

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

Decision Notice

Date: 26 September 2011

Public Authority: London Borough of Hammersmith and Fulham
Address: Town Hall
King Street
Hammersmith
London
W6 9JU

Summary

The complainant submitted a request to the London Borough of Hammersmith and Fulham ('the Council') for information relating to trees on a particular site. During the course of the investigation, the Council disclosed some information with some redactions under the exceptions at regulations 12(3) and 12(5)(e). The complainant believed that this exception was applied incorrectly and that the Council held more information that fell within the scope of her request. The Commissioner has investigated and concluded that the Council incorrectly applied the exceptions at regulations 12(3) and 12(5)(e). The Commissioner is not satisfied that the Council has disclosed all of the information that it holds within the scope of the complainant's request. In addition, the Council has breached regulation 5(2) by failing to make information available within 20 working days, and regulation 11(4) by failing to communicate the outcome of its internal review to the complainant within the statutory time for compliance. The Commissioner requires the Council to disclose the withheld information to the complainant. The Council must take these steps within 35 calendar days.

The Commissioner's Role

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

2. The trees referred to in the complainant's request are located on a one acre site on Goldhawk Road, Hammersmith. This site lies within the Ravenscourt and Starch Green Conservation Area, and is currently owned by the Council. The site houses a former care home, which has been vacant since 2006, and a block of sheltered housing flats.
3. In October 2008, Places for People (PfP) was selected as the Council's preferred registered social landlord partner to purchase and develop the site. In December 2009, a planning application was considered and granted, subject to the signing of a section 106 agreement. Currently, the section 106 agreement remains outstanding and so planning permission has not been granted. The Council has informed the Commissioner that PfP are currently reviewing the scheme.
4. The complainant represents a local residents' association which has concerns about the design of the proposed development and, as is particularly relevant to this complaint, the conservation of a number of trees located on the site.

The Request

5. On 16 October 2009 the complainant wrote to the Council and requested the following information relating to trees on a site at 282-288 Goldhawk Road:
 1. "all internal notes regarding trees on this site from 2007 to date
 2. any assessments that the Council has made of these trees 2007 to date
 3. the background assessment made in 2007 that a certain number of trees should be retained"
6. The Council acknowledged this request on 19 October 2009, and provided a substantive response on 11 November 2009. This response stated that the information was exempt under section 41 (information provided in confidence) and section 43 (commercial interests) of the Act.

However, the Council disclosed the following documents in relation to each part of the request:

1. An email dated 15 October 2007 to the Council and its consultants which clarified the status of the trees on site and the need to protect certain trees during the development.
2. Documents that related to Supplementary Design Guidance and a draft Tree Preservation Order map.
7. On 19 November 2009, the complainant requested an internal review of this decision. The Council acknowledged this request on 20 November 2009, and informed the complainant that she would receive the outcome of this review by 17 December 2009. On 28 January 2010, the complainant contacted the Commissioner to complain about the lack of response to her request for an internal review.
8. After the intervention of the Commissioner, the Council provided the complainant with the outcome of its internal review on 3 March 2010. This stated that the request should have been considered under the EIR. The review found that all the information held by the Council in relation to the complainant's second and third requests had been disclosed, and that the information relevant to the complainant's first request was excepted from disclosure under regulation 12(4)(b). This provides an exception for requests that are manifestly unreasonable.
9. The Commissioner explained to the Council that it was likely he would find that the public interest in disclosure outweighed the interest in maintaining the exception at regulation 12(4)(b). As a result, the Council disclosed 22 emails to the complainant on 12 October 2010. Some information contained in the emails was redacted under the exception at regulation 12(5)(e). The names of some staff members were redacted under regulation 13.
10. During the course of the investigation the Commissioner also asked the Council to conduct further searches for information as he did not believe that the searches that it had conducted were adequate. The Council conducted these searches and as a result, disclosed seven additional emails to the complainant on 28 July 2011.

The Investigation

Scope of the case

11. On 10 November 2010 the complainant contacted the Commissioner to complain that she was dissatisfied by the Council's response to her request.
12. The complainant has confirmed that she is satisfied that the Council holds no more information relevant to her second and third requests. Specifically, the complainant asked the Commissioner to investigate whether the Council holds any more information that falls within the scope of her request, and whether the Council had redacted information correctly under regulations 12(5)(e) and 13.
13. During the course of the investigation, the Council supplied the Commissioner with unredacted copies of the information provided to the complainant. At this point, the Council also indicated that several of the emails disclosed to the complainant did not in fact fall into the scope of her request because they did not relate to the trees on the Goldhawk Road site. The Commissioner has reviewed these parts of the information and agrees that this is the case. It is unclear why the Council initially disclosed these emails to the complainant given that they do not fall into the scope of her request. However, the Commissioner consequently has to exclude this information from the scope of the investigation. The emails that do not fall into the scope of the request are dated:

16 October 2009, 29 July 2009, 20 August 2009

Chronology

14. On 12 November 2010 the Commissioner wrote to the Council to ask that it answered some queries about whether any further information was held, and the application of regulation 12(5)(e). The Council acknowledged this email on 17 November and responded on 15 December 2010.
15. The Commissioner and Council exchanged further correspondence about the way the Council had dealt with the request during February and May 2011.

Analysis

Substantive Procedural Matters

Regulation 2

16. The Commissioner has considered whether the information requested by the complainant is environmental in nature as defined by the EIR.
17. The Commissioner considers that the information requested falls within 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”. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The complainant requested notes made by the public authority about trees on particular piece of land. The Commissioner therefore considers the information requested by the complainant to be environmental information under regulation 2(1)(c), as it relates to measures that might affect the elements of the environment as set out in regulation 2(1)(a).

Exceptions

Presumption in favour of disclosure

18. Regulation 12(2) of the EIR requires the public authority to assume a presumption in favour of disclosure. Public authorities should therefore consider information from the initial point of view that it should be disclosed.

Regulation 12(5)(e)

19. The Council has redacted parts of the emails disclosed under the exception at regulation 12(5)(e). Regulation 12(5)(e) provides an exception to disclosure where this would “adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”. This allows commercial or industrial information which is held under either a statutory or a common law duty of confidentiality to remain confidential if that duty is required in order to protect the legitimate economic interests of any party.

20. The matters to be considered in Regulation 12(5)(e) are therefore:

- i) Is the information commercial or industrial in nature?
- ii) Is the information subject to a duty of confidence which is provided by law?
- iii) Is confidentiality required to protect a legitimate economic interest?
- iv) Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?

This four stage approach was adopted by the Information Tribunal in [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association](#) (EA/2010/0012). If the exception is engaged, the Commissioner will then go on to consider whether the public interest test favours maintaining the exception or disclosing the information. Like all exceptions under the EIR, the exception is subject to a public interest test under regulation 12(1)(b).

Is the information commercial or industrial in nature?

21. The exception in regulation 12(5)(e) only protects the confidentiality of commercial or industrial information. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity carried out by either the public authority or a third party. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit.
22. The Commissioner's view is that "industrial" in this context can be taken to refer to any business activity or commercial enterprise, and is unlikely to expand the scope of the exception to encompass non-commercial information.
23. In this case, the Commissioner accepts that the withheld information is commercial in nature, because it relates to the Council's procurement of work to be undertaken on the site, and refers to the costs and pricings given by for this work by a third party contractor.

Is the information subject to confidentiality protected by law?

24. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under contractual obligation, statute, or the common law of confidence.

Contractual obligations of confidence

25. For the purposes of the exception, the Commissioner will accept obligations of confidence imposed by contract. If a public authority can

establish that there is a binding confidentiality clause covering the requested information, there is no need to consider the common law test of confidence. In this case, the Council has argued nor provided any evidence to demonstrate that such a confidentiality clause exists.

Statute

26. Although regulation 5(6) disapplies any statutory bars on disclosure for the purposes of the EIR, a statutory bar will still mean that confidentiality is provided by law for the purposes of the exception. However, the other limbs of the exception – and the public interest test – will still need to be satisfied. In this case, the Commissioner finds that there is no evidence that any confidentiality was provided by statute.

Common law of confidence

27. When considering whether the common law of confidence applies, the Commissioner's approach will be similar in some respects to the test under section 41 of the Act, although there are some important differences. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
- Does the information have the necessary quality of confidence?
 - Was the information shared in circumstances importing an obligation of confidence?
28. However, in contrast to the Commissioner's approach under section 41 of FOIA, there is no need to consider here whether there would be an unauthorised disclosure to the detriment of the confider. This is because there is no need to establish an actionable breach of confidence for the purposes of this exception. This approach is also supported by the fact that the element of detriment (or adverse effect) will need to be considered.

Does the information have the necessary quality of confidence?

29. Information will have the necessary quality of confidence if it is not trivial and not already in the public domain.

Is the requested information in the public domain?

30. Information will not have the necessary quality of confidence if it is already in the public domain. In [Coco v A.N.Clark \(Engineers\) Ltd](#)

[1969], Megarry J found that “however confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge”. The Information Tribunal in [S v the Information Commissioner and the General Register Office EA/2006/0030](#) also concurred that information in the public domain loses the quality of confidentiality.

31. In this case, the Commissioner notes from a search of the Council’s website that the content of the first three paragraphs of the email of 8 May is already publicly available in minutes of meetings and online information pages. The Council accepts that this is the case. This information consequently lacks the requisite nature of confidentiality, and the exception is not engaged.
32. There is no evidence to suggest that the remainder of the information redacted under the exception is already in the public domain. It comprises of emails sent within the Council regarding the site. On the balance of probabilities the Commissioner concludes that this information is not in the public domain.

Is the information trivial?

33. In this case the Commissioner believes that the Council’s discussions and notes about the work that might take place on the site would be considered to be important to the council, the contractor PfP, and residents of the area. The Commissioner has therefore concluded that the requested information is not trivial.
34. Consequently, the Commissioner concludes that with the exception of the first three paragraphs of the email of 8 May 2009, the information has the necessary quality of confidence.

Was the information shared in circumstances importing an obligation of confidence?

35. The obligation of confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any standard practice regarding the status of information. A useful test is likely to be to consider whether a reasonable person would have considered that the information had been shared in confidence.
36. Whilst there is no requirement under regulation 12(5)(e) for information to have been obtained from another person, the Commissioner’s view is that a duty of confidence under common law is owed by one party to another. This means that the party in receipt of

the confidential information cannot disclose it without the permission of the other party as doing so would breach a duty of confidence it owes to the confider of the information.

37. The requested information constitutes internal emails within the Council, although some of the content was originally provided by PfP.
38. The Council has provided the Commissioner with no specific arguments to demonstrate that the information was shared in circumstances importing an obligation of confidence, despite being invited to do so. The Commissioner also notes that there is no direct reference to the information being confidential in the emails.
39. As the Council has failed to demonstrate that this information was provided in confidence, the Commissioner is not satisfied that the exception at regulation 12(5)(e) was applied correctly.
40. As the Commissioner has found that the Council has not demonstrated that the exception is engaged, he has not gone on to consider the other factors set out in paragraph 16. In any case, the Council did not provide any specific arguments to demonstrate that factors (iii) and (iv) applied. As the exception is not engaged, the Commissioner has also not gone on to consider the public interest test. The Council advised the Commissioner that it had no record of the factors it had considered in determining that the public interest lay in maintaining the exception.
41. The Commissioner therefore requires the Council to disclose the information redacted under regulation 12(5)(e) to the complainant.

Regulation 13

42. The Council has withheld some of the requested information under regulation 13. This states that:

‘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.’

43. The elements of regulation 13 relevant to this request are as follows:

‘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'

44. In analysing the application of regulation 13 the Commissioner has considered:

a) whether the information in question was personal data; and

b) whether disclosure of the personal data under the regulations would contravene the first data protection principle.

Is the information personal data?

45. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:

- o from that data,
- o 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.

46. The withheld information in this case is the names of members of Council staff, and their telephone extension numbers. These include the sender and recipient of emails, and members of staff who are mentioned in the emails. The emails also include the names of some members of the public. The Commissioner is satisfied that a living individual can be identified by their name and therefore accepts that the information in the context of this request is personal data as defined by the DPA. There is also one redaction in the email of 3 September 2009 that relates to the personal circumstances of a member of staff.

47. The complainant has only complained about the Council's decision to obscure the identities of its employees, rather than redaction of names of members of the public or information about staff's personal circumstances. The Commissioner has therefore only considered whether the Council was correct to redact the names of members of staff.

Would disclosure contravene any of the principles of the DPA?

48. The DPA has eight data protection principles which govern the processing of personal data. Regulation 13(2)(a)(i) of the EIR exempts the personal data of individuals who are not the requestor of the information where its disclosure would breach any of these principles.

49. The Commissioner considers that the data protection principle most likely to be breached by a disclosure of this information is the first data protection principle. This has two components:
1. Personal data shall be processed fairly and lawfully; and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Fairness

50. In determining whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered:
- o Whether the information relates to the individuals' public roles
 - o The individuals' reasonable expectations of what would happen to their personal data in these circumstances
 - o The seniority of the individuals
 - o Whether there is a likelihood of unwarranted damage or distress to the individuals; and
 - o Legitimate interests of relevant stakeholders in knowing the names of the individuals that sent the emails

The Commissioner's approach to the disclosure of names is set out in his [guidance](#) on the matter.

51. The Commissioner first notes that whilst the Council has redacted the names of members of staff, it has not redacted job titles from the "signatures" of sent emails. The Commissioner found that when a simple search was conducted for each job title on the Council's website, the names of some of the individuals who held these posts were displayed.
52. For example, the Council redacted the name of the officer who sent a email of 16 October 2009, but has not redacted their job title of 'Area Team Leader (North)'. When a search was conducted for this job title on the Council's website, the first result displayed linked to a page where the full name of the Area Team Leader (North) was listed. This was the case for the following job titles: Area Team Leader (North), the Principal Planning Officer, the Head of Development Manager, the Principal Enabling Officer, the Head of Urban Design and Conservation, and the Principal Arboriculturist.

53. The Commissioner finds that it is not unfair to disclose the names of these members of staff to the requestor, because the Council has already placed this information in the public domain on its website. The complainant also notes that the fact that the Council has not redacted job titles means that several individuals are easily identifiable.
54. The names of the individuals who are employed in the following roles have also been redacted: Planning Officer, Senior Planning Officer, Divisional Manager Support Services. However the names of these individuals are not displayed on the Council's website. The Commissioner has therefore gone on to consider whether it would be fair to disclose the names of these members of staff.
55. Generally, individuals have an expectation that their information would be processed in a particular way, either because it would be reasonably obvious that that would be the case, or because the data processor (in this case the council) told them that their information would be processed in a certain way when it was obtained. The Council states that it has a policy of "protecting" the names of members of its staff below Assistant Director level. It is unclear to what extent the Council makes its staff aware of this policy, and it has not provided any evidence on this point. As shown by the fact that some names are publicised on the Council's website, it is clear that the policy is not applied uniformly. The Commissioner is therefore unable to conclude that staff would have an expectation that their names would never be disclosed. As detailed in the [Commissioner's guidance](#) on this matter, a public authority should not give a blanket promise of anonymity, given that the response to each request for information will need to be made on its own merits.
56. The Commissioner notes that these individuals are not very senior members of staff. Generally, the Commissioner accepts the principle that more senior members of staff should expect greater scrutiny of their actions and work. However, the Commissioner notes that the information in the emails relates exclusively to the individuals' work and their public role. While the Commissioner appreciates that disclosure of any personal data could potentially lead to some level of distress, he has been unable to identify any specific reasons why disclosure would cause significant distress or damage to the individuals in this case. Balanced against this is a legitimate public interest in disclosure of information which would promote accountability and transparency, particularly in relation to decisions about whether to maintain or dispose of trees on this site. Given that the Council has not demonstrated that the individuals had any definite expectation that their names would not be disclosed, and has raised not any arguments that disclosure would cause detriment or distress, the Commissioner's

view is that on balance, it would not be unfair to disclose the requested information.

Schedule 2, Condition 6

57. In order for disclosure to be in accordance with the first data protection principle, one of the conditions in schedule 2 of the DPA must be satisfied. In this case the Commissioner is satisfied that condition 6 is relevant. Schedule 2, paragraph 6(1) of the Data Protection Act provides a condition for processing personal data where:

“The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a 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.”

This establishes a three part test which must be satisfied:

- there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public and,
 - even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms & legitimate interests of the data subject
58. The legitimate interests of the public are noted in paragraph 51 above, primarily disclosure would promote accountability and transparency regarding the decision making process about the trees on the site. Having established that there is a legitimate interest in disclosure, the Commissioner has gone on to consider whether disclosure of the withheld information is necessary to meet the legitimate interests identified above.
59. The Commissioner notes that the Council has disclosed the job titles of the individuals that sent the emails, and he accepts that this disclosure does go some way to promote accountability in the way decisions relating to the trees were managed. The Commissioner believes that disclosure of the withheld information would provide some additional accountability and is necessary to address the legitimate interests of the public. He also notes that the names of other individuals whose names were disclosed were identifiable from their role. As such, this additional disclosure of the names of colleagues at the same or similar level would not be any more intrusive than the disclosures already made by the Council. The Commissioner therefore considers that

disclosure of the information requested is necessary to satisfy the legitimate interests of the public.

60. The Commissioner has considered the collective weight of the necessary legitimate interests and whether disclosure would have caused unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject at the time that the request was received. Given the fact that the information relates to the individual's public life (i.e. their role as a public employee), the Commissioner does not consider that any significant prejudice would arise for the individual concerned. On balance, the Commissioner accepts that disclosure of the information requested would be necessary for a legitimate interest of the public and considers that this outweighs any unwarranted prejudice that might be caused to the individuals' own rights, freedoms and legitimate interests. The Commissioner has therefore concluded that condition 6 of Schedule 2 of the DPA is met in this case.

Lawfulness

61. The Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In the current case he has seen no evidence that any of these breaches would occur, and as a consequence he has concluded that disclosure would not be unlawful.
62. For the above reasons, the Commissioner is satisfied that disclosure of the withheld information would be neither unfair nor unlawful and would not breach the first data protection principle. As such, the Commissioner is not satisfied that the information requested was correctly withheld by the Council under regulation 13 of the EIR.

Procedural requirements

Regulation 5

Regulation 5(1)

63. Regulation 5(1) states that "...a public authority that holds environmental information must make it available on request".
64. The Council has explained to the Commissioner that it raised a work package request with its IT support service for a search of all emails on the Council's email archive service, and internal notes on shared drives. The search criteria was as follows:

"Period: 2007 to 16th Oct '09

Scope: (i) emails with key words (email title and / or content) to from [eight named members of staff] which include: - 282, 288, 282-288 Goldhawk Road, Elizabeth Finn House, PfP scheme, Places for People, Ashchurch Place, Trees

(ii) internal notes held by the named officers which make ref to trees at 282 – 288 Goldhawk Road or Ashchurch Place or Elizabeth Finn House..."

65. This work package returned over 16,000 items. Over half of these were emails from or to the two arboricultural officers detailed amongst the eight members of staff. The Council therefore decided to exclude these two individuals from the search, on the basis that a large proportion of their emails would contain the word "tree" due to the nature of their roles. The Council also combined search terms for the remaining six officers' emails and electronic files as follows:

- (a) '282 Goldhawk Road' + 'Trees'
- (b) '288 Goldhawk Road' + 'Trees'
- (c) 'Elizabeth Finn House' + 'Trees'
- (d) 'PfP' + 'Trees'
- (e) 'Ashchurch Place' + 'Trees'

66. This clarified search returned 802 items and of these, the Council decided that 22 emails fell into the scope of the complainant's request. The Commissioner has asked that the Council explains why the majority of the emails returned by this search did not fall within the scope of the request, particularly given that the Council originally withheld the information under the exception at regulation 12(4)(b). The Council has explained that a significant number of these emails were received from or addressed to individuals outside of the organisation. The complainant's request was for *internal* notes, and so communications with outside parties were excluded. There were also a number of 'chain' emails, where each response to an original message was returned as a separate search result. The Council excluded these messages and only disclosed the final email of the 'chain' which included the previous correspondence. The Council also explains that some emails were included in the scope because they included one of the search terms set out in (a)-(e) above along with the word 'trees' in the email footer. However, this appeared in the email footer in the context of a standard message about limiting printing in order to save

trees. However the content of the emails did not relate to trees on the site. These emails were consequently also excluded.

67. The Commissioner understands that the use of inverted commas around each search term means that only emails that include an exact match for the phrases used will be returned as a result of the search. So, if a search was conducted using the terms set out in search (a) above, only emails that contained the exact phrases "282 Goldhawk Road" and "trees" would be returned. The Council has confirmed that this search looked for matches in the subject line, body or attachments to an email. So, an email with "282 Goldhawk Road" as its subject, and "trees" within the body of the text would have been returned.
68. Originally, the Council explained that it believed that relevant emails sent by or to either of the two arboricultural officers would be revealed by the search of other officers' emails and files. The Commissioner however noted that any emails were sent *between* these two officers concerning the site, they would not have been returned. Consequently, during the course of the investigation, the Commissioner asked that the Council conduct an additional search of the arboricultural officer's emails using the same search terms as set out in paragraph 61. The Council did this and as a result, disclosed seven additional emails to the complainant.
69. The Council has confirmed that the officers detailed are the only members of staff who have worked on the Goldhawk Road project. The Commissioner considers that the Council has now conducted thorough and appropriate searches for the requested information. On the balance of probabilities he accepts that the Council has disclosed all of the information that it holds within the scope of the request.

Regulation 5(2)

70. Regulation 5(2) provides that "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".
71. The complainant's original request was made on 16 October 2009. The Council did not disclose any information within the scope of her request until 12 October 2010. Some information was not disclosed until 28 July 2011. Consequently the Commissioner finds a breach of regulation 5(2).

Regulation 11

72. Regulation 11(3) provides that a public authority must reconsider its response to a request for information upon receiving representations from an applicant. Regulation 11(4) provides that the outcome of a decision under regulation 11(3) must be communicated to the applicant as soon as possible and within forty working days after representations were received.
73. The complainant submitted her request for an internal review on 19 November 2009. The outcome of this review was not provided until 3 March 2010. The Council has consequently breached regulation 11(4).

The Decision

74. The Commissioner's decision is that London Borough of Hammersmith and Fulham did not deal with the request for information in accordance with the EIR. The Commissioner has found that:
- The Council was incorrect to withhold information under regulation 12(5)(e)
 - The Council was incorrect to withhold information under regulation 13
 - The Council breached regulation 5(2) by failing to make the requested information available within 20 working days
 - The Council breached regulation 11(4) by failing to provide its internal review within the statutory time for compliance

Steps Required

75. The Commissioner requires the Council to make the information withheld under regulations 12(5)(e) and 13 available to the complainant.
76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

77. 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,
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 sent.

Dated the 26th day of September 2011

Signed

**Andrew White
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SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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;

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 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 12 - Exceptions to the duty to disclose environmental information

Regulation 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.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(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

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

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.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—
“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data; “personal data” means data which relate to a living individual who can be identified —

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data

Schedule 1

The first data protection principle

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met

Schedule 2

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
- (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.