

## Environmental Information Regulations 2004

### Decision Notice

Date: 04 August 2010

**Public Authority:** Caerphilly County Borough Council  
**Address:** Penallta House  
Tredomen Park  
Ystrad Mynach  
Hengoed  
CF82 7PG

#### Summary

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The complainant, representing an organisation, requested details of the individual who had complained to the Council about a proposed patio at its premises. The Council considered the request in accordance with the EIR and stated the information was exempt under regulation 13. The Commissioner has investigated and finds that the Council correctly applied regulation 13 of the EIR to the request. The Commissioner identified a number of procedural shortcomings in the way the Authority handled the complainant's request but requires no steps to be taken.

#### The Commissioner's Role

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1. The Environmental Information Regulations (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 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

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2. This complaint relates to a request for the name of the individual who contacted Caerphilly County Borough Council ('the Council') regarding

works which had commenced on a raised patio at the complainant's premises. The Council instigated a planning enforcement investigation which resulted in a formal planning application being submitted in respect of the patio, for which planning permission was granted on 10 July 2009.

## **The Request**

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3. On 17 June 2009 the complainant wrote to the Council and requested:  
  
"I would be grateful if under the Freedom of Information Act 2000 you would let me know who made the initial enquiry/complaint to the Council regarding our proposed patio"
4. The Council issued a refusal notice on 10 July 2009 confirming that it had considered the request in accordance with the EIR. The Council stated that the information requested was exempt by virtue of regulation 13 and that further details regarding the application of this exception would be provided in due course.
5. On 27 July 2009 the Council wrote to the complainant and provided further information about why it considered the information requested to be exempt under regulation 13. The Council stated it considered disclosure would breach the first data protection principle.
6. On 25 August 2009 the complainant requested an internal review of the Council's decision not to release the information requested.
7. The Council provided the outcome of its internal review on 23 November 2009 and upheld its decision not to release the information requested as it was considered to be exempt under regulation 13.

## **The Investigation**

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### **Scope of the case**

8. On 3 December 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she had requested should be disclosed.

## Chronology

9. On 27 January 2010, the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for formal consideration and requested copies of the withheld information.
10. The Council wrote to the Commissioner on 18 March 2010 providing the withheld information and further representations to support its view that the information requested was exempt from disclosure.
11. The Commissioner wrote to the Council on 24 May 2010 and requested clarification of the reasoning behind its application of regulation 13 and the circumstances surrounding the planning issue relating to the request.
12. The Council responded to the Commissioner on 24 June 2010 providing some background information to the planning enquiry and further representations in respect of its application of regulation 13.

## Analysis

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### Substantive Procedural Matters

#### Correct Access Regime

13. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR. Full details of the relevant legislation relevant to this case are reproduced in the attached legal annex.
14. The Commissioner considers that the information requested falls within the definition of environmental information as provided by regulation 2(1)(c): "measures (including administrative measure), 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 these elements".
15. The information requested comprises details of the individual who reported a potential planning breach to the Council, which led to a planning enforcement investigation being undertaken. The Commissioner is satisfied that the withheld information falls within regulation 2(1)(c) because it is information on, or relating to, a

measure which is designed to protect the elements referred to in regulation 2(1)(a); namely land and landscape.

## **Exceptions**

### **Regulation 13(2) - third party personal data**

16. The exception under regulation 13(2) applies to information that is the personal data of an individual other than the applicant (the complainant), where disclosure of that information would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA'). In this case, the Council considers that disclosure of the withheld information would breach the first data protection principle.

### **Is the information personal data?**

17. In considering whether the Council has correctly applied regulation 13(2) of the EIR to the withheld information, the Commissioner has first considered whether the withheld information can be considered to be 'personal data'.
18. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
  - from that data,
  - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
19. The withheld information in this case is the name of the individual who made the initial enquiry to the Council regarding the works commencing on a patio at the rear of the complainant's premises. The Commissioner is satisfied that a living individual can be identified by their name. The Commissioner therefore accepts that the information in the context of this request is personal data as defined by the DPA.

### **Would disclosure contravene any of the principles of the DPA?**

20. As the Commissioner is satisfied that the information requested constitutes the personal data of the individual who made the initial enquiry to the Council about the patio, he went on to consider whether disclosure would breach any of the data protection principles. As stated in paragraph 16 above, the Council claimed that disclosure of the withheld information in this case would breach the first data protection principle.

## **The first data protection principle**

21. The first data protection principle has two main components. They are as follows:
- the requirement to process all personal data fairly and lawfully; and
  - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
22. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle. The Commissioner's general approach to cases involving personal data is to consider the fairness element first. Only if he believes that disclosure would be fair would he move on to consider the other elements of the first data protection principle.

## **Would disclosure of the information be fair?**

23. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced these against the general principles of accountability, transparency and legitimate public interest.

### **a) Expectations of the individuals concerned**

24. The Council has confirmed to the Commissioner that, as a matter of practice, it does not divulge details of individuals who report potential planning breaches to it. The Council advised it does not have any evidence to confirm whether the individual in this particular case was advised of the practice of confidentiality in relation to reporting such incidents. The Council stated that had the issue of confidentiality been raised by the individual, they would have been advised that their identity would have been kept confidential.
25. The Council confirmed that it consulted the individual who raised the planning issue at the time it received the information request and consent was not provided. The Council has provided the Commissioner with a copy of representations it received from the individual in question after the request was submitted. The individual has confirmed they were not made aware that their identity would be disclosed to the public or any other party. Further, the individual stated that had they

been aware of the potential for such disclosure, they would have reported the matter anonymously.

26. The Commissioner accepts that, where a person informs a public authority about their concerns regarding a potential breach of planning regulations, they would not normally expect their identity to be disclosed into the public domain.
27. The Commissioner notes that when a formal planning application has been made, there is a general expectation that details of any objectors are available to the public. This enables the planning applicant to discuss how to resolve issues that have arisen and deal with the problem, often before buying land. The Commissioner believes that there are different considerations when considering 'protected informants' who have complained that land has not been developed in accordance with planning permission. These individuals are informing the Council on behalf of the public. Many of these individuals will often be neighbours and individuals living in close proximity to the alleged respondent. While it is for the Council to determine whether further action is taken in relation to such complaints, it is essential that the public is protected in order to ensure fair process and to allow planning issues to be investigated. The Commissioner does not see that there is an expectation that the name of such individuals would be disclosed to the public.
28. Having reviewed the information and representations of the Council and the individual concerned, the Commissioner is satisfied that, in this particular case the information was provided to the Council with an expectation of confidence.

#### **b) Consequences of disclosure**

29. The Council has indicated to the Commissioner that there has been some local controversy about the proposed patio. The Council considers that disclosure would cause considerable personal distress to the individual who first raised concerns about the proposed patio. The Council also stated that, in its view, disclosure "may lead to potential conflict, or worse", between the individual and other members of the community and would therefore cause significant unwarranted harm to the interests of the individual.
30. The Commissioner recognises that the subject of local planning issues is an emotive one and one which often provokes a vigorous response from local residents who are understandably concerned about any impact any development may have on their homes and lives. The Commissioner has considered the submissions made by the Council

and the nature of the withheld information and he is satisfied that disclosure of the information to the public and the associated loss of privacy has the potential to cause unnecessary and unjustified harm to the individual in this case.

### **c) General principles of accountability and transparency**

31. The Council has recognised that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties in order to promote accountability and public confidence. The Council also accepts there is a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them. However, in the Council's view these arguments do not apply in this case and it argues that there is little legitimate interest in knowing the identity of the person who made the initial enquiry/complaint about the complainant's patio.
32. On the contrary, the Council believes that individuals would be discouraged from reporting planning issues to it if they were aware that their identity could be disclosed to the public.
33. The Commissioner acknowledges that the planning process should be sufficiently transparent to determine that the correct procedures have been followed, and to allow for challenges. However, in this case, he does not consider there to be sufficient legitimate interest to circumvent the existing planning processes and procedures. His view is that while certain members of the public may be interested in knowing who first made the initial enquiry/complaint to the Council about the patio, this does not mean that the wider public interest is served by disclosure of the information requested. The Commissioner also believes that there is a greater interest in protecting the individual in this type of case, as he notes that otherwise there would be a considerable 'chilling effect' and fewer cases would be reported to be considered and planning regulations would be harder to enforce.
34. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individual who made the initial enquiry/complaint to the Council about the patio). In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject.



35. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on consider the other elements of the first data protection principle. The Commissioner therefore upholds the Council's application of regulation 13(1) [by virtue of regulation 13(2)(a)(i)] because disclosure of this information would breach the first data protection principle.

## **Procedural Requirements**

### **Regulation 11**

36. Regulation 11(4) provides that, on receipt of representations from an applicant, a public authority should consider whether it complied with the requirements of the EIR. Such 'internal reviews' should be completed as soon as possible, and no later than 40 working days after the date of representations.
37. The complainant requested an internal review on 25 August 2009 and the Council provided the outcome of its review on 23 November 2009. The Commissioner considers that the Council breached regulation 11(4) as it took 62 working days, from the complainant's request for a review, to complete the review process.

### **Regulation 14(2)**

38. Regulation 14(1) requires public authorities to provide an applicant with a refusal notice which sets out in writing which exceptions it is relying on to refuse to provide requested information. Regulation 14(2) requires that any refusal notice is provided within 20 working days following the date of receipt of the request. Regulation 14(3) provides that the refusal notice should specify the reasons the public authority considers the information should not be disclosed.
39. The request was received on 17 June 2009 and although the Council issued a refusal notice on 10 July 2009 stating the information was exempt under regulation 13, the Council did not explain why it considered regulation 13 to be applicable until 27 July 2009. In failing to explain fully why the exception was engaged within 20 working days after the date of receipt of the request, the Council breached regulation 14(2).



## The Decision

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40. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, in that it:

- Correctly withheld the information requested in accordance with regulation 13

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

- In failing to undertake an internal review within 40 working days of receipt of the request for the internal review, the Council breached regulation 11(4).
- In failing to explain the reasons why regulation 13 was applicable within 20 workings after the date of receipt of the request, the Council breached regulation 14(2).

## Steps Required

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41. The Commissioner requires no steps to be taken.

## Right of Appeal

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42. 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 sent.

**Dated the 4th day of August 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### 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(2)** Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

**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.

**Regulation 11(5)** Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

### Regulation 13 - Personal data

**Regulation 13(1)** To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

- (i) any of the data protection principles; or
  - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

**Regulation 13(3)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**Regulation 13(4)** In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**Regulation 13(5)** For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

## **Regulation 14 - Refusal to disclose information**

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

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

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

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and

- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

**Regulation 14(4)** If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

**Regulation 14(5)** The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.