the application. In relation to request 8, the complainant explained that he did not accept that the email provided by the Council was the only documentation held showing the approval. He added that it was not in any case a signed formal document which was what he had requested. The complainant also stated that he wished the Commissioner to consider request 7 although the Commissioner had already explained that this request had been dealt with separately as a Subject Access request.
24. On 24 September 2009, the Commissioner telephoned the Council to discuss its letter dated 11 November 2008. In particular, the Commissioner wished to clarify whether the Council was seeking to rely on section 14(1) in relation to all of the requests. The Council stated that it required some time to look up the details of the case and that it would return the Commissioner's call later that day.
25. When the Council did not return the Commissioner's call, the Commissioner attempted to contact the Council's officer a number of times by telephone but was unsuccessful.
26. On 29 September 2009, the Commissioner wrote to the Council explaining that he had been unable to contact the Council's officer by telephone. He explained what information he required to help with his investigation and he asked the Council to respond by 13 October 2009.
27. On 14 October 2009, as the Commissioner had not received any response from the Council, he telephoned the Council again but was unable to establish whether a response had been sent at that time. He warned the Council that failure to engage with the Commissioner would be likely to result in a formal Information Notice under section 51 of the FOIA.
28. The Council sent an email to the Commissioner on 14 October 2009 apologising for the delay in responding.
29. On 16 October 2009, the Council provided its response to the Commissioner. The Council stated that it felt it had provided all of the information held in relation to the majority of the requests and it therefore did not consider it was necessary to seek to rely on section 14(1). In relation to request 9, it stated that it would reiterate what it had said in previous correspondence and in its letter to the Commissioner dated 11 November 2008 that this information was exempt under section 40(2). In relation to requests 1 and 2, the Council stated that it felt these requests seemed irrelevant given the Council's confirmation that Officer B approved the application however it stated that it did not think it would be reasonable to say that this information was exempt under section 40(2). It stated that it was therefore investigating whether it held this information.

30. From 29 October 2009 until 7 January 2010, various items of correspondence passed between the Council and the Commissioner as part of the Commissioner's investigation into what information was held by the Council and whether it had correctly relied upon section 40(2) of the FOIA. The details of this correspondence have been discussed in more detail in the Analysis sections of this Notice. For clarity, during this exchange, the Commissioner established that the information requested at request 9 was not actually held by the Council. He therefore has not gone on to consider the Council's application of section 40(2) to this information.

## Analysis

---

### Substantive Procedural Matters

31. The Commissioner firstly considered whether the requests had been handled under the correct access regime. Although the Council dealt with the requests under the FOIA, the Commissioner considers that the requests should have been dealt with under the ambit of the EIR as the requests relate to a planning application that would have affected the environment. This is information on a plan affecting one of the elements referred to in regulation 2(1)(a) (in this case, land). It therefore falls within the scope of regulation 2(1)(c).
32. The Commissioner then went on to consider whether the Council held information relating to each request that it was able to provide to the complainant. For clarity, in keeping with the Tribunal decision in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency (EA/2006/0072)*, the Commissioner determines whether information was held on the balance of probabilities.

### Requests 1 and 2

33. As noted in the chronology section of this Notice, the Commissioner initially thought that the Council was seeking to apply section 40(2) to this information. Having reconsidered the correspondence, the Commissioner decided that it appeared that the Council had never actually responded to these two requests as its references to the exemption under section 40(2) appeared to concern request 9 only. The Council therefore needs to respond directly to the complainant.

### Request 6

34. The complainant has explained to the Commissioner that this request was designed to access information showing that Officer A, rather than Officer B approved the application. The complainant particularly asks for recorded information demonstrating why the Council believes that Officer B approved the application and Officer A did not. In response, the Council provided a copy of the email dated 20 April 2004 showing Officer B's approval.

35. It appears that the complainant asked Fabian Hamilton MP to contact the Council in connection with his complaints about his neighbour's planning application. The complainant has supplied a copy of a letter written by Mr Hamilton dated 20 September 2005 (this is the letter referred to in request 6). Towards the end of this letter, Mr Hamilton wrote that he had discovered that Officer A had approved the application in question on 22 April 2004. He was apparently told this during a telephone conversation with the Council. The complainant has referred to Mr Hamilton's letter as evidence that the Council was incorrect to claim that Officer B approved the application.
36. The Council has made it clear to the Commissioner that it does not hold information showing that Officer A approved the application because Officer B approved it. It supplied written confirmation of this fact provided by Officer B, the officer who had in fact approved the application and it has also stated that he approved the application alone. The Council explained that Officer A had prepared a report recommending approval and as his name was on this report, this may have led to confusion over who had approved the application.
37. The Council stated that it has checked the planning file and relevant correspondence as well as discussing the matter with the Chief Planning Officer. It stated that no information about these matters had been deleted, destroyed or mislaid.
38. In view of the above, the Commissioner accepts that the Council did not, on the balance of probability, hold any information falling within the scope of this request other than the email which it provided.

#### Request 8

39. As already mentioned, the Council has provided the complainant with a copy of an email dated 20 April 2004. In this email, Officer B stated that he approved the planning application. The Council has stated that this is the only recorded information it holds showing the approval of the application. The complainant has expressed dissatisfaction with this as it is not a formal signed document.
40. The Council has explained that Officer B was ill at the time and has since passed away. It stated that for this reason he was unable to sign the relevant report in the usual way.
41. The Council stated that it has checked the planning file, relevant correspondence and consulted with the Chief Planning Officer to ascertain that it did not in fact hold any other information falling within the scope of this request. It has stated that no information has been deleted, destroyed or mislaid.
42. In view of the above, the Commissioner accepts that the Council did not, on the balance of probability, hold any signed documentation concerning the approval of the planning application.



## Request 9

43. The Council initially stated that it considered that this information was exempt under section 40(2). In a letter to the complainant dated 12 November 2007, it explained that Officer A was not an employee of the Council but was used on a consultancy basis to provide an additional resource to the Council to assist with the Council's workload. Officer A is a retired divisional planning officer who used to work for the Council. During the Commissioner's investigation, the Council stated that it only held the home contact details of Officer A and did not hold any "business" information relating to Officer A. It has stated that it has checked that this is the case with appropriate officers at the Council. It appears that the complainant incorrectly assumed that Officer A's services were provided as a business activity. In view of this, the Commissioner accepts that the Council did not, on the balance of probability, hold the information requested.

## **Procedural Requirements**

44. The Council failed to respond at all to requests 1 and 2. It therefore breached regulation 5(2) of the EIR for failing to respond within 20 working days.
45. In relation to request 6, as the Council did not respond until 8 January 2008, it breached regulation 5(2). The Council should have responded within 20 working days of the request which was dated 12 November 2007.
46. In relation to request 8, the Council breached regulation 14(2) for failing to state that it did not hold the information by citing regulation 12(4)(a) within 20 working days. It also breached regulation 14(3)(a) because it failed to rectify this by the date of its internal review.
47. In relation to request 9, the Commissioner's investigation established that the Council did not in fact hold the information requested as it only held a home address for Officer A. In view of this, the Commissioner considers that the Council breached regulation 14(2) for failing to state that it did not hold the information by citing regulation 12(4)(a) within 20 working days. It also breached regulation 14(3)(a) because it failed to rectify this by the date of its internal review.
48. The Commissioner also notes that although the complainant requested an internal review on 13 February 2008, one was not conducted until 8 May 2008. This breached regulation 11(4) of the EIR which provides that a public authority should not take longer than 40 working days to conduct an internal review.

## **The Decision**

---

49. 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:

- In relation to request 6, the Council supplied the only information held and therefore complied with its obligation under 5(1) to make environmental information available upon request.
50. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The Council failed to respond at all to requests 1 and 2 and therefore breached regulation 5(2)
  - In relation to request 6, the Council breached regulation 5(2)
  - In relation to request 8, the Council breached regulation 14(2) and regulation 14(3)(a)
  - In relation to request 9, the Council breached regulation 14(2) and regulation 14(3)(a)
  - The Council breached regulation 11(4) for failing to conduct an internal review within 40 working days

### Steps Required

---

51. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:
- The Council should write directly to the complainant, responding to requests 1 and 2 in accordance with its obligations under the EIR. It should either provide the information held or issue a valid refusal notice under regulation 14(1). If the Council wishes to claim that the information was not held, the Council should note that it will need to issue a refusal notice citing regulation 12(4)(a).
52. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### Failure to comply

---

53. 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

---

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

## **Internal reviews**

55. The Commissioner notes that at the time of the Council's internal review, it stated that if the complainant remained dissatisfied, it would initiate stage 2 of its internal complaints procedure. The Commissioner's guidance recommends that internal reviews should not consist of more than one stage to enable them to be dealt with promptly. If a requester is dissatisfied following an internal review of an information request, the requester's route of appeal is to the Commissioner's office. The Commissioner understands that this issue has since been addressed and that the Council is now operating a single stage complaints procedure.

## **Identity of requesters**

56. The Commissioner noted that, in its letter to the Commissioner dated 11 November 2008, the Council indicated that it would normally disclose the information requested by the complainant at request 9 but it was not doing so in this case because of who the complainant is. It transpired that the Council did not in fact hold the information however the Commissioner would like to remind the Council that it is not permitted to discriminate between requesters in this way. Any disclosure made under the FOIA is a disclosure to the general public and if the Council would disclose information to other members of the public under the FOIA, it must also disclose it to the complainant.

## Right of Appeal

---

57. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 4<sup>th</sup> day of March 2010**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

### The 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(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..."

#### Regulation 14 - Refusal to disclose information

**Regulation 14(1)** "If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation".

**Regulation 14(2)** "The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request".

**Regulation 14(3)** “The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3)”.

### **Regulation 11 - Representation and reconsideration**

**Regulation 11(1)** “Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request”.

**Regulation 11(3)** “The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement”.

**Regulation 11(4)** A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.