

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 28 September 2015

Public Authority: East Hampshire District Council

Address: Penns Place
Petersfield
Hampshire
GU31 4EX

Decision (including any steps ordered)

1. The complainant has requested information relating to a tree preservation order (a TPO). The council disclosed information in response to the request. The complainant then made a further request on the basis that he does not believe that the report which led to the TPO was correct, or that the TPO was issued by the council following the correct procedures. The council provided him with a copy of the emails which led to the TPO being issued but redacted the names of officers involved under Regulation 13(1) (personal data). When the complainant questioned whether he had received a copy of one particular email it said that it did not hold a copy of this. The council also belatedly disclosed the identity of one individual it had initially applied Regulation 13(1) to on the basis that that person had subsequently provided their consent to their identity being disclosed.
2. The council also provided him with a copy of its delegated authority procedures. The complainant does not consider that these were followed correctly however. He therefore asked for a copy which demonstrates that the officer who signed the TPO had the delegated authority to make that decision. The council argued that the TPO was issued correctly under the delegated authority procedures it had already disclosed to him and said that no further procedures are held.
3. The Commissioner's decision is that the council was not correct to apply Regulation 13(1) to the information. He has also decided that on the balance of probabilities it does not hold any further information falling

within the scope of the requests. The Commissioner also consider that in respect of the identity of one councillor, the council did not comply with the requirements of Regulation 5(2).

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose copies of unredacted emails where it had previously applied Regulation 13.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 5 February 2015 the complainant wrote to the council and requested information in the following terms:
 - *Full details of the TPO covering 'T2'. This should include the date on which the TPO was made and any request/report that led to that decision.*
 - *A list, with reference numbers and dates, of any other 'highway' tree[s] within Four Marks which are the subject of a TPO.*
7. The council responded on 16 February 2015. It provided the complainant with a copy of the TPO together with a copy of the report which led to the order being made.
8. On 18 February 2015 the complainant wrote back to the council. Having received the information he considers that there is no evidence to justify a statement in the report which said that "*HCC highways have objected to the scheme because the tree blocks the site lines of the proposed junction*". His view is that Hampshire County Council Highways had actually said that there was not enough evidence to decide whether that was the case or not. He therefore requested:
 - *Please confirm whether there is further information available to justify [officer's name redacted] claim and if so provide copies.*
 - *My initial request asked for details of any 'request' [from members of the public etc] that led to this TPO being made. Please provide any information regarding the 'concern' that had apparently been raised with [name redacted].*

- *Please provide full details of any condition survey on this particular highway tree.*
- *Please confirm the date of the Delegated Meeting at which this Order was approved [presumably between 11 and 16 April 2014] and the name and position of the officer responsible for upholding the recommendations.*

I note that the Order was signed by someone 'for the Solicitor to the Council'.

- *Please provide the name and position of the signatory.*
9. The council responded on 2 March 2015 and provided the complainant with further information in response to his requests, including redacted copies of emails, relevant reports, and the name of the signatory to the TPO.
 10. Following an internal review the council wrote to the complainant on 14 May 2015. It revised its position and provided further information from the redacted sections of the documents, disclosing the name of a councillor which it had previously redacted, however some names of officers remained redacted.
 11. The council also confirmed that it had now disclosed all of the relevant information which it held to the complainant.

Scope of the case

12. The complainant initially contacted the Commissioner on 29 April 2015 to complain about the way his request for information had been handled.
13. Following further correspondence, and further responses from the council the complainant outlined the remaining aspects of his complaint as being:
 - a. The email which is referred to as being previously forwarded to the council by a councillor in an email to the Arboricultural Officer dated 28 March 2014
 - b. Details as to how the officer was authorised to make a decision under the council's delegation of authority documents.

- c. The identities of the names which were redacted from the emails which were disclosed to the complainant.
- d. He wished the Commissioner to consider whether the council was initially correct to apply section 13(1) to the identity of the councillor. The councillor had subsequently consented to the disclosure of her identity and this was therefore disclosed to him.

On this latter point the Commissioner's policy is issue a decision notice finding that the council breached Regulation 5(2) in that it did not provide the information within 20 working days. His policy is that he will not to consider further whether the council was correct to apply the exemption in the first instance.

- e. The complainant also asked the authority:

• Please confirm that the Council holds only information that contradicts [name of Arboricultural officer redacted] claim, and holds no information to support and/or justify it."

This relates to a finding in the TPO report which stated that the County Council had expressed concerns that the relevant tree blocks the sight lines of the proposed junction. The complainant says however that the public information on its objection stated that there was insufficient information on which to determine whether the oak would or would not interfere with the required sightlines. He also argues that a subsequent document issued on a different planning application for the same area also quoted that the visibility requirements could be met.

Whilst the Commissioner recognises that the complainant considers this to be a discrepancy or an error in the arboricultural officers report, he considers that the complainant's request is not a valid request for information. It is not a request for recorded information per se, and the council has confirmed that the complainant has been provided with a copy of all of the recorded information which was used to reach the decision.

The request as written would require the authority to effectively review the report and the evidence, and make a further decision/value judgement as to whether the evidence supported or contradicted the decision in order to respond to the request. This is not a function of the Regulations however, and so the Commissioner has therefore excluded this from consideration within this decision notice.

14. The Commissioner considers therefore that the complaints which he is able to consider are outlined in points a–d above.

Reasons for decision

15. Regulation 13(1) of EIR 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.

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 –

16. any of the data protection principles;"

17. The council argues that it has redacted the names of the individuals from the emails as it would breach the first data protection principle of The Data Protection Act 1998 to disclose them.

18. The first data protection principle states that:

"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."

19. The council said that disclosing the identities of the individuals would breach the first data protection principle as none of the conditions in Schedule 2 of the Data Protection Act is met. It added that insofar as Schedule 2, condition 6 is concerned, the council does not consider that disclosing the data is necessary for the purposes of legitimate interests pursued by third parties.

20. The Commissioner's approach to the first data protection principle is firstly consider whether disclosure of the personal data of the individuals would be fair. In doing so he takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
21. In considering whether any damage or distress will occur to the individual if the information is disclosed the Commissioner may take into account:
- whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
22. If the individual would not expect their personal information to be disclosed the Commissioner will consider whether there is a pressing social need for the information to be disclosed which might outweigh the expectations of the individual and make the disclosure fair.
23. The Commissioner notes that the individuals' details were included in the emails only because they were copied into an email from the councillor to the council. They did not themselves make any comment in the emails and appear to have been copied in for information purposes only.
24. The first thing to note is that the information is purely the names individuals in the form of email addresses. Some of the individuals are carrying out public roles, and a disclosure of that information would not disclose any facts or details about their 'private' lives. The Commissioner considers that there will always be some expectation that the identity of public servants, civil servants or elected members may be disclosed where the information relates to them carrying out their public roles. This is particularly the case where the individuals are senior within the organisation, or where their role is public facing or brings them regularly in contact with members of the public.
25. The Commissioner also considers that there will be some expectation where individuals have put themselves forward to represent parts of the community, such as elected members, that information about them might be disclosed in response to a request.

26. The Commissioner has taken into account the identities of those whose names have been redacted from the emails. He is satisfied that three of the individuals would have an expectation that their information might be disclosed. They are in a public facing role and have voluntarily placed themselves within the public eye.
27. Although the individuals do not appear to have been involved in the email chain directly, and do not comment on the situation within the emails, they were clearly copied into the chain for a purpose. Whilst they might not have had a direct understanding that their information would be disclosed, the position of these individuals does lead the Commissioner to consider that there would be an expectation that their details may well be disclosed in circumstances such as this.
28. A further individual is not a public servant. The Commissioner cannot provide further explanation without discussing the individual in detail. He can however say that he has considered the role of this person further, and that he is satisfied that person would have an expectation that their details may be disclosed in circumstances such as this case. Again the person has voluntarily taken a role representing issues publically previously. The Commissioner also considers that a disclosure of their inclusion in the email chain would not particularly provide any detrimental information about them.
29. The council has not submitted any arguments of any detriment which might occur should the identities of these individuals be disclosed. The Commissioner notes that they were simply copied in to the email chain, and it is therefore difficult to identify any reason why a detriment might occur to them as a result of disclosure.
30. The Commissioner therefore considers that it would be fair to disclose the names of these individuals for the purposes of the first data protection principle.
31. The next question is therefore whether a condition from schedule 2 of the DPA can be met. The council argues that as far as condition 6 of schedule 2 is concerned, it does not consider that disclosing the data is necessary for the purposes of legitimate interests pursued by third parties.
32. Condition 6 states:

"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."

33. The council argues that it is not necessary for the identities of those copied in to the email to be disclosed in order to understand the reasons why the TPO has been applied, and therefore any disclosure of the identities would be unwarranted by reason of prejudice to their rights and freedoms or their legitimate interests.
34. The Commissioner must balance each individual's rights against the rights of the public to know who has been involved in the process of the TPO decision. Whilst the individuals themselves did not directly participate in the email chain beyond being copied into it, this does not mean that they have not passed comment verbally or had some degree of influence outside of the email chain.
35. The Commissioner accepts that it is not necessary to disclose the information in order to understand the reasons why the TPO has been applied as this is clearly outlined within the Arboricultural officers report. Although the complainant argues that the report is factually incorrect this is not a matter for the Commissioner to consider.
36. The Commissioner considers that a disclosure of the information would highlight to interested parties those who may have had involvement with the decision, and this may inform the public about how public representation works and how interested parties were informed of the consideration being taken by the council. It would also create greater public confidence that decisions taken on such matters are not formed in isolation by the council, and that relevant parties are referred to or informed during the decision making process in order that they may make their representations should they wish to do so.
37. Balanced against this, the Commissioner has already noted above that the council has not outlined any particular detriment which would occur should the names be disclosed beyond the loss of anonymity regarding this matter which currently exists. Given the roles played by these individuals the Commissioner believes that the arguments for disclosure outweigh the general right to privacy and therefore a disclosure of the information would not be unwarranted in the circumstances of this case.
38. In conclusion, the Commissioner considers that principle 6 of schedule 2 can be met by a disclosure of this information.
39. The Commissioner therefore considers that the council was not correct to apply Regulation 13 in this instance.

Regulation 5

40. The complainant has pointed to one section of the councillors email which states that:

"When I spoke to [name redacted by Commissioner] last week he considered that it needed additional protection, as was also expressed in the email I forwarded from [name redacted by council] with information from HCC Highway concerns."

41. The complainant wishes a copy of the email which was forwarded by the councillor but this has not been provided to him. For its part the council has said that all information which it holds has been disclosed, other than the sections of the information which were redacted under Regulation 13.
42. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
43. In order to determine this, the Commissioner asks a number of questions of the authority, asking it to describe the searches which it carried out to locate relevant information. If the searches described are appropriate, and are carried out in appropriate areas, the Commissioner will consider that on a balance of probabilities the information is not held unless there are strong reasons or evidence to consider that it might be.
44. The Commissioner therefore asked the council to explain the searches which it had carried out. The council explained that searches were carried out of the physical file held relating to the making of the TPO. It argued that any relevant information falling within the scope of the request would have been identified in this search. In relation to searches for digital information, it said that planning officers use a case management system called Acolaid, and that all actions taken in relation to this request would have been recorded there, with digital copies of documents attached within the file management for this matter. No information had been found beyond that already disclosed. It also confirmed that it considered that no documents or information have been destroyed in relation to this matter.
45. The councillors' statement in her email strongly suggests that the council did at one point hold a copy of relevant email, but it has not been able to locate this through its searches. The Commissioner therefore asked the council to confirm whether it had carried out searches of its email systems and asked the arboricultural officer whether he retained a copy on his PC. The council confirmed that it had asked the officer who confirmed that he had searched for it but had not

located a copy. It also confirmed that another officer who was involved in discussions no longer works for the authority and that his email account had been deleted some time ago.

46. Given the searches which the council has described the Commissioner is satisfied that on a balance of probabilities the council does not hold any further information in respect of the request for this email.

Information relating to delegation of authority procedures

47. The complainant argues that the council procedures relating to the delegation of authority do not specify that the decision which was taken was authorised to be taken by the officer who signed the TPO decision. Part of his request was therefore for information on the procedure for the sub-delegation of a delegated authority.
48. The council considers that the delegation policy it disclosed already demonstrates how the delegation procedures work, and argues that the council officer who took the decision had the necessary authority to make the decision under that policy. It confirmed that there are no further documents relating to sub-delegation of a delegated authority which it could provide to the complainant.
49. The Commissioner is satisfied that the council has provided the complainant with the information which it holds which falls within the scope of his request. If the complainant still considers that the officer acted outside their authority in making the decision he can question this further with the council. If he still retains doubts, he may be able to make a complaint to the Local Government Ombudsman about the potential for maladministration.
50. The Commissioner has no powers to consider whether the officer had the necessary authority to make the decision or not.

Regulation 5(2)

51. The council initially withheld the identity of a councillor who had been active in lobbying the council to protect the tree through a TPO under Regulation 13(1). Subsequently the councillor consented to the disclosure of her identity and the information was disclosed to the complainant.
52. The Commissioner's policy in such circumstances is to confirm a breach of Regulation 5(2) rather than to investigate whether the initial refusal was correct.

53. The complainant made his request for information on 18 February 2015. The council however did not disclose the information to the complainant until its review of 14 May 2015. This falls outside of the period of 20 working days required by Regulation 5(2).
54. The Commissioner therefore finds that the council did not comply with Regulation 5(2) in respect of this part of the request.

Right of appeal

55. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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