

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

Date: 8 November 2011

Public Authority: Uttlesford District Council
Address: Council Offices
London Road
Saffron Walden
Essex
CB11 4ER

Decision (including any steps ordered)

1. The complainant has requested Uttlesford District Council ('the council') to release information relating to the planning applications submitted by Tesco and Sainsbury's. The council released the requested information to the complainant with the exception of six internal emails, which it withheld under regulation 12(4)(e) of the EIR.
2. The Commissioner's decision is that regulation 12(4)(e) of the EIR is engaged in this case. However, in all the circumstances of the case, the public interest in maintaining this exception is outweighed by the public interest in disclosure.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - it should release the remaining six internal emails to the complainant.
4. The council 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 January 2011, the complainant wrote to the council and requested information in the following terms:

"...can you please supply me with copies as soon as possible of the following information relating to the planning applications by Sainsbury's Supermarkets Limited (UTT/1451/09/FUL) (the "Sainsbury's Application") and Tesco Stores Limited (UTT/1323/09/FUL) (the "Tesco Application"):

- Copies of all e-mails, letters, documents and other correspondence or information of any nature whatsoever from Sainsbury's Supermarkets Limited or any of their agents or anyone else acting on their behalf (together "Sainsbury's") to Mr J. Mitchell, chief executive of Uttlesford District Council;
 - Copies of all e-mails, letters, documents and other correspondence or information of any nature whatsoever from Tesco Stores Limited or any of their agents or anyone else acting on their behalf (together "Tesco") to Mr Mitchell;
 - Copies of all e-mails, letters, documents and other correspondence of any nature whatsoever from Mr Mitchell to Tesco or Sainsbury's;
 - Copies of any file notes, internal memoranda, notes of telephone conversations and meetings, or any similar records prepared by any member of Uttlesford District Council ("UDC") and reflecting any discussion or conversation between Mr. Mitchell and Tesco or Sainsbury's or between Mr Mitchell and any members or employees of UDC and relating to the Sainsbury's Application or the Tesco Application;
 - Copies of all e-mails, letters, documents and other correspondence of any nature whatsoever between any employees, agents or representatives (including councillors) of UDC and Mr. Mitchell and relating to the Sainsbury's Application or the Tesco Application."
6. The council responded on 21 February 2011. It stated that it was willing to release some information subject to the payment of fee but considered other information to be exempt from disclosure under regulation 12(4)(e) of the EIR.
7. Following an internal review the council wrote to the complainant on 28 February 2011. It failed to outline its findings and simply referred the complainant to the Commissioner.

Scope of the case

8. The complainant contacted the Commissioner on 28 February 2011 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the council's decision to charge for the provision of some of the information and to consider the council's application of regulation 12(4)(e) to the information it wished to withhold.
9. During the Commissioner's investigation the council altered the fee it wished to charge for the provision of some of the information to ensure compliance with regulation 8 of the EIR. As this information was subsequently disclosed to the complainant, the Commissioner considers this aspect of the complaint to have been resolved.
10. This Notice will focus on the remaining withheld information, which consists of six emails; four between officers within the council and two between named Councillors and officers within the council.
11. During the Commissioner's investigation the council questioned whether the remaining emails should be considered under FOIA, as it felt the contents of the emails did not relate to elements of the environment. The Commissioner considered the remaining withheld information and which regime should apply and concluded that the complaint is to be considered under the EIR.
12. The Commissioner's view of what constitutes environmental information is relatively broad. It is not necessary for the information itself, i.e. in this case, the contents of the emails in question, to have a direct effect on the elements of the environment or to discuss or record such an effect. The relevant consideration is whether the information is *on* something falling within the subsections of regulation 2(1).
13. In this case, the Commissioner considers the remaining withheld information to be information on a plan or measure (regulation 2(1)(c)) which would affect the elements of the environment (as required by regulation 2(1)(a) of the EIR). The information in this case is on the planning proposals put forward by Tesco and Sainsbury's and whether certain named Councillors should vote on the applications at a forthcoming Development Control Committee meeting. The planning proposals for both Tesco and Sainsbury's will affect the elements of the environment if they go ahead.
14. As the Commissioner is satisfied that the remaining withheld information should be considered under the EIR, he will now proceed to consider the council's application of regulation 12(4)(e) to this information.

Reasons for decision

Regulation 12(4)(e)

15. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
16. In respect of the four emails between officers within the council, as these are quite clearly internal emails which have not been copied to any external source, the Commissioner is satisfied that this information falls within the definition of this exception.
17. Regarding the two remaining emails, the Commissioner notes that these are communications between officers in the council and six named Councillors. It is the Commissioner's view that not all communications between officers in the council and elected Councillors will be internal communications. It will depend upon the reasons for each communication and its contents. If an officer within the council and an elected Councillor are corresponding over private, political or representative purposes, the communication(s) will not fall within the definition of 'internal communications'.
18. However, a communication between an officer in the council and an elected Councillor will be classed as an internal communication if the Councillor has been contacted or has produced that communication in their capacity as a council member acting on behalf of the council.
19. The Commissioner notes that the remaining two emails were sent or received by the six elected Councillors concerned in their capacities as council members acting on behalf of the council at the forthcoming Development Control Committee. The emails discuss whether these Councillors should vote as members of the council at the committee meeting that was planned to decide the applications submitted by Tesco and Sainsbury's.
20. The elected Councillors corresponded with officers in the council in their capacities as council members not in relation to private, political or representative issues. The Commissioner is therefore satisfied that these emails are internal communications for the purposes of the EIR.
21. As the Commissioner is satisfied that the remaining withheld information falls within the definition of 'internal communications', he has concluded that regulation 12(4)(e) of the EIR is engaged in this case. The Commissioner will therefore now go on to consider the public interest.

Public interest test

22. Regulation 12(1)(b) states that a public authority may refuse to disclose environmental information requested if 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) of the EIR states further that a public authority should apply a presumption in favour of disclosure.
23. The Commissioner asked the council to explain in detail the arguments it considered for and against disclosure, the weight it gave to each argument and how it reached the view that the public interest in maintaining this exception outweighed the public interest in disclosure. Despite being asked twice to provide this information and to supply this level of detail, the council failed to do so.
24. The council provided no submissions to the Commissioner to explain what arguments it considered in favour of disclosure and it only supplied one main argument to support its decision that the public interest rested in non disclosure.
25. The council confirmed that the emails in question discussed whether certain Councillors' should vote at the forthcoming Development Control Committee in respect of the planning applications submitted by Tesco and Sainsbury's. It argued that officers should be free to give advice to such members on probity issues without the risk of such information coming into the public domain. Such advice is given with a view to assisting members to avoid being the possible subject of a Standards Committee investigation or a challenge to the council. The council confirmed that it is up to each member concerned whether or not to act upon that advice or to seek further external advice before reaching a decision.
26. It stated that it is not in the public interest to disclose such communications, as disclosure would result in members being unable and more reluctant in the future to tender similar advice which would in turn put such members at greater risk of Standards Committee investigations and the council facing a legal challenge.
27. The Commissioner has given this matter careful consideration. Although the council has provided no arguments in favour of disclosure, the Commissioner considers there are public interest factors in favour of disclosure in this case.
28. The Commissioner considers there is a public interest in the overall transparency and accountability of the council and in members of the public gaining access to information which enables them to understand more clearly why decisions made by the council were taken. It also encourages public debate and enables members of the public to

challenge such decisions from a more informed position should they wish to do so.

29. He is also of the view that there is a considerable public interest in the planning process and information being made available to the public about applications that are made and how these are assessed. In this case, the requested information concerns planning proposals put forward by two major retailers and often such proposals will have a wide scale impact upon the environment and the surrounding communities.
30. The requested information also concerns the ability of six elected Councillors to vote when the applications are considered at the Development Control Committee, which took place the month prior to the complainant's request. The purpose of these committees is to review and determine applications referred to it and to ensure determinations are consistent with the council's policies in relation to development control. According to the council's website, the committee is made of 14 elected Councillors or members representing the main political parties. The Commissioner considers that if it is questionable whether some of these members are able to perform their duties i.e. vote on a particular application put to the committee, there is a considerable public interest in knowing why.
31. The Commissioner accepts that the purpose of regulation 12(4)(e) is to protect to private internal thinking space. However, he considers this public interest sways more toward disclosure once decisions or policies are formulated and the need for private thinking space is no longer required. In this case, the Commissioner notes that the emails in question are dated around February 2010; several months prior to the Development Control Committee meeting that ultimately took place to consider these applications. By the time of the complainant's request the Development Control Committee meeting had taken place and members had voted by this point on the planning proposals. The issue of whether certain Councillors should vote or not must therefore have been resolved and the need for private thinking space diminished.
32. The Commissioner therefore does not consider this argument to be compelling enough to warrant the non disclosure of this information. He considers there are public interest factors in favour of disclosure of equal weight and therefore, in accordance with regulation 12(2) of the EIR, he has concluded in this case that the public interest in maintaining this exception is outweighed by the public interest in favour of disclosure.

Right of appeal

33. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF