

**Freedom of Information Act 2000 (Section 50)
and
The Environmental Information Regulations 2004.**

Decision Notice

Date: 18 October 2011

Public Authority: City of York Council
Address: The Guildhall
York
YO1 9QN

Summary

The complainant submitted a request to the City of York Council ('the Council') for information from environmental records held on a property in York. The Council stated that it would only provide a collated version of this information upon provision of a fee. The Commissioner finds that Council has breached regulations 5(1) and 5(2) of the EIR as it failed to make the requested information available on request within the statutory time for compliance. The Council has breached regulation 8(3) by imposing an unreasonable charge for the provision of environmental information. The Council has breached regulation 6(2)(c) by failing to make the applicant aware of the appeal provisions of the EIR when refusing to provide information in a specific form. It has also breached regulation 11(4) by failing to provide its internal review to the complainant within 40 working days. The Commissioner requires the Council to make the requested information available to the complainant for a reasonable fee within 35 days of this notice.

The Commissioner's Role

1. The Environmental Information Regulations (The Regulations) 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 Regulations 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 Regulations.

Background

2. Section 3 of the Local Land Charges Act 1975 compels all local authorities to generate, maintain and update a Local Land Charges Register and to provide local searches. In order to obtain information from a local search, an application for an Official Search must be submitted to the relevant Local Authority on form LLC1. This is usually accompanied by form CON29R.
3. The CON29R form is comprised of two parts. Part 1 contains a list of standard enquiries about a property. Optional enquiries are contained in Part 2.
4. When a property or piece of land is purchased or leased, a request for a search is sent to the relevant local authority.
5. The complainant represents a company which provides information about property and land issues.

The Request

6. On 20 October 2010 the complainant requested access, free of charge, to records containing the information necessary to complete a CON29R form.

The complainant requested this information in relation to a specific known property, and specified that she wished to inspect these records in person.

7. The Council acknowledged this request on the same day and responded on 17 November 2010. This response stated that pending further guidance from central government, it would only offer access to "public register information". The remainder of the CON29R information would be provided via a computer print out at a cost of £69.
8. On 18 November 2010 the complainant emailed the Council and requested an internal review of this response. On 6 January 2011, the complainant again emailed the Council and asked that the Council respond to her request for an internal review. On 7 January 2011, the Council emailed the complainant and stated that in its view, a request for internal review was only valid if the applicant had made "representations" about why they believed a public authority had failed

to comply with the EIR, in line with regulation 11. The Council stated that it would only carry out an internal review once it had received the complainant's "representations and any supporting evidence".

9. On 10 January 2011, the complainant emailed the Council to again reiterate her request for an internal review was conducted. She explained why she believed that the Council had failed to comply with regulations 5(1), 5(2), 6(1), 6(2)(c), 9(1), 14(2), and 14(3)(a).
10. Following the intervention of the Commissioner, the Council provided its internal review outcome to the complainant on 10 March 2011. This upheld the original response.

The Investigation

Scope of the case

11. On 3 February 2011, the complainant contacted the Commissioner to complain about the Council's compliance with the provisions of the EIR.
12. The Council has confirmed that it will make some of the requested information, specifically information relevant to CON29R queries 1.2, 2(a), 3.4(a), 3.4(e)-(f), available for inspection free of charge. The Commissioner has therefore excluded these parts of the request from the scope of his investigation.

Chronology

13. On 2 March 2011, the Commissioner wrote to the Council to inform it that he had received the complaint. The Council responded on 4 March 2011 and stated that it did not believe that the complaint was valid for consideration by the Commissioner. The Council's view was that the complainant had not submitted a valid 'representation' for internal review until 10 January 2011, and so the 40 working days afforded to the Council to comply with the request in regulation 11(4) had not expired.
14. On 7 March 2011, the Commissioner emailed the Council to explain that his view was that the complainant had made a valid request for an internal review on 18 November 2010. The Council had consequently breached regulation 11(4) by failing to provide its internal review within 40 working days. The Commissioner therefore concluded that the complainant had a valid complaint, and asked that the Council forward a copy of its internal review outcome to him as soon as

possible. The Council provided its internal review to both the Commissioner and the complainant on 10 March 2011.

15. On 15 March 2011, the Commissioner wrote to the Council to set out his general position on access to information of this nature under the EIR. He also drew the Council's attention to relevant decision notices and decisions of the First Tier (Information Rights) Tribunal. The Commissioner asked the Council a series of questions about the request. The Council responded to this email on 16 April 2011.

Analysis

Substantive Procedural Matters

Regulation 2

16. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
17. The Commissioner considers that the information requested falls within regulation 2(1)(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 these elements". Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The Commissioner therefore considers the information requested by the complainant to be environmental information. The Council states that it has "no choice but to accept that the information is environmental".

Regulation 5

18. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) provides that this information should be made available within 20 working days following receipt of the request.
19. As yet, the Council has not provided the complainant with the requested information.
20. The complainant's original request was submitted on 10 November 2010. The Commissioner therefore finds that the Council has breached regulation 5(1) by failing to provide the requested information, and

regulation 5(2) by failing to make the requested information available within the statutory time for compliance.

Regulation 6

Regulation 6(1)

21. Regulation 6(1) provides an applicant with the right to request that information be made available in a particular form or format. 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. A public authority should comply with this preference unless, in accordance with regulation 6(1)(a), it is reasonable to make the information available in another format, or, in accordance with regulation 6(1)(b) the information is already publicly available in another format.
22. Although the Council has not specifically stated that it relies on regulation 6(1)(a), the Commissioner assumes that this is the case. The Council states that it will not provide the requested information via inspection, but instead in the form of a print out from its Uniform system. Uniform is a spatial system used by many local authorities to manage property search information. The requested information has been computerised and held within this system since 2000. In order to locate the relevant information, a search is conducted of the system for a particular address, and information relevant to that property is returned in the form of a report. The Council explains that because the land charges service is now fully electronic, its paper records are held off site in a storage facility, which is not accessible to the public and has no facilities for inspection.
23. The Commissioner accepts that in the particular circumstances of this case, it would be reasonable for the Council to provide the information in a format other than inspection. This is because of the practical difficulties that allowing inspection would create, because there is no facility for allowing members of the public to inspect information held either in an offsite storage facility or on back office computers. The Commissioner also accepts that the Uniform system can only generate the relevant information as a result of a search and that the applicant cannot inspect the data its original format on these computers. The Commissioner therefore accepts that it is reasonable for the Council to make the requested information available in another format, specifically as a print-out from the Uniform system, and finds that the Council has complied with regulation 6(1).

Regulation 6(2)

24. Regulation 6(2)(c) states that where a public authority decides it will not provide information in a format requested by the complainant, it should inform the complainant of the appeal and enforcement provisions set out in regulations 11 and 18 of the EIR. The Council did not advise the complainant of her right to request an internal review or how to complain to the Commissioner. Consequently the Commissioner finds that the Council has breached regulation 6(2)(c).

Regulation 8

25. 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 set out in regulation 8(3).
26. Regulation 8(3) states that any charge levied by a public authority for making environmental information available should be 'reasonable'. In [Markinson v Information Commissioner](#), the Tribunal found that these fees could not exceed the cost of providing the information, and should only take into account the costs of disbursements such as packaging and postage.
27. The Commissioner notes that the Council continues to impose a charge to provide the information requested by the complainant. The Council emphasises that this charge is levied in accordance with the [The Local Authorities \(England\) \(Charges for Property Searches\) Regulations 2008](#) ('the CPSR'). However, the Commissioner's position is that regulation 5(6) specifically disapplies the charging provisions under the CPSR. In [Kirklees v Information Commissioner](#), the Upper Tribunal accepted that regulation 5(6) has the effect of disapplying the provisions of the CPSR. The Tribunal also pointed out that regulation 4(2) of the CPSR provides that its charging provisions will not apply when another enactment, such as the EIR, requires information to be made available free of charge.
28. Consequently, the Commissioner considers that if the property records comprise environmental information as defined by regulation 2 of the EIR the CPSR cannot be used as the basis for charging and the Council must adopt the charging provisions of the EIR. The Council has not disputed that this property information is environmental. Therefore, despite the provisions of the CPSR, the information should be considered for disclosure under the EIR. This position also

acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law.

29. The Council has stated that it will levy a charge of £69 to provide the requested information to the complainant in the form of a print-out. It states that this charge covers the costs of “resource time to process what is in effect a search request through the land charges system”. In this case, the Commissioner has concluded that it was reasonable for the Council to provide the requested information in a format other than inspection, i.e. in hard copy. Regulation 8(3) provides that a public authority can charge a “reasonable” fee for providing electronic information. However, as confirmed by the Tribunal in [Markinson v Information Commissioner](#), this fee cannot include the costs of maintaining, identifying, locating or retrieving from storage the information in question, or the costs of staff time spent in dealing with the request. By taking into account additional factors, such as the costs of staff time, the Council has breached regulation 8(3).

Regulation 11

30. Regulation 11(1) provides that

“an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request”

Regulation 11(3) provides that upon receiving such representations, a public authority will consider them and decide if it has complied with the EIR. Regulation 11(4) provides that the public authority’s decision should be communicated to the applicant as soon as possible and within 40 working days.

31. In this case, the complainant emailed the Council on 18 November 2010 after receiving its response of 17 November. In this email, the complainant stated “I disagree with your decision regarding your interpretation of the EIR as stated below. I request an internal review into your decision...”
32. The Council however did not regard this as a valid request for an internal review, because regulation 11(1) states that an applicant is permitted to make ‘representations’. The Council did not respond to the complainant until she sent another email chasing a response on 6

January 2011. At this point the Council responded to explain that the complainant needed to make 'representations'.

33. The Commissioner disagrees with the Council's interpretation of regulation 11. He notes that paragraph 60 of the [EIR code of practice](#) states that

"Any written reply from the applicant (including one transmitted electronically) expressing dissatisfaction with an authority's response to a valid request for information should be treated as a complaint... These communications should be handled in accordance with the authority's review procedure pursuant to Regulation 11..."

The complainant's email of 18 November 2010 stated that she disagreed with the Council's response, and asked that an internal review was conducted. The Commissioner's view is that this is an unambiguous expression of dissatisfaction, and should have triggered the Council's internal review procedure.

34. The Commissioner acknowledges that it can be useful if an applicant tells a public authority why they are dissatisfied with the response to a request, so that it can ensure that any specific concerns are addressed. However, this is by no means a pre-requisite of a request for review. The Commissioner's view is that a public authority should treat an internal review as an opportunity to revisit the request and decide whether the initial response was correct. A public authority can, and should, do this without the applicant having to identify any specific failures in the response.
35. The Commissioner further notes that upon the Council's instruction, the complainant did submit a detailed 'representation' on 10 January 2011 which explained why she believed that the Council had committed breaches of seven regulations of the EIR. The Council did not in any case address any of these points in its eventual internal review. He also notes that even if 10 January was considered to be the date that the complainant submitted a valid request for review, the Council still failed to conduct the review within 40 working days of this date.
36. Consequently, the Commissioner finds that the complainant submitted a valid request for an internal review on 18 November 2010. The Council failed to provide the outcome of this review until 10 March 2011, and has therefore breached regulation 11(4).

The Decision

37. The Commissioner's decision is that City of York Council did not deal with the request for information in accordance with the EIR. The Commissioner finds that:
- The Council has breached regulations 5(1) and 5(2) of the EIR as it failed to make the requested information available for inspection within the statutory time for compliance.
 - The Council breached regulation 6(2)(c) by failing to advise the complainant of the appeal and enforcement provisions of the EIR when refusing to provide information in a specific format.
 - The Council has breached regulation 8(3) by imposing an unreasonable charge for the provision of environmental information.
 - The Council breached regulation 11(4) by failing to provide the outcome of its internal review within 40 working days.

Steps Required

38. The Commissioner requires that the Council make the requested information available to the complainant in the form of a print-out. The Council is only entitled to charge the complainant a fee that covers the costs of any disbursements.
39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

41. 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

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 18th day of October 2011

Signed

**Gerrard Tracey
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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 –

- (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 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 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 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 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;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or the request involves the disclosure of internal communications.

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).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.