

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

Decision Notice

Date: 12 October 2011

Public Authority: Havant Borough Council
Address: Civic Offices
Civic Centre Road
Havant
Hampshire
PO9 2AX

Summary

The complainant submitted a request to Havant Borough Council ('the Council') for information about a loft conversion at his property. The Council levied a charge for providing some information, and stated that the remainder of the requested information was not held. The Commissioner has investigated and concluded that the Council has disclosed all of the information that it holds within the scope of the complainant's request. However, the Council has breached regulation 8(3) by levying an excessive charge for providing information, and regulation 14(3)(a) by failing to cite the correct exception when stating information was not held. The Commissioner does not require the Council to take any further action.

The Commissioner's Role

1. The Environmental Information Regulations (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. In 1987 planning permission was granted for a loft conversion at the complainant's property.

The Requests

Request one

3. On 16 December 2009, the complainant submitted a request to the Council for building control records of previous and outstanding inspections at his address.
4. The Council sent copies of the inspection records for building regulations application submitted for a replacement garage at the property in 1992.
5. On 29 December 2009, the complainant emailed the Council to request that it also provided "building records for the loft conversion".
6. On 4 January 2010, the Council emailed the complainant to explain that it did hold a record from the 1980s of an application for a loft conversion at the address. However, it stated that it did not hold any plans or records relating to this application. The complainant queried this in an email of 7 January 2010.
7. On 13 January 2010 the Council emailed the complainant explaining that it had found copies of the "Planning Permission and Passing of Plans for Building Regulations". The complainant then attended the Council offices to view these records. The Council provided a copy of the decision notice for the planning application for the loft conversion, and a notice from building control confirming that the plans had been approved. The Council informed the complainant that a charge of £10 would be levied for each of these documents.

Request two

8. The following year, on 28 July 2010, the complainant requested "building inspection records" for three properties. One of these was the same property referred to above, and the other two were neighbouring properties.

9. The Council responded on 13 August 2010 and stated that building regulation inspection records for all three properties were available for inspection at its offices.

Request three

10. On 4 September 2010, the complainant emailed the Council to ask if between 1 December 2009, and 25 August 2010, it held the building inspection records, and plans submitted for building regulation approval for the loft conversion at his address.
11. The Council responded on 21 September 2010 stating that it did not hold these records. The complainant asked for a refusal notice setting out that the information was not held on 5 September 2010, and the Council confirmed that it would not provide any further refusal notice on 23 September 2010.

Request four

12. On 22 September 2010, the complainant emailed the Council and requested an appointment to conduct a personal search of the local land charges register for his address. He also asked to view building regulation documents.
13. The Council responded on 21 October 2010 and stated that the local land charges register would be made available for inspection, but a fee of £30 would be charged for providing information about building regulations.

Request five

14. On 20 October 2010, the complainant made a request for:
 - i. A copy of the passing of plans for a loft conversion at his address
 - ii. A copy of the plans submitted for building regulation approval for the loft conversion at his address
 - iii. A copy of the application form for building regulation approval for the loft conversion at his address
15. On 25 October 2010 the Council responded and stated that it did not hold this information.

The Investigation

Scope of the case

16. On 23 October 2010 the complainant contacted the Commissioner to submit a valid complaint about the way his requests for information had been handled.
17. The Commissioner has contacted the complainant on several occasions to attempt to set a scope for this investigation. The Commissioner has restricted the scope of his investigation to the following areas:
 - i. Does the Council hold any information relevant to the complainant's requests for:
 - o The building control decision notice for the loft conversion at the complainant's address
 - o The "passing of plans for building regulations" for the loft conversion at the complainant's address
 - o The plans submitted for building regulation approval at the complainant's address
 - o The building regulation inspection records for the loft conversion at the complainant's address
 - ii. Whether the fee of £10 for a copy of the decision notice for the planning application for the loft conversion, and the notice from building control was compliant with the EIR
18. The complainant has objected to the limited scope of the Commissioner's investigation. In particular he has asked that the Commissioner address his "complaint on the way the request for the planning documents was handled". However, the Commissioner's view after reviewing all the supporting evidence provided by the complainant is that the scope set out above includes all of the valid parts of the complainant's request. He has been unable to identify any supporting documentation for another complaint about a separate planning matter.
19. Initially the Commissioner also investigated whether the whether the Council's decision to refuse to provide access to building regulation history and charge a fee of £30 for this information was compliant with the EIR. During the course of the investigation the Council has confirmed that it accepts that this charge is not compliant with the EIR,

and that it now makes this information available at the Council's offices free of charge. The Commissioner has therefore excluded this part of the request from the scope of his investigation.

Chronology

20. On 18 May 2011, the Commissioner wrote to the Council with some queries about the way it had handled these requests. The Council responded on 31 May 2011.
21. The Commissioner and the Council exchanged further correspondence about the complainant between June and August 2011.

Analysis

Substantive Procedural Matters

Regulation 2

22. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
23. 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".
24. In this case, the complainant has requested information relating to planning and building control applications and decisions. The complainant has requested information relating to an application for a loft conversion. The Commissioner understands that this conversion involved constructing flat in the existing roof space of the address, with dormers to the front and rear and an external staircase. The Commissioner therefore considers that this application constituted a 'measure' that affected the landscape, which is an element of the environment set out in regulation 2(1)(a). Information relating to this would constitute "any information on" the application or measure. Therefore it is the Commissioner's view that the request was for environmental information

Regulation 5(1)

Does the Council hold any further information on building control and regulation notices for the loft conversion?

25. Regulation 5(1) provides that a public authority should make environmental information available upon request. The Commissioner has considered whether the Council holds any further information within the scope of the complainant's requests. In cases where it is unclear whether information is held, the Commissioner makes a decision based on the civil standard of the balance of probabilities test.
26. The Council has stated that it does not hold, nor has it ever held, the building control notice or the plans submitted for building regulation approval in relation to the loft conversion at the complainant's address. The Council explains that the "passing of plans for building regulations" would be the same document as the building control notice.
27. The Commissioner understands that the building regulations process is separate from planning permission. Building regulations approval confirms that the design and construction of a building is safe. Responsibility for ensuring that the building regulations have been met lies with Building Control Bodies. Local authorities operate such a building control service, but this can also be obtained through Approved Inspectors, who provide a private sector building control service. The individual carrying out the work has the choice of where to get approval.
28. The Council explains that in terms of building control, it receives one of two types of application. A 'Full Plans' application is an application to the Council for building regulation approval. The Council would produce a decision letter in response, with accompanying plans. A 'Building Notice' application is a notification to the Council that an Approved Inspector is providing the building control service. The Council has confirmed that would send an acknowledgment in response to such an application.
29. The Council explains that no building control application was ever made for the loft conversion at the complainant's address. Consequently, it did not create any information and so no information is held. The Council states that it has conducted a search of its computer system, Acolaid for this information, but has not found any relevant information. The Council states that all building control applications are recorded on this system, and no information is deleted from it.

30. The Commissioner asked the Council to explain why an email to the complainant of 13 January 2010 states "...we have found both copies of the Planning Permission and Passing of Plans for Building Regulations". This appeared to be sent in response to a request regarding the loft conversion. There is no record of what information was actually presented to the complainant for inspection when he attended the offices.
31. As a result of the Commissioner's enquiries on this point, the Council investigated why this email had been sent to the complainant. As a result, the Council undertook a search of its microfiched records. There is no index for this microfiche, which contains over 4000 records, and so Council staff had to search every record manually. This took a total of six working days. However, the Council stated because it could not explain fully why the email of 13 January 2011 referred to further information, it chose to conduct this work in order to ensure no further records were held. As a result of this search, the Council located copies of a planning permission, and plans for a formation of a flat in the loft space at the complainant's address. Copies of both documents have now been disclosed to the complainant. The Council cannot however conclusively confirm that this is the information referred to in its email of 13 January, as the officer who provided the response to this email has now left the Council's employment.
32. The complainant maintains that he has already seen the "passing of plans for building regulations", or the building control notice, at the Council's offices. He has advised the Commissioner that he is happy to "get an affidavit and swear to that is the truth". The complainant's contention is that after he viewed these documents, they were either destroyed or withheld by the Council.
33. The Commissioner accepts that the complainant is convinced that he has seen this document at the Council's offices. However, he also notes that the Council has, throughout its extensive correspondence with the complainant, consistently stated that it does not hold this information. He also notes that the Council has now conducted thorough searches of all of the manual and electronic records held by the relevant department, and none of these searches has revealed any information relevant to an application for building regulations approval. The complainant has not provided the Commissioner with any evidence to suggest that any application for building regulations approval was ever made to the Council. On this basis, the Commissioner accepts that on the balance of probabilities the Council does not hold any information within the scope of the request.

Regulation 14

34. Regulation 14(3) provides that where a public authority refuses a request, the refusal notice should cite the specific exception that it relies upon. Where information is not held, the appropriate exception to use is at regulation 12(4)(a). Although the Council stated that it did not hold the requested information, it failed to cite this specific exception in its refusal notice, and so it has breached regulation 14(3)(a).

Regulation 8

35. 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).
36. 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.
37. The Council levied a charge of £10 for a copy of the planning decision notice. This charge is set out on its [website](#). The Council explains that the charge was set as part of its "Medium Term Financial Strategy" and based on benchmarking with other authorities. However, as this information is environmental in nature, the Commissioner considers that any charges must be levied in accordance with the EIR. The Council states that the cost of £10 for these documents covers "Initial price for research and obtaining information". 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 in obtaining the information, the Council has breached regulation 8(3).

The Decision

38. The Commissioner's decision is that:
- o The Council has disclosed all of the information that it holds within the scope of the complainant's requests;
 - o The Council has breached regulation 8(3) by levying an excessive charge for environmental information; and
 - o The Council has breached regulation 14(3)(a) by failing to cite the specific exception it relied upon in its refusal notice.

Steps Required

39. The Commissioner does not require the Council to take any further action.

Other Matters

40. The Commissioner notes that the complainant has received some of 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.
41. 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

42. 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: 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 12th day of October 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF**

Legal Annex

Regulation 5 - Duty to make available environmental information on request

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.

(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 8 - Charging

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

(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 that examination.

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

Regulation 12 - Exceptions to the duty to disclose environmental information

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.

- (2) A public authority shall apply a presumption in favour of disclosure.
- (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.
- (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;

Regulation 14 - Refusal to disclose information

- 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.
- (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.
 - (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