

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

Decision Notice

Date: 14 February 2011

Public Authority: Babergh District Council
Address: Council Offices
Corks Lane
Ipswich
Suffolk
IP7 6SJ

Summary

The complainant made a number of requests to the council for information relating to an Airfield in Sussex. The council stated that it could not find some of the information requested, and withheld other information on the basis that Regulations 12(4)(e) (internal communications) and 12(5)(f) (the interests of the person providing information) applied.

The Commissioner's decision is that some information is exempt under Regulation 12(3) (personal data). He has decided that some information falls within the exception in Regulation 12(4)(e) however the majority of it does not. Where Regulation 12(4)(e) does apply his decision is that the public interest in maintaining the exception does not outweigh the public interest in disclosing the information. Further to this however he has decided that 2 documents should be exempt under Regulation 12(5)(b) as they are subject to legal professional privilege.

Given his decision that Regulation 12(3) applies he has not considered the application of Regulation 12(5)(f) further.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation

18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

2. The request refers to a privately owned airport in Suffolk. The airport is subject to flying restrictions preventing flights during certain days or hours from 2 of its runways. These restrictions are enforced by the council.
3. A number of years ago the landowner made an application for a Certificate of Lawful Usage or Development (a CLEUD application). This sought to establish that there was a third runway which had been used at the site for a period of over 10 years without restrictions being applied. The CLEUD, if awarded, would have legitimised that usage and prevented flying restrictions being applied to its use, as had been applied to the other 2 runways. That application was subsequently refused by the council.
4. The complainant belongs to a group of pilots who operate aircraft from the airfield and who are seeking evidence that the initial decision was incorrect.

The Request

5. On 12 August 09 the complainant requested from the council:

"I know that an internal investigation is currently underway in respect of the conduct of Babergh DC in relation to Nayland Airfield at Hill Farm, Wiston. In the past three years, information has been supplied by BDC for both a Public Inquiry and a High Court action.

Within the bundles was a document sworn by [complainant A]. He refers to a number of complaints he made during 1994 to 1998. This is just a digest. I want copies of the actual letters, emails or telephone conversation file notes for these actual allegations. In particular, I want to see them for allegations of inappropriate use of the Airfield for: - 4/7/1995, 8/7/1995, 22/7/1995 and 4/8/1995. The relevant planning permission was

granted by the Secretary of State in 1994 for reference B/432/85. If allegations from other individuals for these dates are on file or referred to, I want to see these too.

Also, a Requisition for Information, ref. PL3/3/53/7 was issued to the landowner, [name of third party]. I want a copy of that Requisition. Electronic copies are acceptable via my email address."

6. The council replied on the 11 September 2009. It apologised for the delay in responding but stated that it was having problems locating the file. On the same day the complainant wrote back providing a likely location for the file.
7. On 16 September 2009 the complainant wrote to the council. He stated that he was aware of other freedom of information complaints where the council was stating that it could not find the same file. He reminded the council about a CLEUD file which it stated had gone missing prior to an inquiry on the same matter in 2006. He stated that the council had at that time stated that it had been unable to find a copy of the file prior to the inquiry, however he noted that the council 'managed' to find it for the actual inquiry itself. He stated that if that was now available he also wanted to review that. This file is entitled file B/98/00528/CEU.
8. On 18 September 2009 the council wrote back to the complainant. It stated that it had found a copy of the planning file but that it had still not been able to locate a copy of the legal file. It added that it was now checking whether there was personal data in the planning file.
9. On the same date the complainant wrote back stating that the crucial file that he required a copy of was the enforcement file dealing with allegations of breach of a planning permission.
10. On 30 September 2009 the complainant wrote to the council again stating:

"In respect of the 'missing' files I offer you one last piece of assistance. The deemed planning permission, under which the complaints I seek were made by [name of third party], is B/85/0432. I record for your benefit, that a file note pertaining to the original complaint investigation by [name of council officer] dated 1984, which led to the above-mentioned application, turned up easily enough for the 2006 Public Inquiry. Perhaps you should be looking at the file that came from. Other documents accompanying the Requisition for Information I seek were readily

available for the High Court action of December 2008. I just do not believe they are lost."

11. On 1 October 2009 the council responded to the complainant. It provided:
 - a copy of the reply from the requisition for information,
 - stated that it did not hold specific complaints for the dates which the complainant had stated,
 - stated that the file in respect of the Certificate of Lawful usage (the 'CLEUD file') contained personal data of third parties, information received in confidence and information which was internal communications. It therefore applied section 40 (personal data) and 41 (information received in confidence) of the Act. It also applied Regulation 12 (4)(e) (internal communications). It also stated that as the information was provided by third parties, voluntarily and in confidence the regulation 12(5)(f) applied.
12. The complainant responded on 4 October 2009. He stated that the requisition form which had been provided was not the document he had asked for but the reply to the requisition form. He had asked for a copy of the document which had been sent to the landowner, not the reply. He also stated that he was astonished that the original witness statements were no longer held by the council given that they were witness statements to a breach of planning conditions.

"The Council used an unattested digest of allegations in its Court Bundle for the Injunction Hearings in 2007/8. I can only assume you had more substance than that at that time, so why is it not available to me now? I want to know what the exact allegations are."
13. He also argued that the witness statements were made with the knowledge that those statements would be made public:

"The file contains all the submissions made by the public in response to the normal public consultation for this type of application. At that time it was available for public scrutiny."
14. As regards the CLEUD file he said that he was aware of other authorities where council decisions on CLEUD's were made in public and questioned why the council felt that this might be considered to be exempt.

15. On 5 October 2009 the complainant wrote again and asked the council to review its decision. He asked it to provide its response by 12 October 2009.
16. The council responded on 8 October 2009 stating that it could not answer the review within the complainant's deadline but would try to respond by 19 October 2009.
17. The complainant wrote stating that he was not happy with that response as some of the information had been asked for over a month before. For some information he did accept the council's stated date however.
18. On 19 October 2009 the council wrote to the complainant stating that as the request involved some complexity it was going to take the entire time available to it under the Regulations to ensure that the response it provided was correct.
19. The complainant then made his complaint to the Commissioner. After correspondence with the Commissioner regarding the lack of response to the review the council provided its response to the complainant on 26 January 2010.
20. The review stated that:
 - a) The council does not hold a copy of the requisition form. It only holds the front page, which it had already sent to the complainant. Subsequent correspondence with the complainant sought to clarify what documentation he was expecting to receive in respect of the Requisition for Information as he was not satisfied with the Council's answer. The Council therefore found that it had acted appropriately in respect of this request."
 - b) It said as regards the complaints which the council had received from the complainant A: "The Council does not hold copies of the allegations in relation to the dates of 4th July, 8th July, 22nd July and 4th August 1995 other than as referred to in the statement. The Council therefore cannot provide you with copies."
 - c) It also stated that, having looked at the CLEUD application files it was satisfied that the application had been made available to the public when it was first submitted. A copy was therefore disclosed to the complainant. However the council maintained that the remainder of the file should be exempt for the reasons provided in the initial refusal notice.

21. On 27 January 2010 the complainant wrote the council stating that he was not happy with its response.

The Investigation

Chronology

22. Following his previous correspondence relating to the lack of internal review, on 15 March 2010 the Commissioner wrote the council and stated that he understood that the council's position was as follows:
- 1) Complaints made by (Mr A) between 1994 and 1998 and by Mr A and others on specific dates in 1995.
 - The Council holds some relevant information but this is withheld under the exception at Regulation 12(5)(f).
 - In reaching the conclusion that the public interest lies with maintaining the exception, the Council has considered reports of the intimidation of people who have made complaints about the use of the Airfield.
 - 2) A copy of the Requisition for Information sent to the landowner
 - A blank copy of the requisition is not held. This might have been contained in the legal file PL/3/4/53/2/A, which was mislaid some years ago. Efforts to trace the file have been unsuccessful.
 - The Council has searched all relevant files and concludes that it does not hold this information. It provided further explanation as to how it had searched for the information and where it believed it might have been lost.
 - 3) Access to the file B/98/00528/CEU
 - This file is held by the Council but is withheld from disclosure under the exceptions at regulations 12(4)(e) and 12(5)(f).

Scope of the case

23. The Commissioner must therefore consider whether the following information was appropriately withheld by the authority;
- Complaints made by (Mr A) between 1994 and 1998 and by Mr A and others on specific dates in 1995
 - Whether a blank copy of the requisition for information form which was sent to the landowner is held.
 - A copy of file B/98/00528/CEU

Analysis

Procedural Requirements

24. The Commissioner notes that the request for information was sent to the authority by the complainant on 12 August 2009. A refusal notice was not issued until 1 October 2009. This is longer than the twenty working day deadline for responding to requests imposed by the combined provisions of Regulation 5(2). Accordingly, the Commissioner notes that the public authority breached the requirements of Regulation 5(2).
25. The Commissioner notes that the councils response to his request that the decision be reconsidered was on 26 January 2010. This response falls outside of the period of 40 working days provided under the regulations for carrying out a review of a request for environmental information. The council therefore breached regulation 11(4) in failing to respond within the statutory deadline for response.

Is the Information Environmental Information?

26. The Commissioner notes that the council sought to use both the Regulations and the Freedom of Information Act to withhold information from the complainant. The Commissioner's decision is that the entirety of the information is environmental information and that the council should have considered the information under the Regulations.
27. Regulation 2(1)(c) provides that –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements’

28. The factors referred to include -

(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);

29. The Commissioner is satisfied that the information in question is environmental information on an activity which affects the air and the land around that site, together with factors such as noise.

30. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

Information not held

31. The Commissioner notes that the council has claimed that it has been unable to find some of the information requested by the complainant. It states that it has not been able to find a copy of the blank requisition form provided to the applicant for the CLEUD, and that it has also been unable to establish the whereabouts of the enforcement file which it thought might include some of the complaints of complainant A which he had requested .

32. The Commissioner wrote to the council asking it to provide further information regarding the searches it had carried out in order to ascertain whether it holds the information or not.

33. The council explained that a number of files relating to the airfield had previously been sent to a solicitor at the county council due to short staffing. He in turn had passed 4 boxes of files to external legal advisers to provide a report and advice on the CLEUD application. The files had been returned to the council however it states that one file appears to have been lost during this process. It added that much of the information from that file was however duplicated on another file (the 'b' file). It appears however that some of the documents requested by the complainant were not duplicated.

The blank requisition form

34. As regards the blank requisition form it states that there was potentially a covering letter which was issued with it however it has been unable to find a copy of that and that it suspects that it likely to be held on the missing file.
35. It added that it has searched through all of the other relevant files for this information. It added that its searches had identified 19 planning and legal files which were relevant and it has therefore searched through all of these files for information.
36. It confirmed that the information would not have been deleted.
37. It confirmed that it follows the records management retention system for local authorities guide produced by the Records Management Society of Great Britain.
38. Given the above the Commissioner is satisfied that on a balance of probabilities the information is not held.

Complaints from Mr A

39. The Commissioner notes that the council stated that it did not hold information relating to complaints from complainant A for the dates which are mentioned. Again, based on the submissions and the description of events provided by the council the Commissioner is satisfied that, on a balance of probabilities, the council does not hold the information. Other complaints which the council does hold were provided to the Commissioner to consider and his decision is as outlined in his consideration of Regulation 12(3) below.

Exemptions

Regulation 12(3)

40. The Commissioner is the regulator of both the Data Protection Act (DPA) and the Freedom of Information Act. The rights of an individual under DPA, which include the right of access to personal information about themselves, are not compromised by the provisions of the Act. Section 40 of the Act provides an exemption relating to personal information in various ways. In *Bowbrick v Information Commissioner* (EA/2005/2006) the Information Tribunal confirmed that the Commissioner can use his discretion to look at section 40 when considering cases under the Act.
41. This case refers to environmental information and must therefore be considered under the Regulations rather than the Act. The Commissioner considers however that the same principle must apply.
42. Regulation 12(3) exempts personal data from disclosure under the Regulations in some circumstances. Although the council did not claim it, the Commissioner has decided, as the regulator of the Data Protection Act, to use his discretion to consider whether regulation 12(3) applies to the requested information.
43. Regulation 12(3) refers the right of disclosure to the factors described in Regulation 13. 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').
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. Personal data is defined in section 1 of DPA as data
 - “which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual”.

46. The Commissioner notes that some of the withheld information consists of letters written by individuals submitting submissions to the council in response to the airport owners CLEUD application.
47. The Commissioner is satisfied that the individuals can be identified from the letters. He is also satisfied that anonymising the information by removing the individuals' names and addresses would not be possible in this instance because the letters refer to particular areas which would identify the individuals' property, and often to the parties history at the site that they live in. As the airport is in a low populated rural area it would be fairly easy to ascertain the property, and the individuals who had written those letters. The Commissioner therefore accepts that the information is personal data as defined by the DPA.

Would disclosure breach any of the Data Protection Principles

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 the information in this case is the first data protection principle.

The First Data Protection Principle

50. The first data protection principle requires that personal information is processed "fairly" and "lawfully", and that one of the conditions in schedule 2 of the DPA applies. He has firstly considered whether a disclosure of the information would be fair for the purposes of the EIR.

Would disclosure be "fair"

51. The fairness requirement means that generally, (but not always) individuals should 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 (i.e. in this case the council) told the individual that their information would be processed in that way at the time that the information was obtained. Alternatively another reason will apply under the circumstances which will make that disclosure fair, such as an overwhelming public interest in the information being disclosed. The Commissioner has therefore considered the fairness aspect of the personal data which falls within the scope of the request.

52. The Commissioner has firstly considered submissions from third parties which are retained in the CLEUD file. The complaints from Mr A which are not covered within the CLEUD application are dealt with separately below.

The CLEUD File

Planning objections versus planning breaches and complaints

53. The Commissioner considers that if a person informs a public authority about their concerns about a potential breach of planning regulations they would not normally expect their identity to be disclosed into the public domain.
54. On the counter side however, the Commissioner notes that when a formal planning application has been made there is a general expectation that details of any objectors are made available to the public. This is because a disclosure occurs generally in such circumstances. This enables the planning applicant to discuss how to resolve issues that have arisen with the individual raising objections and potentially to reach agreement on the issue.
55. CLEUD's are not applications for planning permission. Neither do they specifically relate to planning enforcement matters. A CLEUD application allows an individual to make representations that he has used a piece of land for an extended period of time in a particular way, and that this use has not been questioned or enforced against previously. If that usage can be proven as matter of fact for a set period of time then the council provides a CLEUD evidencing that use of the land, and restrictions cannot subsequently be placed against that use by a planning authority. The applicant will therefore submit an application for a CLEUD and provide evidence to prove, as a matter of fact, that the land has been used in a specific way for a specified period of time.
56. The Commissioner understands that although there is no statutory requirement on Public Authorities to advertise the receipt of a CLEUD application, in practice they often inform interested parties about the receipt of the application. The Commissioner further understands that members of the public are not entitled to raise formal objections to CLEUD applications. The council's considerations are limited to identifying the facts of the case rather than adjudicating simply on the use itself or considering planning objections to it.
57. However if members of the public believe that the submissions within the application are not correct they make their own submissions

claiming that the CLEUD application is not factually correct. For instance an authority may receive arguments that the land subject to the application has not been used in a particular way for the relevant period of time.

58. The issue in this case is somewhat confused given the history of the site. There were already flying restrictions from the airfield relating to two runways which were in use from the field, however the CLEUD application submitted that there was a third runway which had been in use for a period of over 10 years bordering the other two runways. The landowner argued that as restrictions had not specifically been applied to this runway, and as it had been in use for over 10 years this was an established use. This would mean that the council would be unable to enforce or introduce restrictions on the use of this runway, and the airport was therefore free to continue using it free from the restrictions applicable to the other 2 runways. Hence the CLEUD file includes representations as to the existence and usage of a third runway.
59. The Commissioner considers that the letters held on the CLEUD file in this case fall somewhere between planning application objections and complaints about breaches of planning conditions. However he considers that the nature of the information held within the documents on this file, together with the history of the site and the enforcement measures previously laid against it mean that the letters should be treated as being more akin to formal complaints about breaches of planning conditions than to planning objections.
60. The Commissioner considers that submissions are not generally "objections". Some of the statements simply comment on their view of the application; stating that they have been aware of, or have not been aware of flights taking off or landing on a third runway. Others are however statements disagreeing with the contentions of the applicant for the CLEUD – in effect alleging that the applicant is in some way mistaken in his application. Such accusations may be taken far more personally than mere objections for planning reasons in the same way that complaints about breaches of planning conditions may be.
61. The Commissioner believes that there are different considerations when considering 'protected informants' who have complained that land has not been used in accordance with planning restrictions. 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 such issues to be informed upon and

investigated. The Commissioner considers that there is no expectation that the name of such individuals would be disclosed to the public. If the identity of complainants and the nature of their complaints were routinely to be provided in response to requests the risk would be that individuals would decide not to provide such information in the future, thereby preventing valuable sources of information for councils. In addition, in particularly contentious cases wider disclosures might cause friction within the community. The Commissioner notes that the council states in this case that there have previously been allegations of intimidation made against some supporters of the airfield during previous regulatory and enforcement events in this history of this site.

62. The Commissioner notes that the complaints within this file were made some time ago. The application itself was made in 1998, however a decision was not made on the application until March 2003. The CLEUD applications were turned down and have not been appealed. A further CLEUD was made and refused in 2004. The representations within this information were made to the council at the time of the first CLEUD application. They were therefore made in 1998 or thereabouts.
63. The Commissioner must consider, in light of the above, whether the individuals would have an expectation, or whether it would be obvious that the information would be disclosed to the world via an FOI request some years after the conclusion of the application. He also has to bear in mind that the matter is still very contentious within the area, and that there is still the possibility of further action being taken in respect of the airfield by either its owners or by the council.
64. The Commissioner notes that there are two types or representations within the CLEUD File:
 1. Representations made by interested parties providing evidence and affidavits supporting the CLEUD, i.e. that the runway had been in use for over 10 years.
 2. Representations and responses to the CLEUD application from other interested parties, providing their view as to whether a third runway had not been in use for that period of time. These submissions often include previous complaints made by representatives for periods around 1988 as part of their submission.
65. The Commissioner considers that the factors and circumstances surrounding these opposing parties is different, one party being in support of the CLEUD, the other opposed to it.

Parties opposed to the CLEUD

66. The Commissioner considers that the fact the council has alleged there has previously been intimidation by third parties of complainants who have made representations against the CLEUD application provides further evidence of the potential unfairness which disclosure would bring.
67. He also considers this to be evidence that, when making their submissions, the individuals would not have had an expectation that their submissions would subsequently be disclosed to the public. It is clear from the information that the airport was an extremely contentious issue, with strong support on both sides from members of the public. He has provided some considerations in the paragraphs above as to why in this case CLEUD submissions may be considered more contentious than objections.
68. The Commissioner is satisfied that there was no evidence that the council provided assurances that the information would not be disclosed further. This would particularly be the case given that further efforts at enforcement may have required it to use the submissions in any legal proceedings which ensued such as those which occurred previously.
69. The complainant has argued that letters of complaint were made with a view to seeking an injunction and for enforcement proceedings. The individuals would therefore have had an expectation that their information would be disclosed further by the council when seeking to enforce its enforcement restrictions. The complainant pointed the Commissioner to the requirements of Statutory Instrument 2002/2685, particularly Rule 6 (13) and Rule 15 (7) in evidence that there could have been no such expectation, particularly as evidence used in enforcement proceedings must be open for all parties to view. He argues that the information would therefore have been open to view at that time and therefore that no expectation of privacy could therefore have been formed, The Commissioner disagrees with this however. He notes in the first instance that the information held on the CLEUD file was not used for the purposes of enforcement, but for the purposes of making a decision on the CLEUD application. The relevant provisions Statutory Instrument 2002/2685 would not therefore have effect as regards this information.
70. The Commissioner considers that the individuals would have considered that their data was to be used primarily to respond to the CLEUD applications and legal proceedings as a result of that application

rather than any other, wider purpose such as a disclosure under these circumstances might entail.

71. However some of the submissions include complainants' previous letters of complaint about flights which have contravened the restrictions in place on the use of the airport. Some of these have been included on the CLEUD file as part of the submissions of the individuals who have acted against the CLEUD application. It is therefore possible that some of these 'earlier' letters may have been used for the enforcement proceedings and that the inspection of these may have been possible at the time using the provisions above.
72. However the Commissioner notes that even if that were the case, it is unlikely that the individuals would have had an expectation that their information would be disclosed globally in response to an FOI request some years after the CLEUD application had been decided.
73. Given all of the above the Commissioner's view is therefore that it would not be fair for the purposes of the first data protection principle for this information to be disclosed.

Parties supporting the CLEUD

74. In light of the circumstances of this case the Commissioner considers that it is more than possible that those who submitted affidavits in support of the CLEUD would still have some of the same expectations as noted above. They would have provided their information to the council a number of years ago in support of the CLEUD, but with no expectation that that information might then be disclosed globally some years later in response to an FOI request. Even where the information they provided was for the purposes of the public inquiry, the Commissioner is satisfied that there would be no wider extension of that expectation for the purposes envisaged here.
75. The Commissioner therefore considers that it would not be fair for the purposes of the first data protection principle for the council to disclose their personal information to the complainant.
76. The Commissioner's decision is therefore that disclosure of this information would also breach the first data protection principle. His decision is therefore that the exception in Regulation 12(3) applies.

Complaints to the council made by Mr A and others

77. The council stated that for the most part it no longer holds complaints made to it about the airfield other than those held on the complaints

file. However it did confirm that it holds some information in respect of the complainant's request for complaints made by 'complainant A', albeit not complaints from the dates provided by the complainant. It also holds small amounts of other complaints relating to the airport.

78. Following his consideration above, the Commissioner considers that his analysis in paragraphs 49 to 71 above is applicable, and that it would be unfair for the purposes of the first data protection principle for this information to be disclosed. Hence he considers that this information is exempt under Regulation 12(3).

Regulation 12(4)(e)

79. The council has also claimed Regulation 12(4)(e) for the information. Regulation 12(4)(e) provides an exception for information which is an internal communication. It is provided in the legal annex to this Decision Notice. As a class based exception, it is not necessary to show that a disclosure would cause prejudice or harm in order for the exception to be engaged. The council merely needs to show that the request would involve the disclosure of internal communications.
80. The Commissioner has considered the information which has been withheld from the complainant under Regulation 12(4)(e) and he is satisfied that the council incorrectly applied the exception to the majority of the information. He notes that it comprises of:
- a) Correspondence sent internally between officers and parties at the council. The Commissioner is satisfied that where a) is applicable the information engages regulation 12(4)(e).
 - b) Legal advice sought by the council from an external source in response to the application. Regulation 12(4)(e) cannot be applicable to this information as the advice was sought and received from an external legal adviser.
 - c) Emails between the council and external organisations such as agents of either the airport owner or of the groups of residents contesting the expansion of the airports activities. Where this is the case, Regulation 12(4)(e) will not be applicable.
 - d) Emails sent to officers internally at the council but also copied to external people or organisations. Where this is the case Regulation 12(4)(e) will not be applicable as the information was also provided externally.

e) Emails between the council and the county council discussing the situation. Again the county council is an external organisation and therefore Regulation 12(4)(e) will not be applicable.

81. The Commissioner is satisfied that emails falling within b), c), d) and e) are not internal communications and will not be caught by Regulation 12(4)(e). As no alternative exception has been applied by the council which would be applicable to information of this sort the Commissioner considers that the information fall in within points c), d) and e) will need to be disclosed (with the exception of personal data, as discussed above). However as regards b) he has addressed this information further below, from paragraph 101 onwards.
82. As regards the information falling within point a), this does engage the exception. Regulation 12(2) therefore requires a public interest test to be carried out in order to establish whether the information should be disclosed in spite of the exception being engaged. The test to be applied is whether the public interest in maintaining the exception outweighs the public interest in disclosing it.

Public interest arguments in favour of disclosing the requested information

83. The main public interest lies in producing transparency and accountability behind the council's investigation. There has been some suggestion that the decision was not properly made because the decision was delegated out to a third party solicitors company to consider.
84. Further to this, in normal circumstances the council is required to produce a decision on a CLEUD application within a relatively short period of time, however in this case the Commissioner understands that a decision took a number of years.
85. The Commissioner understands that a decision on a CLEUD application should be made on a matter of fact, rather than any planning policies. If a use is established over the necessary period of time then the CLEUD should be issued. The consideration should not take into account planning considerations or objections. A disclosure of the internal documentation would allow interested parties further information with which to reassure themselves that only appropriate considerations were taken into account in reaching the decision.
86. It would also highlight to the public the work involved by councils in making decisions on CLEUD applications, providing some explanation to those affected by CLEUD applications that the council is unable to consider planning considerations on its Decision in this respect.

87. Disclosing the withheld information would inform the public debate as to whether the correct decision was taken to refuse the CLEUD application. Given the Commissioner's findings on the personal data aspect of the case it would not clarify all of the information which the council had in front of it when it took the actions it did. It would however shed further light on the process it undertook to make that decision.
88. That debate relating to the use of the airport has been ongoing for over 10 years. It has included legal proceedings before the High Court and a public inquiry. Both those for, and those against further flying from Nayland have had dealings with the council on this issue, and have at times been critical of the council's handling of it.
89. The Commissioner therefore recognises that there is fairly strong public interest in allowing greater transparency in order that interested parties can see what actions the council took and consider whether, in their view those actions were appropriate and suitable for the circumstances of the case.

Public interest arguments in favour of maintaining the exemption

90. Decisions on CLEUD applications are made on matters of fact rather than on law. Establishing what evidence is required to establish a submission as fact is clearly the most important part of cases of this nature. The majority of the internal documents therefore address the evidence that has been provided, or discuss what further information is needed prior to a decision being taken. The majority of the withheld information contains personal data assessing the facts, together with advice and discussions around what further evidence was needed to establish the application.
91. The public interest in maintaining the exemption lies in protecting the private thinking space of officers deliberating the application of operational policy and applying it to the CLEUD application. As stated, relevant internal discussions about the application generally referred to the evidence from the parties and discuss if further evidence might be needed in order for the CLEUD application to be either established as fact or discounted. The withheld information does not therefore address or involve policy making or other matters which would effectively require private "thinking space".
92. The public interest also lies in protecting the freedom to speak about cases frankly without fear that details of that discussion would be disclosed to the public during a period where the information is still of

relevance. The Commissioner notes that if he ordered disclosure the council could argue that there would be a chilling effect on discussion of this nature – that officials might be inhibited in recording their future discussions or views for cases of this nature in the future. However the information in question is not particularly controversial or sensitive and the Commissioner does not place a great deal of weight on the view that council officers might be dissuaded from being free or frank on the basis of the disclosure of this information.

93. There is a public interest in council officers being able to discuss ongoing applications away from public scrutiny in order that they can speak fully and frankly about the applications without fear that that may subsequently be disclosed. This is however countered by the argument that such deliberations should be made as openly as possible in order that all affected parties can understand how and why a particular decision was reached.

Balance of the public interest arguments

94. The Commissioner has considered the above. He has already decided that the majority of personal data held within the information should be not disclosed. Conversely, the councils application of regulation 12(4)(e) to information which is clearly not internal correspondence means that the majority of non personal data needs to be disclosed. The information which therefore needed to be considered under the public interest test for regulation 12(4)(e) is relatively small.
95. There is little left within the information which engages section 12(4)(e) which the Commissioner would consider to have an adverse affect on the council. Conversely the disclosure would shed further light on the council's internal discussions regarding the evidence it had and any further evidence it needed. It would also provide public confidence in the council's decision making as it would demonstrate that it took appropriate considerations into account and discarded inappropriate considerations.
96. The consequence of the Commissioner finding that the majority of information that is not personal data needing to be disclosed is that this lessens any adverse affect which might occur should the remainder of the information be disclosed. Arguments about the "safe space" in which civil servants need to operate therefore becomes weakened, particularly as there is no "decision" which required 'cabinet responsibility', and no policy is being drafted and discussed within the information.

97. Given this, and given the clear presumption in favour of disclosure expressed in Regulation 12(2) the Commissioner considers that the public interest in maintaining the exception does not outweigh the public interest in the information being disclosed.

Regulation 12(5)(f)

98. Regulation 12(5)(f) applies to individuals who have voluntarily submitted their information to the council and exempts information where disclosure would have an adverse effect on 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 has not consented to its disclosure.
99. The Commissioner considers that this exception would not be applicable to individuals carrying out professional tasks for or in conjunction with the council. In this case it could only apply to the information which has already been considered exempt under Regulation 12(3) above; namely the complaints and the affidavits of those supporting or opposing the CLEUD application, or complaints about breaches of planning restrictions.
100. Given this the Commissioner has not considered the application of Regulation 12(5)(f) further.

Regulation 12(5)(b)

101. The Commissioner notes that regulation 12(4)(e) will not apply to the legal advice and the council's request for that advice. However the Commissioner notes that the documents associated with this may be subject to legal professional privilege. Given the protected status such information normally holds he considers it within his powers to consider whether the information does have privileged status and if so, whether it should or should not therefore be disclosed to the complainant.
102. Legal professional privilege protects the confidentiality of communications between a lawyer and client. There is no specific exception within the Regulations referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously recognised that Regulation 12(5)(b)

encompasses such information. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on:

“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”

103. The Commissioner notes that the relevant criterion from the above for this particular case would be whether a disclosure of the information would have an adverse effect on the course of justice.
104. He must firstly establish that the information is subject to legal professional privilege.

Is the information subject to legal professional privilege?

105. The information relates to elements of the CLEUD application and addresses elements that the council needed to consider in respect of the application. It includes a letter from the council solicitor briefing a barrister, and the corresponding advice in response to that request. The Commissioner is therefore satisfied that the information can attract legal professional privilege.

Would a disclosure of the information have an adverse effect on the course of justice?

106. The Commissioner notes that the test is whether disclosure “would” have an adverse effect rather than “could” and so a clear argument would need to be shown as to how justice would be affected by the disclosure of the information.
107. Legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
108. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the Act or the Regulations. Clients and their advisers’ confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
109. The Commissioner accepts this, and has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an

- indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege which he is ordering disclosed. However the Commissioner must also consider the specific information caught by this request when making his decision on this complaint.
110. His first consideration is whether the advice was still in use at the time of the request or whether there was any likelihood that it would become relevant to litigation in the future. If that is not the case then disclosure would be less likely to have an adverse effect and the council would need to provide further reasons to show how it might.
 111. The Commissioner notes that the advice was provided specifically for the responding to the CLEUD application and is dated 1999. At the time of the request a significant amount of time had therefore passed, and two CLEUD applications had been submitted and refused by the council.
 112. He also notes that the landowner did not fight the high court injunction proceedings in the High Court, and did not contest the evidence. No legal action has therefore taken place since that point.
 113. The Commissioner further notes however that the issue has resurfaced on frequent occasions over the past twenty years. He also notes that there have been a number of information requests made to the council relating to the airport since 2009, in all likelihood with a view to reopening the issue at some point in the future. The Commissioner's view is therefore that there is a significant possibility that the issues will arise again in the future, potentially requiring further litigation in order to resolve them.
 114. Secondly he has considered the nature of the information within the document. It relates to the CLEUD application and to the requirements of evidence which might need to be met by either party to the case in order to prove their case. The Commissioner is unable to include further detail without discussing the exempt information itself.
 115. The Commissioner's decision is that disclosing the information would have an adverse effect on the course of justice.
 116. Regulation 12(5)(b) is subject to a public interest test under Regulation 12(1)(b). The test is whether the public interest in maintaining the exception outweighs the public interest in disclosing it.
 117. The Commissioner must also consider the presumption in favour of disclosure as set out in Regulation 12(2).

The public interest in maintaining the exemption

118. The Council has not submitted arguments regarding the public interest in maintaining the exemption. The Commissioner recognises however the general arguments in favour of maintaining the exemption in respect of information which is subject to legal professional privilege. These include:

- Disclosure would undermine the Council's position in future litigation.
- It is in the public interest that the Council is entitled to a level playing field for any future litigation.
- Any disclosure of instructions to Counsel would inhibit the Council from fully explaining issues of concern in relation to future legal advice. It is very much in the public interest that the Council maintains the ability to seek full and frank legal advice, without the inhibition disclosure would cause.
- There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.

119. The concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank discussions. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.

120. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v ICO & DTI* [EA/2005/0023] the Tribunal stated that, "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

121. The Commissioner considers that the main public interest in the exemption being maintained in this instance lies with the general public interest in allowing authorities to seek free and frank advice from their legal advisors without fear that their case may be damaged or the weakness of their arguments will be disclosed as a result of disclosure in response to an FOI request.

122. The Commissioner considers that authorities must have the ability to consider and address strengths and weaknesses in its position free from the fear that disclosure may be required and that its opponents could exploit its own legal advice to their own purposes when seeking to overturn a decision made by the council.

123. If the doctrine of privilege is weakened through the regular disclosure of such advice then concerns about this may result in a 'chilling effect'. Councils may become less likely to seek advice in the first instance, become inhibited in the questions they ask of their advisors (or vice versa), or the advice which is provided may become less frank. Alternatively advice may be sought verbally rather than in writing and either no, or sparse records of the advice which is given retained.
124. There are therefore strong arguments regarding the chilling effect such a disclosure may have on public authorities seeking legal advice, and there is a strong public interest in allowing a public authority to seek clarification of its legal standing in law in order to facilitate its decision making. It may then act from an informed position, with a robust legal basis or defence for its actions.

The public interest in disclosing the information

125. The Commissioner considers that there is also a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This helps create a degree of accountability and enhances transparency of the way in which decisions were arrived at.
126. The Commissioner has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO* [EA/2007/0092], which was considering the public interest in relation to the section 42 of the Act (this provides an exemption for information to which a claim to legal professional privilege could be maintained in legal proceedings). During its deliberations the Tribunal said:
- "...what sort of public interest is likely to undermine [this]... privilege? ... Plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."
127. In this case there has been a suggestion that the council did not approach its duty to make a decision correctly and in adherence with the correct procedures for making a decision on a CLEUD application.
128. However, having considered the withheld information the Commissioner has not found any evidence of the above factors, and the complainant has not provided any evidence that any of these might have occurred.

Balancing the public interests

129. After considering the above factors the Commissioner is satisfied that there is a strong public interest in maintaining the exception under regulation 12(5)(b). This decision is based on the strong inherent public interest in protecting the principles that underpin the course of justice. He has been unable to discern a countering public interest which is strong enough to counter this weight.
130. The Commissioner's decision is therefore that the public interest in disclosing the information does not outweigh the public interest in maintaining the exception in this instance.

The Decision

131. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
 - In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.
 - The council did not provide a response to the complainant's request of 12 August 2009 within the 20 day working deadline required by Regulation 5(2).
 - It also breached regulation 11(4) in failing to respond within the 40 day statutory deadline for responding to a request to review its decision.
 - The council was not correct in applying Regulation 12(4)(e) to all of the information.

Steps Required

132. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose all of the information held to the complainant other than:

- Information containing personal data relating to complainants, either for, or against the CLEUD application.
- Information containing personal data of complaints made outside of the CLEUD application.
- The information which the Commissioner finds is subject to legal professional privilege.

133. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

135. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

136. 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.

137. 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 14th day of February 2011

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

“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 elements of the environment referred to in (b) and (c);

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.

- (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 date of receipt of the representations.

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

Regulation 12(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.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

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

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 –

- (b) 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

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).