

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

### **Decision Notice**

**Date: 1 March 2010**

**Public Authority:** West Sussex County Council  
**Address:** County Hall  
West Street  
Chichester  
West Sussex  
PO19 1RQ

### **Summary**

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The complainant made a number of requests for information relating to consultation responses held by the Council. The Council dealt with the requests under the Freedom of Information Act 2000 ("the FOIA") and stated that it did not hold the information requested. The Information Commissioner ("the Commissioner") investigated and decided that the Council should have considered the requests under the Environmental Information Regulations 2004 ("the EIR"). He also considered that the Council incorrectly claimed that the requested information was not held on the basis that it would require too much skill and judgement to collate it or that extracting the information would amount to the creation of "new information". The Commissioner has ordered the Council to carry out steps in relation to each of the requests. He also found that the Council breached regulation 14(2) and 14(3)(a).

### **The Commissioner's Role**

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1. 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. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

### **Background**

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2. In February 2008, the Council issued a "second phase" consultation document entitled "Planning Rother Valley Schools for the Future". This covered a number

of proposals for primary reorganisation in the area, including the closure of some schools, as well as a proposal to bring three existing secondary schools together to form an academy. Regarding the academy, although the consultation document described that there would be some “interim arrangements” it made it clear that the ultimate vision was to build a new single site 11-18 academy for the Rother Valley. At the end of the consultation document, there was a tear-off form inviting responses. This invited respondents to state whether they were a parent/guardian, school staff, governor, student, local resident, or other. It asked parents to state how old their children are and it asked in general terms for people’s views on the proposals set out in the consultation document.

## The Request

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3. On 24 June 2008, the complainant sent three emails to the Council in which he made a number of information requests relating to the responses received to the consultation document. Each request has been numbered by the Commissioner for ease of reference. The requests made in the first email timed 5:49pm were as follows:
  1. “Of the 317 written responses to the ‘Planning Rother Valley Schools for the Future’ booklet which made particular reference to academy [sic] proposal, exactly how many explicitly welcomed the academy plan, and how many objected?”
  2. “Of these 317 written responses, how many indicated that they fell into each of the following categories: parent/guardian; school staff; governor; student; local resident; other?”
  3. “How were objectors and assenters distributed among these groups (parent/guardian; school staff; governor; student; local resident; other?)”
4. His second email timed 5:51pm requested information in the following terms:
  4. “Of the 317 written responses to the ‘Planning Rother Valley Schools for the Future’ booklet which made particular reference to academy [sic] proposal, how many also made explicit reference to the change in the age of transfer?”
  5. “Of this group, how many stated their support for a change in the age of transfer and how many stated a preference for the three-tier system?”
  6. “Of the 317 written responses to the ‘Planning Rother Valley Schools for the Future’ booklet which made particular reference to academy [sic] proposal, exactly how many also expressed a preference of site?”
  7. “Of these, exactly how many expressed a preference for the Easebourne site?”

5. In a third email timed 5:52pm, the complainant requested information in the following terms:

8. "Of the 317 written responses to the 'planning Rother Valley Schools for the Future' booklet which made particular reference to academy [sic] proposal, how many respondents noted concerns in each of the following areas?

- that the proposals are financially driven;
- parents do not want 10 year olds attending the Grammar School as they are too young, particularly those who would have to travel from the far east of the Rother Valley
- concern regarding potential disruption to children
- concern expressed for teachers' jobs
- traffic/transport concerns – for those travelling from far across the area and potential future issues in accessing the Easebourne site;
- the Academy would be experimental as there are no other rural Academies thus far;
- the Academy does not provide for parental preference;
- the Grammar School is not failing
- the Academy decision has already been made

6. The complainant's requests directly refer to statements made by the Council about the consultation responses in a report by its Executive Director of Adults and Children and Cabinet Advisor for Children's Projects which was published in early June 2008. The Commissioner notes in particular that on page 4 of the report is a statement that 317 people made particular reference to the academy proposal when responding to the second phase consultation document. It was therefore clear that the complainant's requests related to the 317 responses referred to in the report that made particular reference to the academy.

7. The Council replied to the requests on 23 July 2008. The Council stated the following:

*"In effect our open-ended invitation to potential respondents to submit their views, provided helpful qualitative data but it did not lead to data that lends itself to quantitative analysis of the type you have requested...since many respondents raised multiple questions, concerns and aspirations, the analysis involved a drawing together of the key theme most regularly expressed. These were identified in some detail in the Cabinet Member decision report of early June 2008 (enc). I regret that it is not possible to provide you [sic] the information in the form you have requested. Nevertheless, I hope that the above response is of some assistance to you".*

8. On 24 July 2008, the complainant wrote to complain about the Council's response. He stated that he believed that the Council was able to provide the information he had requested.
9. On 7 August 2008, the Council completed its internal review. The Council referred the complainant to its original response and stated that there had been no change in the Council's position.

## The Investigation

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### Scope of the case

10. On 8 August 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had responded to his request correctly in stating that it did not hold the requested information because it was not required to collate it and it would, in any event be unable to do so.

### Chronology

11. Unfortunately there was a delay in allocating the complaint for investigation. On 24 July 2009, the Commissioner contacted the complainant to ask whether he still wished to pursue his complaint.
12. The complainant replied on the same day and confirmed that he wished to pursue the complaint.
13. On 24 July 2009 the Commissioner also wrote to the Council and requested information to help him to investigate the complaint. In particular, the Commissioner asked the Council to confirm whether it considered that it held the information requested and if it did not, to explain more about why it had taken that view.
14. The Council replied to the Commissioner on 13 August 2009. The Council reiterated that because it had received a variety of responses in different formats it had found statistical analysis impossible. It referred to the fact that it had commissioned an independent report in July 2008 and stated that it had provided a link to this document on its website. It stated that it required more time in order to establish whether it had any more information that it could provide.
15. On 11 September 2009, the Council wrote to the Commissioner again stating that it wished to confirm that the July 2008 summary report appearing on the link contained the analysis of the Planning Rother Valley Schools for the Future consultation in full.
16. The Commissioner telephoned the Council to discuss the complaint on 2 October 2009. The Commissioner acknowledged that the Council had referred to an independent report but he explained that it was not currently clear whether the Council considered that this report contained any of the information specifically requested by the complainant. The Council stated that the complainant had asked for a summary of the consultation and that was what was provided in the report. The Commissioner pointed out that the complainant had not asked for a summary of the consultation but had asked very specific questions. The Commissioner explained that if the Council was able to show that any of the requests had been answered in the July 2008 report then he would let the complainant know in order to try and informally resolve those specific aspects of the complaint. The

- Commissioner and the Council also discussed the issue of how to determine whether information is held. The Council advised the Commissioner that it would need to investigate whether it still held the consultation responses. The Commissioner also suggested that the information could fall under the ambit of the EIR.
17. On 12 October 2009, the Commissioner wrote to the Council. The Commissioner expressed the view that the information was environmental. He also asked the Council a number of questions to help him to consider whether the Council held the information requested as the complainant had asserted.
  18. The Commissioner also wrote to the complainant on the same day setting out his understanding of the complaint.
  19. The complainant replied on 12 October 2009 confirming that the Commissioner had correctly understood the nature of his complaint.
  20. The Council replied to the Commissioner on 27 October 2009. It stated that it did not consider that the EIR applied in this case and it explained why. The Council stated that the information requested by the complainant was not held and provided some rationale for this position although it did not specifically cite the exception under 12(4)(a). It added that if the Commissioner considered that it held the information it would argue that the FOIA does not require it to prepare and present it in a particular way as that would be creating new information. It also explained that if the Commissioner took the view that the requests should have been considered under the EIR, then it would wish to rely on the exceptions under regulations 12(3), 12(4)(b) and 12(4)(d). It provided some limited rationale in support of the application of these exceptions.
  21. On 5 November 2009, the Commissioner discussed the case with the Council during a telephone conversation and in particular, he asked for more information to help him to consider whether the information was environmental.
  22. On 6 November 2009, the Commissioner sent an email to the Council setting out his queries concerning the information to help him to decide whether it was environmental.
  23. The Council replied to the Commissioner on 16 November 2009 providing some background information.
  24. On 17 November 2009, the Commissioner sent correspondence to the complainant regarding his requests to which the complainant replied on the same day.
  25. On 18 November 2009 the Commissioner wrote to the Council. He explained that he had considered the information it had provided and had concluded that it was environmental and therefore should have been considered under the EIR. He also set out his view that it was likely that some of the information requested was held and he asked the Council to reconsider its position that the information was

not held. The Commissioner also asked the Council to provide him with copies of the consultation responses.

26. On 8 December 2009, the Council provided a bundle consisting of all of the consultation responses rather than just the 317 mentioned in the report to which the requests for information relate. It stated that it wished to maintain its position that the information requested was not held. It stated that the complainant's requests required it to conduct a complex analysis and not a straight-forward counting exercise. It offered no substantial further rationale in support of its position.

## Analysis

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### Substantive Procedural Matters

#### Was the information environmental?

27. Regulation 2(1)(c) of the EIR provides that any information on plans or activities affecting or likely to affect the elements and factors referred to in regulation 2(1)(a) and (b) constitutes "environmental information". In this case, the relevant element to consider is land.
28. The Council considers that it correctly handled the requests under the FOIA and that the EIR did not apply in this case. It has argued the following in support of this position:

*"Technically the consultation was about school reorganisation only. The documentation produced during the consultation process detailed that, in the long term, if the academy route was decided upon, there would be an opportunity to approach government for funding for future building work, in respect of which there would be the usual planning consultations in the future.*

*The move from schools to academies involved no destruction or creation of buildings and therefore the FOI was applied. The move to academies could have meant that it was more likely than not that the state of the land relating to the school sites, or indeed other sites might at some future date be altered, in which case section 2(c) of the EIR would apply, but the effect would not be immediate. The link between the move to academy status and any future build would be subject to government funding and planning matters and therefore too distant to bring the request within the Regulations."*

29. Having considered the consultation document in question, the Commissioner did not agree that the Council was purely inviting views on merging the schools together as suggested. The Council clearly referred to the aim of building a new building in the consultation document, the closure of some primary schools and ensuring adequate transport provision. In the Commissioner's view, the consultation document therefore invited comments on plans that were likely to affect the environment i.e. the land. The fact that any effect was not likely to be

immediate, as the Council has suggested and that proposals were subject to planning permission does not alter the fact that the consultation and final decision regarding the academy proposal was likely to affect the elements of the environment.

30. For the reasons set out in the above, the Commissioner decided that the Council should have dealt with the requests under the EIR rather than the FOIA as the information requested fell within the scope of regulation 2(1)(c) of the EIR.

### **Was the information held?**

#### **The Council's position**

31. In its refusal notice, the Council stated that it was not possible to provide the information that the complainant had requested. During the Commissioner's investigation, the Council maintained the position that it did not actually hold the information. The Council's position was that essentially, although it held the consultation responses themselves, it did not hold the information requested. The Council also believed that even if it had held the "raw data" requested then it would argue that the FOIA did not require it to prepare and present that information in a particular way as that would be creating new information.

32. In the Council's correspondence with the Commissioner dated 27 October 2009, it did not address all of the requests when explaining precisely why it did not hold the information. It referred to request 1 and asserted that this request was impossible to answer. It explained the following:

*"Some responses were in tick box arrangement with additional comment and others were in the form of letters detailing family personal involvement with certain schools, some expressed reservations with support depending on answers to 'but if' type questions. None of these enabled a proper answer to this particular question".*

33. In relation to request 2, the Council stated the following:

*"Whilst the tick box forms allowed for this data to be provided by the individual, not all those responding using the forms actually ticked the boxes, others ignored the form and wrote letters without this information, other letters were from groups. It would have been difficult and time-consuming to try to establish from narrative which category the responses fell into".*

34. In relation to request 3, the Council stated the following:

*"A response would have involved reading each letter (some three pages long) and producing statistics purely for the requestor. It would be inappropriate for the authority to allow one individual to dictate the use of resources in this way".*

35. The Council was asked by the Commissioner to elaborate on its arguments and the Commissioner set out his view that it seemed likely that the Council did in fact

hold some of the information requested. The Council provided some further arguments in its letter dated 8 December 2009 as follows:

- Request 1 – “no further comment.”
- Request 2 – “There are two points here. Some of the responses were silent as to certain categories which mean we did not have the information to give an accurate answer to e.g. how many of the responses were from parents, because we did not know. In addition the level of skill or judgement required to analyse the data was not available. The Council accepts that in some cases it was known whether the response came from a parent, future parent, previous parent...”
- Request 3 – “no further comment”.
- Request 4 – “please see documents enclosed” [i.e. the consultation responses]
- Request 5 – “I have tried to explain the position in our correspondence and am not sure I can add anything to this. Please see documents enclosed” [i.e. the consultation responses]
- Request 6 – “Again, I have tried to explain the position. It was not possible to establish what information was held without a complex analysis”.
- Request 7 – “Sometimes a person’s preference was hidden within the content of the response and not as apparent as an express statement of support for a particular site or silence as to preference. This needed to me [sic] interpreted. An analysis was required”.
- Request 8 – not addressed in the letter.

### **The Commissioner’s position**

36. Having considered the arguments proposed by the Council, the Commissioner considered that some of them appeared to contradict the position it had taken that the information was not held. In particular, he notes the following lines of argument:
- Some responses did not contain the information to respond to particular requests, although others did.
  - A response that necessitated reading each response and producing statistics purely for the requestor would be an inappropriate use of its resources.
37. Regarding the first bullet point above, the fact that some information was not contained in all of the responses, does not in the Commissioner’s view mean that no information was held at all. If some responses contained information relevant to the request this would still be held and it would have been appropriate to explain to the complainant that the information was not recoded in respect of all of the responses and that the Council was only required to consider recorded information.
38. Regarding the second bullet point, the Council appears to suggest that it would in some cases be possible to extract relevant information but that this was not an appropriate use of its resources. Arguments concerning how long it may take to



establish whether information is held and if so to extract it, are relevant when assessing whether the public authority can refuse a request on the basis that the cost or time of complying with it means that it is manifestly unreasonable. If this is the case, the exception under regulation 12(4)(b) will apply. However, such an argument does not support the Council's position that the information was not held.

39. Despite the above, the Council stated that it wished to maintain that it did not hold any of the information requested by the complainant.

40. The Commissioner's general position is that:

- The fact that a public authority may not have the requested information to hand but needs to extract it from other information does not in itself mean that information is not held on the basis that the request demands the creation of "new information".
- Information is held notwithstanding that it requires any level of skill to retrieve and extract the relevant information although arguments concerning section 12 under the FOIA or regulation 12(4)(b) under the EIR may apply if the cost or time taken to comply with a request would be beyond the "appropriate limit" under the FOIA or manifestly unreasonable under the EIR.
- Information is held where it is reasonable to expect the public authority to apply their knowledge to make a judgement to obtain the relevant information.
- Information is unlikely to be held where the public authority would be required to make a complex judgement which may require specialist knowledge.

41. In the case of Johnson and the Ministry of Justice, ("The MOJ") the Information Tribunal made the following statement at paragraph 49:

*"...we accept...that the degree of skill and judgement that must be applied to the building blocks may well have a bearing on whether the information is held or whether what is being sought is more properly construed as being new information..."*

42. The Commissioner accepts that it will often be difficult to separate "skill" from "judgement" and that both activities may be required in order to respond to a request.

43. The Commissioner will find that requested information is held regardless of whether any level of skill is required to retrieve and extract the information. This is on the basis that a skill represents an ability acquired through training. Anyone can be taught to retrieve and extract information. In any event, the Commissioner would expect most public authority employees to possess the basic skills to add, subtract, multiply and divide which are likely to be required to answer requests asking for totals, averages or percentages.

## Request 1

44. It is important to note at this point that public authorities should read requests objectively. In the Commissioner's view an objective reading of request 1 means that any response which *explicitly* welcomed or objected to the academy proposal would be within its scope. The Council mentioned that some responses expressed reservations with support depending on responses to 'but if' questions. In the Commissioner's view such answers would fall outside of the scope of the request.
45. The Commissioner has not reviewed the relevant 317 responses to determine whether any information relating to request 1 was held by the Council however he considers that the Council could have carried out this exercise. Responding to this request would involve reading the 317 responses, identifying whether any of the respondents explicitly welcomed or objected to the academy and arriving at a total figure for each. It is not the Commissioner's view that the skill and judgement required to respond to this request was so complex that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason. Moreover, on the basis of the submissions to date, the Commissioner is not satisfied that on a balance of probabilities information within the scope of the request is not held.
46. It is however also important to clarify that the EIR provides for a right of access to recorded information. Therefore if a review of the relevant responses revealed that none of the respondents explicitly welcomed or objected to the academy, then no information relevant to request 1 would be held. Where no information was held regulation 12(4)(a) would be applicable. However, this would be on a very different basis to that claimed by the Council to date. In the event that there were some responses explicitly welcoming the proposal but no objections or vice versa, information of relevance to part of the request would be held.

## Request 2

47. The Commissioner has not reviewed the relevant 317 responses to determine whether information was held relating to each of the categories listed in the request however he considers that the Council could have carried out this exercise. Responding to this request would involve reading the 317 responses, identifying how many respondents indicated that they fell within one of the categories listed by the complainant and arriving at a total figure. It is not the Commissioner's view that the skill and judgement required to respond to this request was so complex that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason. As above, he is not satisfied on the basis of the submissions to date and on a balance of probabilities, that information of relevance to the request is not held.
48. As with request 1, if a review of the responses revealed that there were any categories which none of the respondents fell within, information in relation to those categories would not be held and regulation 12(4)(a) would apply. Again, this would be on a very different basis to that claimed by the Council.

### Request 3

49. The Commissioner has not reviewed the responses to determine whether any information relevant to request 3 was held however he considers that the Council could have done so. Responding would involve reviewing any responses relevant to request 1 to determine whether it is possible to identify if the respondent was a parent/guardian, school staff, governor, student, local resident or other. The Council would then need to arrive at total figures. The skill and judgement required to respond to this request was not so complex in the Commissioner's view that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason. As with the other requests the Commissioner is not persuaded that on a balance of probabilities information of relevance to the request is not held.
50. If no information relevant to request 1 was held, information would not be held in relation to this request either. In the event that information relevant to request 1 was held but it was not possible to identify whether the respondents fell within any of the categories listed, again, the information would not be held. Alternatively, information may be held in relation to part of the request if recorded information was held in respect of some of the categories and not others. Where no information was held regulation 12(4)(a) would be applicable. However, this would be on a very different basis to that claimed by the Council.

### Request 4

51. The Commissioner has not reviewed the relevant 317 responses to determine whether any information relating to request 4 was held however he considers that the Council could have done so. Responding would involve reviewing the 317 responses, identifying how many made explicit reference to the age of transfer and arriving at a total figure. The skill and judgement required to respond to this request was not so complex in the Commissioner's view that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason.
52. If a review of the relevant responses revealed that none of the respondents made explicit reference to the age of transfer then the information would not be held and regulation 12(4)(a) would apply. This would however be on a very different basis from that claimed by the Council. However the Commissioner is not persuaded, on the basis of the submissions to date, that on a balance of probabilities information of relevance to the request is not held. This is particularly given the comments regarding support for the change to a two tier system in paragraph 4.11.2 of the Council report that was published in June 2008 and which is mentioned in paragraph 6 of this notice.

### Request 5

53. The Commissioner has not reviewed the relevant responses to determine whether any information relating to request 5 was held however he considers that the Council could have done so. Responding would involve reviewing any responses relevant to request 4 and identifying how many respondents stated

their support for a change in the age of transfer and how many stated a preference for a three-tier system. The Council would then need to arrive at total figures. As with request 1, the Commissioner considers the request, read objectively, would cover clear statements of support for a change in the age of transfer or preferences for a three-tier system. Any responses either way that included caveats, conditions or reservations would fall outside of the scope of the request.

54. The skill and judgement required to respond to this request was not so complex in the Commissioner's view that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason. Moreover, on the basis of the evidence provided to date and on a balance of probabilities, the Commissioner is not satisfied that information of relevance is not held. Again, in reaching this view he has noted the comments in the Council's report that was mentioned in paragraph 52 above.
55. If no information relevant to request 4 was held, information would not be held in relation to this request either. In the event that information relevant to request 4 was held but there was no recorded information revealing whether the respondents stated support for a change in the age of transfer or a preference for a three-tier system no recorded information would be held. However in light of the comments in the paragraph above either of these outcomes appear unlikely. Where no information was held regulation 12(4)(a) would be applicable. However, this would be on a very different basis to that claimed by the Council. Alternatively, information may only be held in relation to part of the request if there was recorded information held regarding respondents supporting a change in the age of transfer but no recorded information concerning respondents expressing a preference for a three-tier system or vice versa.

## Request 6

56. The Commissioner has not reviewed the relevant 317 responses to determine whether any of the respondents expressed a preference for a particular site however he considers that the Council could have done so. Responding to this request would involve reading the 317 responses, identifying those expressing a site preference and arriving at a total figure. The skill and judgement required to respond to this request was not so complex in the Commissioner's view that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason.
57. It may be that the information was not actually held because nobody expressed a preference for a particular site. In these circumstances, no recorded information would be held and Regulation 12(4)(a) would apply but not for the reasons stated by the Council. The Commissioner is not persuaded on the basis of the submissions to date, that on a balance of probabilities, this is the case. As with some of the other requests above, in reaching this view he has noted the comment in paragraph 4.11.2 of the Council report of June 2008 that "just over a third of those who stated a preference expressed their wish for the Academy to be located on the existing Midhurst Grammar School site rather than on a site in Easebourne".

## Request 7

58. The Commissioner has not reviewed the relevant responses to determine whether any information relating to request 7 was held however he considers that the Council could have done so. Responding would involve identifying any responses relating to request 6 and determining whether any of these expressed a preference for the Easebourne site. The Council would then need to arrive at a total figure. The skill and judgement required to respond to this request was not so complex in the Commissioner's view that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason.
59. If no information relevant to request 6 was held, information would not be held in relation to this request either. However this is unlikely bearing in mind the comments in paragraph 57 regarding the content of the Council's report. In the event that information relevant to request 6 was held but none of the respondents expressed a preference for the Easebourne site then no recorded information would be held and regulation 12(4)(a) would apply but not for the reasons stated by the Council. As stated in relation to the other requests, the Commissioner is not persuaded at this point and on the basis of the submissions to date, that on a balance of probabilities, this is the case.

## Request 8

60. The Commissioner has not reviewed the relevant 317 relevant responses to determine whether information relating to request 8 was held but he considers that the Council could have done so. Responding to this request would involve reading the 317 responses to determine whether any expressed the concerns listed by the complainant. The Council would then need to arrive at total figures. The skill and judgement required to respond to this request was not so complex in the Commissioner's view that the information was not held on that basis. He therefore considers that the Council inappropriately stated that the information was not held for this reason. Furthermore the Commissioner is not persuaded at this point and on the basis of the available evidence that on a balance of probabilities no information of relevance is held. This is particularly given that the concerns listed by the complainant were those that the Council had itself identified from the responses and highlighted in paragraph 4.11.2 of the report mentioned in paragraph 6 above.
61. It may be that the information was not actually held because nobody expressed the particular concerns listed by the complainant in his request, though this appears unlikely. In these circumstances, no recorded information would be held. Where no recorded information was held regulation 12(4)(a) would apply but not for the reasons stated by the Council. Alternatively some information may be held in respect of some of the concerns and not in respect of others. However, given the statements included in paragraph 4.11.2 of the Council's report it appears to the Commissioner likely that information relevant to each category will be held.

## Procedural Requirements

62. As the Council failed to cite the exception under 12(4)(a) within 20 working days of the request it breached regulation 14(2). As it had not rectified this by the date of its internal review, it breached regulation 14(3)(a).
63. The Commissioner also considers that when the Council stated that it did not hold any relevant information, it did so for inappropriate reasons because it is clear that the Council had not searched the relevant responses to ascertain whether or not it did in fact hold the information. The Commissioner does not accept that this work would have been so complex that the Council could have legitimately claimed that the information was not held. He also does not accept that extracting the information from the responses would amount to creating “new information”.

## The Decision

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64. The Commissioner’s decision is that the Council dealt did not deal with the request in accordance with the EIR for the following reasons.
  - It breached regulation 14(2) for failing to cite regulation 12(4)(a) (the exception upon which it relied) within 20 working days of the request.
  - It breached regulation 14(3)(a) for failing to cite regulation 12(4)(a) by the date of its internal review.
  - It inappropriately cited section 12(4)(a) on the basis that the skill and judgement involved in extracting relevant information meant that it was not held.

## Steps Required

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65. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR:
  - Issue a refusal notice in accordance with regulation 14(1) of the EIR citing the exception under regulation 12(4)(b) as a basis for refusing to process any of the requests that it considers to be manifestly unreasonable.
  - In relation to any request the Council does not wish to refuse on the basis of Regulation 12(4)(b), search through the relevant 317 responses and either provide the information requested in accordance with regulation 5(1) of the EIR or issue a refusal notice in accordance with regulation 14(1) of the EIR citing an exception other than 12(4)(b). If the Council states regulation 12(4)(a) in relation to any of the requests (or parts of requests) this should be on the basis that having searched through the 317 relevant responses, there was no recorded information held as described by the Commissioner in this Notice. The Council should ensure that it addresses each element of the requests separately.

66. If the Council decides to issue a refusal notice citing the exception under regulation 12(4)(b) in relation to any of the requests, it should consider its obligation to provide reasonable advice and assistance to the complainant in accordance with regulation 9 of the EIR.
67. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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68. 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.

### **Other matters**

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69. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
70. The EIR Code of Practice ("the EIR code") issued under regulation 16 of the EIR sets out recommendations for internal review procedures. The EIR code states the following in part XII:
  - *"The complaints procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR...it should be possible to reverse or otherwise amend decisions previously taken"*.
71. The Commissioner notes that in this case, the internal review appears to have been completed by the same officer who responded to the request initially. The Commissioner considers that, in line with the EIR Code, it is preferable if the same person who responded initially does not also consider the internal review. Ideally, a more senior person should conduct the internal review wherever possible. Conducting internal reviews in this way helps to ensure fairness and impartially.
72. The Commissioner considers that the review itself conducted by the Council was very brief and did not demonstrate that the relevant issues were thoroughly reviewed. The Commissioner would like to take this opportunity to remind the Council that reviews should not be cursory and should provide a genuine possibility of reversing or amending the original decision that was made in line with the EIR code.
73. The Commissioner trusts that the Council will consider the above comments and make appropriate improvements to its internal review procedure. The Council

Reference: FS50210350



Information Commissioner's Office

should also note the guidance issued by the Commissioner on internal reviews that is available on the website at [www.ico.gov.uk](http://www.ico.gov.uk).



## Right of Appeal

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74. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 served.

**Dated the 1st day of March 2010**

**Signed .....**

**Jo Pedder  
Senior Policy Manager**

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

## Legal Annex

### Environmental Information Regulations 2004

#### Regulation 2 - Interpretation

##### Regulation 2(1) In these Regulations –

“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;

#### 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 12 - Exceptions to the duty to disclose environmental information

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

**Regulation 12(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 –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data

#### **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**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).