

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

### **Decision Notice**

**Date: 15 March 2011**

**Public Authority:** Tunbridge Wells Borough Council  
**Address:** Town Hall  
Tunbridge Wells  
Kent  
TN1 1RS

### **Summary**

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The complainant requested the publication of a report commissioned by the council to assess the suitability and possibilities for relocation of the town hall site. The council initially refused disclosure of the report under the Act but during the Commissioner's investigation it was withheld by virtue of regulations 12(4)(e), 12(5)(e) and 12(5)(f) of the EIR. The Commissioner found the council to have applied the exceptions incorrectly and that it had failed to comply with regulations 5(1), 5(2), 14(2) and 14(3) of the EIR. He ordered disclosure of the report.

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

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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

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3. The civic centre site that is under consideration by the council includes the town hall, assembly hall, theatre, museum, art gallery, adult education centre, magistrate's court, public library and police station. The council commissioned consultants from King Sturge, an international property services company, to identify and assess the options that would enable the authority and other organisations to vacate the site and facilitate its re-development. The consultants' report was produced in December 2009 and updated in February 2010. The existence of the report is public knowledge. Local concern has been voiced about the alleged council intentions to vacate the site.

## The Request

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4. On 22 June 2010 the complainant requested the following information from the council:

*" ... the King Sturge report on the Town Hall building and every other report on its structure and suitability for modernisation or adaptation for continuing use by the Council. Can you also make clear the extent of the Town Hall site under consideration by the TW Regeneration Co and what thought has been given to where the displaced facilities, particularly the Library, Museum and Art Gallery, the Assembly Hall and Adult Education Centre could be re-located to give as convenient a service to the public."*

5. In a refusal notice of 22 July 2010 the council confirmed that it held the King Sturge report of December 2009 and its updated version of February 2010. The council informed the complainant that the information was exempt from disclosure by virtue of section 41 (information provided in confidence) and section 43 (commercial interests) of the Act.
6. The complainant appealed on 7 August 2010 and on 27 August 2010 the council's internal review upheld its decision to withhold the information under sections 41 and 43 of the Act.

## The Investigation

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### Scope and chronology

7. The complainant wrote to the Commissioner on 8 September 2010 to complain about the way his request for information had been handled by the council.
8. On 4 October 2010 the Commissioner asked the council to provide him with a copy of the reports in order to ascertain whether they had been withheld appropriately.
9. On 29 October 2010 the council supplied the Commissioner with a copy of the information. It also applied a further exemption at section 36 (prejudice to effective conduct of public affairs) of the Act in order to withhold it.
10. Upon examination of the reports the Commissioner considered their content to be environmental information as defined in Regulation 2 of the Environmental Information Regulations (EIR). This was because they relate to plans and activities which have a direct impact on the use of land and landscape. Consequently, he asked the council on 5 November 2010 to reconsider the request under the EIR.
11. After reconsideration the council informed the Commissioner on 19 November 2010 that the information was subject to the exceptions at regulations 12(4)(e), 12(5)(e) and 12(5)(f) of the EIR. The full text of the regulations referred to in this notice is set out in the annex below.
12. On 2 December 2010 the Commissioner asked the council to provide an explanation and further supporting argument as to why it considered the exceptions to be appropriate. The Commissioner asked the council to respond within ten working days.
13. The council did not respond. The Commissioner repeated his request for the council's supporting arguments on 23 December 2010, 10 January 2011 and 19 January 2011.
14. The council subsequently provided a response on 28 January 2011. Its arguments are incorporated within the analysis below.

## Analysis

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### Exemptions

#### Regulation 12(4)(e)

15. The council relied on the exception at regulation 12(4)(e) in order to withhold the information. Regulation 12(4)(e) provides that information is exempt if the request involves the disclosure of internal communications.
16. The council proposed that the King Sturge report constituted an internal communication. The council's proposition rested on its view that the circumstances of the report were similar to the case concerning the appeal to the Information Tribunal in *Secretary of State for Transport v Information Commissioner – EA/2006/0052*. In that case a study carried out under the leadership of an independent expert was considered by the tribunal to be an internal communication. The council submitted that the similarity lay in the fact that during the compilation of the King Sturge report the authors had conducted interviews on site with council officers and senior councillors.
17. The Commissioner advised the council that communications between a public authority and an external contractor do not constitute internal communication except in very limited circumstances. He explained that in the case of the *Secretary of State for Transport v Information Commissioner* the communications of the independent expert were considered to be internal because he was embedded within the Department for Transport. He headed a team of civil servants there and had a designated office in the building. He also used business cards showing his contact details at the department. The status of his team was that of an independently led internal working group rather than that of an external body. The Commissioner advised the council that this situation was entirely different to the normal and "commonplace" contracting of external consultants by public authorities.
18. The council did not accept the Commissioner's view that there were limited circumstances where communications between a public authority and an external contractor constituted an internal communication. In support of its proposition the council quoted the tribunal's reference (in the Department for Transport case) to the independent expert having been invited into the 'thinking space' in which ministers and their advisers operated when policy operations were still under discussion. This scenario was considered by the council as being "identical" to that of the King Sturge report being circulated to

senior councillors and officers in Tunbridge Wells in order to aid discussion on policy.

19. The Commissioner does not accept the council's submission that the two situations are comparable. In quoting the tribunal's comment, the council omitted the tribunal's tandem observation that whilst the independent expert in that instance had been responsible for the study's recommendations, the study itself was run and managed by the department's own civil servants. This was not the case with the King Sturge report – senior councillors and officers did not run or manage its compilation. There was a clear demarcation between the council and the appointed contractor. The two situations are therefore not analogous.
20. The Commissioner is also mindful of the judgment of the Information Tribunal in *South Gloucestershire Council v ICO & Bovis Homes Ltd – EA/2009/0032*. This was that development appraisals prepared by external consultants are not internal communications.
21. The requirement under article 4(2) of the EU Directive 2003/4/EC from which the regulations derive is that the grounds for refusal shall be interpreted in a restrictive way. Accordingly and in light of his analysis above, the Commissioner's decision is that the information does not constitute an internal communication. He therefore finds that the exception at regulation 12(4)(e) is not engaged.
22. Because regulation 12(4)(e) is not engaged the Commissioner is not required to consider the public interest test in respect of the exception.

### **Regulation 12(5)(e)**

23. The council relied on the exception at regulation 12(5)(e) in order to withhold the information. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
24. The council submitted on 19 November 2010 that the document contained commercially confidential information about the council and external bodies and stated that its bargaining position in respect of various potential contract negotiations would be adversely affected by disclosure. However, it provided no evidence or argument to support its submission.

25. The Commissioner therefore wrote again to the council advising that in order for him to consider the application of regulation 12(5)(e) he required four criteria to be met:
- (i) the information has to be commercial or industrial in nature
  - (ii) the information has to be subject to a duty of confidence provided by law
  - (iii) the confidentiality has to be required to protect an economic interest
  - (iv) that economic interest and thereby its confidentiality has to be adversely affect by disclosure of the information.
26. The Commissioner asked the council to explain with reference to each of the criteria why it had concluded that the withheld information was exempt from disclosure under 12(5)(e). In his email he asked the council to ensure that its response clearly explained the basis upon which it considered that the information was covered by a law of confidence.
27. With reference to the council's response the Commissioner accepts that the information is commercial in nature. The report compares alternative land sites to that of the town hall complex against financial cost criteria. Each of the development options entail commercial transactions. However, the Commissioner must also establish if the information is subject to a duty of confidence which is provided by law. The council declared that it considered the information to be commercially confidential under common law, however, it did not demonstrate how any common law duty of confidence attaches to the information.
28. In order to meet the necessary criteria for a duty of confidence to apply it must be shown that the information was imparted in circumstances creating an obligation of confidence and also that the information has the necessary quality of confidence. The council failed to demonstrate that the information met either of these criteria.
29. The council did not provide any evidence to support its submission that the report is confidential despite opportunities provided by the Commissioner to do so. He therefore finds that the exception is not engaged.

30. Because regulation 12(5)(e) is not engaged the Commissioner is not required to consider the public interest test in respect of the exception.

### **Regulation 12(5)(f)**

31. The council relied on the exception at regulation 12(5)(f) to withhold information in the report supplied by third parties. Regulation 12(5)(f) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where:
- (i) the person was not under or could not be put under any legal obligation to supply that information to any public authority
  - (ii) the person supplying the information did not supply it in circumstances in which the public authority is entitled, apart from under the EIR, to disclose it
  - (iii) the person supplying the information has not consented to its disclosure.
32. Information supplied by third parties is contained in an appendix to the report. It comprises a summary of interviews seeking the opinions of external organisations that occupy the premises affected by the site's redevelopment.
33. The Commissioner considers that the first two limbs of the exception as detailed in paragraph 31 which are necessary for its engagement are satisfied. However, it is unclear from the council's response whether the third limb has been satisfied. Whilst the council stated that none of the external parties had consented to disclosure it provided the Commissioner with no evidence to confirm that any had objected to disclosure.
34. The council submitted that if the third party information was disclosed it would inhibit the council's ability to obtain the frank and honest views of stakeholders thereby lessening the information available to the council and impeding its decision making process. It maintained that disclosure would weaken the council's ability to negotiate with a developer and other third parties. The council provided no specific arguments or evidence to support this statement and did not link the alleged inhibition to an adverse affect on any of the third parties.
35. The purpose of the exception at 12(5)(f) is to protect the voluntary supply of information to public authorities. It rests on the principle that should information providers suffer as a result of supplying that information they will not be so willing to volunteer information in the future. The exception therefore requires there to be an adverse affect

to the interests of the information provider. The public authority's own interests are excluded from consideration when deciding whether the exception applies.

36. The council's submission only concerned the purported affect that disclosure would have on the authority. It failed to demonstrate that any third party interests would be adversely affected should the information be disclosed. The Commissioner therefore finds that the exception at 12(5)(f) is not engaged.
37. Because regulation 12(5)(f) is not engaged the Commissioner is not required to consider the public interest test in respect of the exception.

### **Regulation 13**

38. The Commissioner notes that one of the appendices to the report contains personal data in the form of names and job titles of some of the council's senior officers and elected members. Regulation 13(1) of the EIR provides an exception for information which is the personal data of an individual other than the applicant and where one of the conditions listed in regulations 13(2) or 13(3) of the EIR is satisfied. The Commissioner has subsequently considered whether the personal data contained in the appendix is subject to the exception at regulation 13(2)(a)(i) of the EIR. The council itself did not rely on the exception in order to withhold the information.
39. The exception at regulation 13(2)(a)(i) prevents release of information to the public if its disclosure contravenes any of the data protection principles of the Data Protection Act 1998 (DPA).
40. The first data protection principle requires that personal data is processed fairly and lawfully and that at least one of the conditions in schedule 2 of the DPA is met. Condition 6 of schedule 2 requires that the processing of personal data is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
41. The Commissioner differentiates between information concerning an individual's private and public life. He also takes into account the seniority of public officials when considering its disclosure. The Commissioner is satisfied that in this instance the information relates to the public lives of the individuals concerned and that they hold senior positions in the authority.

42. The Commissioner is supported in his differentiation between public and private lives by the Information Tribunal's decision in *House of Commons v Information Commissioner (EA/2006/0015 & EA/2006/0016)* which states, "*we find that when assessing the fair processing requirements under the DPA that the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer first and paramount. Their interests are still important but where data subjects carry out public functions...or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives.*"
43. In the Commissioner's view disclosure of the information would not cause any interference to the rights, freedoms & legitimate interests of the individuals cited in the appendix. He therefore considers disclosure of their names and job titles to be fair.
44. The Commissioner is also satisfied as to the lawfulness of the information's disclosure. Its release would not breach any contractual agreement, legislation or regulation and he has determined as detailed earlier in this notice that none of the information in the report is subject to any duty of confidence provided by law. He is consequently satisfied that disclosure of the names and job titles of the individuals concerned would not breach the first data protection principle.
45. The Commissioner has proceeded to consider the legitimate interests of those to whom the data would be disclosed. He considers that the public has a strong and legitimate interest in access to information concerning the views of their elected representatives and public officials. This is particularly so when those views have a direct bearing on the everyday lives of members of the public and the environment which they inhabit. It is particularly the case in this instance, where it is clear not least from the media, that a significant number of local citizens have expressed concern about the council's intentions regarding the town's cultural centre and town hall. With this in mind it is the Commissioner's view that the legitimate interests of those to whom the information would be disclosed (i.e. the general public) outweigh those that the data subjects themselves may hold. The Commissioner is therefore satisfied that condition 6(1) of schedule 2 of the DPA is met in this case.
46. He considers that disclosure of the names and job titles of the individuals cited in the appendix would not breach the first data protection principle and he therefore finds that regulation 13(2)(a)(i) of the EIR is not engaged.

## Procedural breaches

47. The council failed to provide the requested information to the complainant. In failing to do so the council breached regulation 5(1) of the EIR.
48. The council failed to provide the requested information within 20 working days of the date of request. In failing to do so the council breached regulation 5(2) of the EIR.
49. The council's refusal notice was issued later than 20 working days after receipt of the request. The council therefore breached regulation 14(2) of the EIR.
50. The council refused the applicant's request under the Act and not the EIR. It consequently breached regulation 14(3) by failing to specify in its refusal notice the EIR exceptions relied upon.

## The Decision

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51. The Commissioner's decision is that the council did not deal with the request for information in accordance with the EIR. It failed to comply with its obligations under regulation 5(1) which requires that environmental information shall be made available on request.

The council incorrectly applied the exceptions at regulations 12(4)(e), 12(5)(e) and 12(5)(f) in order to withhold the information.

The council failed to meet the requirements of regulation 5(2) by not disclosing the information within 20 working days of receipt of the request.

The council failed to comply with regulation 14(2) by not issuing its refusal notice within 20 working days of receiving the request.

The council failed to comply with regulation 14(3) by not citing to the complainant the exceptions under the EIR upon which it relied.

## Steps Required

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52. The Commissioner requires that the council shall disclose the requested information within 35 calendar days of the date of this decision notice.

## **Failure to comply**

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53. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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54. 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)

55. 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.

56. 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 15<sup>th</sup> day of March 2011**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Environmental Information Regulations 2004

**Regulation 2** states that:

(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;

(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.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

**Regulation 12** states 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.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(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.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person -

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

**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>(1)</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.

(4) In determining whether anything done before 24th 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.

(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 that 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 that Act.

**Regulation 14** states that:

(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.

(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.

(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.

## **Data Protection Act 1998**

### **Schedule 2 condition 6**

Conditions relevant for purposes of the First Principle: Processing of any personal data.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.