

Environmental Information Regulations 2004

Decision Notice

Date: 13 May 2010

Public Authority: Denbighshire County Council
Address: County Hall
Wynnstay Road
Ruthin
LL15 1YN

Summary

The complainant made a request to Denbighshire County Council to inspect information held relating to a particular property. The Council agreed to provide the information requested but only on provision of a fee based on the relevant property search regulations. The Commissioner has investigated the case and has determined that the request was to inspect environmental information and as such the Council was unable to make a charge for the provision of the information by virtue of regulation 8(2)(b). The Commissioner's decision is that the Council should have made the requested information available for inspection as requested and, in failing to do so, it breached regulation 6(1). The Commissioner also finds that the Council breached the requirements of regulation 6(2)(c).

The Commissioner's Role

1. The Environmental Information Regulations ('the EIR') were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 ('the Act') are imported into the EIR.

Background

2. Section 3 of the Local Land Charges Act 1975 places a statutory obligation all local authorities within England and Wales to generate, maintain and update a Local Land Charges Register and to allow the general public to search for information contained in that register.
3. When a property or piece of land is purchased or leased, a request for a search of the Local Land Charges Register is sent to the relevant local authority. In order to obtain information from a local authority, an application for an official search must be submitted on form LLC1. This is usually accompanied by form CON29R. The CON29R form is comprised of two parts. Part 1 contains a list of standard enquiries about a property. Optional enquiries are contained within Part 2.
4. The Local Authorities (Wales) (Charges for Property Searches) Regulations 2008 ('CPSR') provide a framework within which local authorities can make charges for property searches services, specifically for granting access to property records held by the local authority and for answering queries about a property. In essence they permit, in certain circumstances, charging to be made on a cost recovery basis. The information requested in this case was part of the property searches being conducted by the complainant.

The Request

5. Between April 2009 and October 2009 correspondence was exchanged between the complainant and Denbighshire County Council ('the Council') in relation to general issues and concerns relating to charges the Council levied for the provision of information relating to property searches. The complainant referred the Council to guidance which the Commissioner had issued in relation to this matter¹.
6. In its letter dated 24 August 2009 the Council advised that it was awaiting advice from Counsel in relation to the provision of property search information. The Council confirmed that, in the meantime, it would continue to operate its current charging regime in line with the provisions of the CPSR.

¹

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/practical_application/fep116_property_searches_and_eir_v1.pdf

7. On 6 October 2009, the complainant made a request to the Council for the following information in relation to a specific named property:

"...an appointment to view the land charges register free of charge to collate information on the above property. I would also at the same time like to view all the free records holding the information required to answer questions on the Con29R and the records required to answer questions; 1.1 (f)–(h), 3.4 3.6 and 3.9 (a)–(n)".
8. The Council responded on 20 October 2009 referring the complainant to its previous response dated 24 August 2009. The Council confirmed that it was still awaiting advice from Counsel in relation to the issue or property search information and in the meantime, it would continue to operate its current charging regime in line with the CPSR. The Council advised that it would "continue to treat CON29R questions 1.1(f)–(h), 3.4 3.6 and 3.9 (a)–(n) under the Local Authorities (Charges for Property Searches) Regulations 2009 and not under the Environmental Information Regulations". As such the Council advised that it was unable to provide access to the information requested free of charge.

The Investigation

Scope of the case

9. On 3 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated that he believed the information requested was environmental, and he should be entitled to inspect it free of charge under regulation 8(2).
10. On 16 November 2009 the Commissioner wrote to the complainant to confirm the scope of his request.
11. On 17 November 2009 the complainant contacted the Commissioner and confirmed that the specific information required to respond to questions 1.1 (f)–(h), 3.4 3.6 and 3.9 (a)–(n) of the CON29R form was the information which he had been unable to inspect free of charge.
12. The relevant questions on the CON29R form are detailed below:

1.1 Planning and Building Decisions and Pending Applications

Which of the following in relation to the property have been issued or refused or (where applicable) are the subject of pending applications: -

- (a) a planning permission
- (b) a listed building consent
- (c) a conservation area consent
- (d) a certificate of lawfulness of existing use or development
- (e) a certificate of lawfulness of proposed use or development
- (f) building regulation approvals
- (g) a building regulation completion certificate
- (h) any building regulations certificate or notice issued in respect of work carried out under a competent person self-certification scheme

3.4 Nearby Road Schemes

Is the property (or will it be) within 200 metres of any of the following:

- (a) the centre line of a new trunk road or special road specified in order, draft order or scheme
- (b) the centre line of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway.
- (c) the outer limits of construction work for a proposed alteration or improvement to an existing road, involving (i) construction of a roundabout (other than a mini roundabout); (ii) widening by construction of one or more additional traffic lanes
- (d) the outer limits of (i) construction of a new road to be built by a local authority; (ii) an approved alteration or improvement to an existing road involving construction of a subway, underpass, flyover, elevated road or dual carriageway; or (iii) construction of a roundabout (other than a mini roundabout) or widening by construction of one or more additional traffic lanes.
- (e) the centre line of the proposed route of a new road under proposals for public consultation
- (f) the outer limits of (i) construction of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway; (ii) construction of a roundabout (other than a mini roundabout); or (iii) widening by construction of one or more additional traffic lanes, under proposals published for public consultation.

3.6 Traffic Schemes

Has a local authority approved but not yet implemented any of the following for the roads and footpaths which abut the boundaries of the property:

- (a) permanent stopping up or diversion
- (b) waiting or loading restrictions
- (c) one way driving
- (d) prohibition of driving
- (e) pedestrianisation
- (f) vehicle width or weight restriction
- (g) traffic calming works including road humps
- (i) minor road widening or improvement
- (j) pedestrian crossings
- (k) cycle tracks
- (l) bridge building

3.9 Notices, Orders, Directions, and Proceedings under Planning Acts

Do any of the following subsist in relation to the property, or has a local authority decided to issue, serve, make or commence any of the following: -

- (a) an enforceable notice.
- (b) a stop notice.
- (c) a listed building enforcement notice.
- (d) a breach of condition notice.
- (e) a planning contravention notice.
- (f) another notice relating to breach of planning control.
- (g) a listed building repairs notice.
- (h) in the case of a listed building deliberately allowed to fall into disrepair, a compulsory purchase order with a direction for minimum compensation.
- (i) a building preservation notice.
- (j) a direction restricting permitted development.
- (k) an order revoking or modifying planning permission.
- (l) an order requiring discontinuance of use or alteration or removal of building or works.
- (m) a tree preservation order.
- (n) proceedings to enforce a planning agreement or planning contribution.

13. The Commissioner's investigation has focused on determining if the information requested, as outlined in paragraph 12 is environmental information falling within the scope of the EIR and if so whether that information should be made available for inspection free of charge.

Chronology

14. The Commissioner wrote to the complainant and the Council on 12 November 2009 confirming that the complaint had been deemed eligible for formal consideration.
15. The Commissioner contacted the Council on 16 February 2010 to discuss the case. During this conversation, the Council advised the Commissioner, that in its view, not all of the information requested was environmental information as defined under the EIR.
16. The Commissioner wrote to the Council on 16 February 2010 confirming his view that the information requested constituted environmental information. The Commissioner referred the Council to previous Decision Notices he had issued in respect of similar cases and asked whether the Council would reconsider its position in light of these decisions.
17. On 2 March 2010 the Council contacted the Commissioner and advised that it would not be making any further representations in respect of this case.
18. On 24 March 2010 the Commissioner contacted the complainant who confirmed that, he had paid a fee of £42.00 for the provision of the information requested in hard copy format as the Council would not allow him to inspect information required to respond to questions 1.1 (f)–(h), 3.4 3.6 and 3.9 (a)–(n) of the CON29R form . The complainant confirmed that this fee was for the provision of a complete set of property search information from the Council, i.e. a completed CON29R form.

Analysis

Substantive Procedural Matters

19. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR. Full details of the relevant legislation relevant to this case are reproduced in the attached legal annex.
20. The Commissioner considers that the information requested falls within regulation 2(1)(c): “measures (including administrative measure), such as policies, legislation, plans, programmes, environmental agreements,

and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements". The questions on the CON29R form, as detailed in paragraph 12 above relate to information on planning and building regulations, road and traffic schemes, and notices, orders, directions and proceedings under planning acts. The Commissioner considers that in order to obtain the answers to these questions it is necessary to inspect environmental information. The information which is inspected would comprise of a measure or plan on an activity (i.e. road scheme, planning application or building plan) affecting or likely to affect one or some of the elements referred to in regulation 2(1)(a).

Regulation 5, Regulation 6, Regulation 8

21. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 6(1) provides that where an applicant requests the information in a particular form or format the public authority is, subject to certain qualifications, obliged to comply with that preference. Regulation 8 provides that a public authority can make a reasonable charge for providing information. However, regulation 8 also specifies two situations where the information must be made available free of charge.
22. The Council has accepted that the information is environmental. However it does not accept that regulation 6 obliges it to make the information available for inspection. The Council contends that it can charge the complainant for providing a hard copy of the information requested in accordance with the provisions of the CPSR.
23. It is the Commissioner's view that although regulation 6(1) may appear primarily to be concerned with the form or format information is provided in, it should be interpreted broadly and does provide a right to request the inspection of environmental information. Analysis of the Directive and the implementation guide to the Aarhus Convention (the Convention to Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters from which the Directive derives) lend support to this:
 - Article 3(5) of the Directive introduces the requirements for arrangements to be made which ensures that the right of accessing information "can be exercised effectively, such as... establishment and maintenance of facilities for the examination of the information required"
 - Recital 15 of the Directive refers to arrangements to "guarantee that the information is effectively and easily accessible".

- The Implementation Guide to the Aarhus Convention specifically states that a public authority “must allow” an applicant to examine the original documentation subject to the two caveats which are repeated in regulation 6(1)(a) and (b). Regulation 6(1)(b) provides that a public authority need not comply with an applicant’s request for the information to be made available in a particular form or format where “the information is already publicly available and easily accessible to the applicant in another form or format”.

24. The Commissioner believes it is clear from the interpretative aids quoted above that the Directive anticipated the EIR would provide the right to request to inspect environmental information and this supports his broad interpretation of regulation 6.

25. Support for this approach can also be drawn from the Information Tribunal’s comments in *East Riding of Yorkshire v Information Commissioner* (EA/2009/0069) where it stated at paragraphs 1 and 49:

‘We have decided that the Information Commissioner was right to decide that East Riding of Yorkshire Council (“the Council”) should have made available for inspection, without charge, certain information on the impact of building regulations and traffic/highways control on a particular property.’

‘The information covered by the Request, being the information required to answer the questions 1.1 (f) – (h), 3.4 and 3.6 of the form CON29R, should have been made available for inspection.....’

26. Having established that regulation 6 provides a right to request to inspect environmental information, it is necessary to consider whether either of the two qualifications to this right is relevant in this situation.

27. Regulation 6(1)(a) provides that a public authority is not required to comply with an applicant’s request to receive information in a particular form or format if it is reasonable for the public authority to make the information available in another form or format. The public authority has not provided any grounds for claiming it was reasonable to make the information available in an alternative format to that requested by the complainant in this case. However, the Commissioner does not accept that it is reasonable for a public authority to prevent the inspection of information merely to justify imposing a charge for making information available in other formats. The Commissioner is of

- the opinion that not making information available for inspection, unless it was reasonable to make it available in another format, is also contrary to the general policy principles of the EIR, i.e. making environmental information as easily accessible as possible.
28. Regulation 6(1)(b) provides that a public authority is not obliged to provide information in a particular form or format requested by an applicant if the information is already publicly available and easily accessible to the applicant in another form or format. In the Commissioner's view, a public authority cannot rely on regulation 6(1)(b) to refuse a request to inspect information because the information is available by following the standard land search procedures. The Commissioner considers that in order for regulation 6(1)(b) to apply, the information must be both publicly available and easily accessible to the applicant. In the Commissioner's view this criteria is not satisfied by the requirement for an applicant to submit a CON29R form and pay the requisite fee. This is because charging acts as a barrier to the information being easily accessible in contrast to, for example, publication on a website or in a public library free of charge. The Commissioner would therefore consider that the exception contained in regulation 6(1)(b) is not relevant in this case.
 29. Since neither of the exceptions to the Council's obligation to provide information in the form and format requested can be satisfied, the Commissioner concludes that the complainant should be allowed to inspect the information he has requested access to. The Commissioner's view on whether public authorities can impose charges for allowing applicants to inspect environmental information is set out in paragraphs 32 and 33 below.
 30. Regulation 6(2)(a) states that if a public authority does not make information available in the form or format requested, it shall explain its decision to the applicant as soon as possible and no later than 20 working days after the date of receipt of the request. Regulation 6(2)(c) provides that where a public authority does not make information available in the form or format requested, it shall inform the applicant of their right to request a review of the decision and their right of appeal to the Commissioner.
 31. In its refusal notice dated 20 October 2009, the Council did not inform the applicant of their right to request an internal review or their right of appeal to the Commissioner and as such, the Council breached regulation 6(2)(c).
 32. Regulation 8 provides a general right for public authorities to charge for making information available. However, that right is subject to a

number of conditions. The relevant conditions in this case are contained in regulation 8(2).

33. Regulation 8(2)(a) states that a public authority shall not make any charge for allowing an applicant to access any public registers or lists of environmental information, and regulation 8(2)(b) states that a public authority shall not make any charge for allowing an applicant to examine the information requested at a place which the authority makes available. The Commissioner is therefore of the opinion that the complainant is entitled to inspect the information requested free of charge.

The Decision

34. The Commissioner's decision is that the Council did not deal with the request for information in accordance with the EIR. The Council has breached the requirements of regulation 6(1) of the EIR by failing to make the requested information available for inspection on request. The Council also breached regulation 6(2)(c) in failing to inform the complainant of his right to request a review of its decision and his right of appeal to the Commissioner.

Steps Required

35. The Commissioner notes that the complainant has received the information he requested, for which he paid a fee. The Commissioner does not therefore need to order the same information be made available again.
36. The Commissioner does not have the power to order a refund in this case and it is up to the complainant to take any further steps to recover any fees which he has paid. However, in view of his decision in this case the Commissioner recommends the Council considers refunding any fees paid.

Right of Appeal

37. 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

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 13th day of May 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

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

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

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

“the Commissioner” means the Information Commissioner;

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

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

- (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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be

up to date, accurate and comparable, so far as the public authority reasonably believes.

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

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 6 - Form and format of information

Regulation 6(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

- (a) it is reasonable for it to make the information available in another form or format; or
- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

Regulation 6(2) If the information is not made available in the form or format requested, the public authority shall –

- (a) explain the reason for its decision as soon as possible and not later than 20 working days after the date of receipt of the request for the information;
- (b) provide the explanation in writing if the applicant requests; and
- (c) inform the applicant of the provisions of regulation 11 and the enforcement and appeal provisions of the Act applied by regulation 18.

Regulation 8 - Charging

Regulation 8(1) Subject to paragraphs (2) to (8), where the public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

Regulation 8(2) A public authority shall not make any charge for allowing an applicant –

- (a) to access any public registers or lists of environmental information held by the public authority; or
- (b) to examine the information requested at the place which the public authority makes available for the examination.

Regulation 8(3) A charge under paragraph (1) shall not exceed an amount on which the public authority is satisfied is a reasonable amount.

Regulation 8(4) A public authority has notified an applicant under paragraph (4) that advance payment is required, the public authority is not required –

- (a) to make available the information requested; or
- (b) to comply with regulations 6 to 14,

unless the charge is paid no later than 60 working days after the date on which it gave the notification.

Regulation 8(6) The period beginning with the day on which the notification of a requirement for an advance payment is made and ending on the day on which that payment is received by the public authority is to be disregarded for the purpose of determining the period of 20 working days referred to in the provisions in paragraph (7), including any extension to those periods under regulation 7(1).

Regulation 8(7) The provisions referred to in paragraph (6) are –

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

Regulation 8(8) A public authority shall publish and make available to applicants –

- (a) a schedule of its charges; and
- (b) information on the circumstances in which a charge may be made or waived.