

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

Decision Notice

Date: 11 May 2011

Public Authority: Selby District Council
Address: Civic Centre
Portholme Road
Selby
North Yorkshire
YO8 4SB

Summary

The complainant submitted a request to Selby District Council ('the Council') for information from environmental records held on a property in Selby. The Council stated that it would provide a collated version of this information upon provision of a fee, as it was reasonable for it to make the information available in a format other than inspection under regulation 6(1)(a). The Council also applied the exception at regulation 12(4)(b), which applies to manifestly unreasonable requests. 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 a charge for the costs of activities it was not entitled to take into account. The Council has also breached regulation 11(4) by failing to provide its internal review outcome within 40 working days. The Commissioner finds that the Council applied the exception at regulation 12(4)(b) incorrectly, and that it breached regulation 14(2) by failing to inform the complainant that it relied upon this exception within the statutory time for compliance. However, the Commissioner finds that the Council correctly relied upon regulation 6(1)(a) as it was reasonable for it to make information available in a format other than inspection. The Commissioner requires the Council to make the requested information available to the complainant in an alternative format 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 24 June 2010 the complainant requested access, free of charge, to records containing the information necessary to complete an LLC1 and CON29R form.

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

7. On 6 July 2010, the Council wrote to the complainant and informed him that the requested information was held. However, it stated that it did not intend to provide this information free of charge. The Council stated that the EIR provided "limitations and exceptions", such as the exceptions for manifestly unreasonable requests, personal data, and regulation 6(1)(a), which provides an exception for complying with an applicant's request to receive information in a certain format if it is reasonable to provide it in another format. However the Council did not state that any of these exceptions applied to the complainant's request.
8. On 7 July 2010, the complainant wrote to the Council to request an internal review of this decision.
9. Following the intervention of the Commissioner, the Council provided its internal review outcome on 11 November 2010. This explained that the Council would continue to charge for the provision of information relevant to the CON29R form in line with the [Local Authorities \(England\) \(Charges for Property Searches\) Regulations 2008](#) ('the CPSR'). The Council also applied the exception at regulation 12(4)(b) to the request, and accepted that it had breached regulation 11(4) by failing to conduct an internal review within 40 working days.

The Investigation

Scope of the case

10. On 6 October 2010, the complainant contacted the Commissioner to complain about the Council's compliance with the provisions of the EIR.
11. The Council has confirmed that it will make the information relevant to CON29R queries 1.1(a)-(e), 1.2, 3.5, 3.9(a)-(n) and 3.10(a)-(b) available for inspection free of charge. The Council has also confirmed that as a result of the [Local Land Charges \(Amendment\) Rules 2010](#) it will make the Local Land Charges Register available free of charge. The Commissioner has therefore excluded these parts of the request from his decision notice.
12. The Council has explained that information relevant to CON29R queries 1.1(f)-(h), 3.7(a) and 3.8 is not held by the Council but by the North Yorkshire Building Control Partnership. Information relevant to CON29R queries 3.3(a)-(b) is not held by the Council but by the relevant water authority. Information relevant to CON29R queries 2(a)-(d), 3.1, 3.2,

3.4(a)-(f), 3.6(a)-(l), 3.7(e), and 3.11 is not held by the Council but by North Yorkshire County Council. The Commissioner has therefore also excluded these parts of the request from the scope of the decision notice.

13. The decision notice consequently sets out the Commissioner's view on whether the Council has complied with the EIR in relation to the outstanding parts of the request: information relevant to CON29R queries 3.7(b)-(d) and (f), 3.12(a)-(c) and 3.13.¹

Chronology

14. On 14 October 2010, the Commissioner wrote to the Council and drew its attention to the decision notice [FER0236058](#), and the subsequent Information Tribunal decision, [East Riding of Yorkshire Council v Information Commissioner \(EA/2009/0069\)](#), which had dealt with a similar request for access to building control information. The Commissioner asked the Council to provide its internal review outcome to the complainant. Alternatively, if the Council wished to waive its right to conduct an internal review, to provide him with a submission in support of its decision to refuse the request. The Council acknowledged this email on 21 October 2010 and confirmed that it intended to conduct an internal review.
15. On 11 November 2010 the Council provided the complainant and the Commissioner with a copy of its internal review outcome.
16. On 16 November 2010 the Commissioner wrote to the Council to ask that it answer some further queries.
17. The Council responded to this email on 24 December 2010.

Analysis

Substantive Procedural Matters

Regulation 2

18. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.

¹ Annex A details the nature of the information relevant to these CON29R enquiries

19. 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.

Regulation 5

20. 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.
21. The Council argues that it does not actually hold the requested information, and refers to the [Local Authority Property Search Services – Costing and Charging guidance](#). This guidance was published by the DCLG in 2009. The guidance makes a distinction between pre-unrefined, unrefined and refined data, and defines the terms as follows:

“Pre-unrefined data’ is used to describe data that cannot be made publicly available as access would not comply with the Data Protection Act (‘DPA’) or pass a Freedom of Information (‘FOI’) test...Only the local authority can access the case file to view or extract the enforcement notice. Pre-unrefined data can only be converted into unrefined data by the local authority... ‘Unrefined data’ is used to describe data that would pass a DPA/FOI test (ie it may have been extracted from other sensitive data). Unrefined data is the first point at which data is accessible to a third party and where any further refinement of that data could equally be undertaken by a third party or the local authority. A local authority can charge for providing unrefined data in accordance with the Local Authorities (Charges for Property Searches) Regulations 2008 unless the information is ‘free statutory information’ within the meaning of the Regulations... ‘Refined data’ is data where value has been added to the unrefined data whether by the local authority (e.g. to produce a compiled search) or by a third party (e.g. the private sector) using the same set of unrefined data.”

22. The Council states that it will need to locate, extract and collate the requested information in order to convert it into "refined" data. It therefore argues that the information is "not a record as existing at the date of the EIR request", and consequently falls outside of the remit of the EIR.
23. The Commissioner notes the distinction between pre-unrefined, unrefined, and refined data as set out in the DCLG guidance. However, he does not share the Council's view that in order to comply with the request, the Council would need to create new information that did not exist as a record at the time of the request. The Council has explained that information relevant to the request is held in its M3 computer system. The Information Tribunal in [Home Office v Information Commissioner](#) [EA/2008/0027] considered a case where the public authority held 'raw data' in a computer system, but would have to create a new search or report in order to identify information relevant to the request. The Tribunal found that

"... there is in reality no distinction between information held by a public authority and raw data held on a database which is itself held by the public authority...The suggestion that... running a new report would involve research or the creation of new information was not one that the Tribunal could accept. In both cases information comes from the same database and no new information needs to be collected in order to obtain information by running a new report...The exercise which [the Home Office] will have to go through seems to us to be covered precisely by the wording of regulation 4(3)(d) (extracting the information from a document [which we accept can include a computer database] containing it)"

Similarly, in [Kirklees Council v Information Commissioner](#) [2011 UKUT 104 AAC], the Upper Tribunal commented that:

"In respect of any request for information...it is inherent that a public authority will have to undertake some sort of evaluative work...some will require more evaluative work than others, but that cannot take it outside of the definition of a request".

24. The Commissioner concurs with this interpretation. In this case, the Council has confirmed that it holds the relevant information in its M3 system. Location and extraction are simply necessary processes in responding to the request, and would not constitute creating new information.

25. As yet, the Council has not provided the complainant with the requested information. However, it has stated that it will provide CON29R information if the complainant pays a set fee.
26. The complainant's original request was submitted on 24 June 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)

27. 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.

Regulation 6(1)(a)

28. Regulation 6(1)(a) provides that a public authority will not have to comply with a complainant's request to receive information in a particular format where it is reasonable to provide information in another format. In this case, the Council argues that it would be reasonable to make the information available in a format other than inspection. The Commissioner has considered this below.
29. The Council explains that the requested information is held in its M3 system. This computer system is physically located in the Council's offices, and is not made accessible to the public because it contains personal information, information provided in confidence, information subject to copyright and legally privileged information.
30. 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 due to the practical difficulties that allowing inspection would create, because there is no facility for

allowing members of the public to inspect information held on back office computers.

31. As the Commissioner has concluded that regulation 6(1)(a) was applied correctly, he finds that the Council has complied with regulation 6(1). The Council should therefore provide the information to the complainant in an alternative format, such as a print-out or electronically.

Regulation 8

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 set out in regulation 8(3).
33. 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.
34. The Commissioner notes that the Council continues to impose a charge to provide the information requested by the complainant. The Council has emphasised that this charge is levied in accordance with the CSPR. It also refers to the DCLG guidance which confirms that authorities can levy a charge for providing 'unrefined' data under the CSPR. However, the Commissioner's position is that regulation 5(6) specifically disapplies the charging provisions under the CSPR. In [Kirklees v Information Commissioner](#), the Upper Tribunal accepted that regulation 5(6) has the effect of disappling the provisions of the CSPR. The Tribunal also pointed out that regulation 4(2) of the CSPR provides that its charging provisions will not apply when another enactment, such as the EIR, requires information to be made available free of charge.
35. Consequently, the Commissioner considers that if the property records comprise environmental information as defined by regulation 2 of the EIR the CSPR 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 CSPR, 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.

36. 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, or via electronic means. 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. It must only cover the costs of disbursement such as photocopying and postage. By taking into account additional factors, such as the costs of staff time, the Council has breached regulation 8(3).

Regulation 11

37. Regulation 11(3) provides that a public authority should reconsider its response to a request for information upon receiving representations from the applicant. Regulation 11(4) provides that the outcome of a decision under regulation 11(3) should be communicated to the applicant as soon as possible and within 40 working days.
38. The complainant submitted a request for internal review on 7 July 2010. The Council did not provide the outcome of its internal review until 11 November 2010, after the intervention of the Commissioner. The Commissioner consequently finds that the Council has breached regulation 11(4). The Council accepts that this is the case and has apologised to the complainant for this breach.

Regulation 12

Regulation 12(4)(b)

39. In its internal review outcome of 11 November 2010 the Council applied the exception at regulation 12(4)(b) to the requested information, and concluded that the public interest favoured maintaining the exception. Regulation 12(4)(b) provides an exception for requests that are ‘manifestly unreasonable’. Whilst the EIR do not define the term, the Commissioner’s opinion is that ‘manifestly’ implies that a request should be obviously or clearly unreasonable.
40. There is no single test for what sorts of requests may be considered to be manifestly unreasonable. Instead, each individual case is judged on its own merits taking into account all of the circumstances surrounding the request. It is the Commissioner’s view that regulation 12(4)(b) will

apply where it is demonstrated that a request is vexatious or that compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

41. The Commissioner notes that the EIR is both applicant and motive blind. However, he appreciates that for vexatious or, as is relevant here, manifestly unreasonable requests, the context of the request and the requester's previous relationship with the public authority may be relevant.
42. The Council argues that the complainant's request is manifestly unreasonable because the complainant had previously conducted a personal search for the property in question on 28 May 2010, paying the requisite fees charged by the Council. The complainant's subsequent request under the EIR was submitted on 24 June 2010. The Council therefore considers the request is manifestly unreasonable because it considers that the requested information has already been made available.
43. The Commissioner acknowledges, it is arguable, that repeated requests could potentially be considered to be manifestly unreasonable if an insufficient period of time has elapsed before a request is resubmitted. What constitutes a reasonable interlude between repeated requests may to some extent depend on the nature of the information sought and whether there is a reasonable expectation that it may have changed since it was last provided by a public authority.
44. The Commissioner considers that a period of around four weeks is not an unreasonable interval between the submission of a request for information in relation to the same property. In any event, the Commissioner does not consider that the Council has demonstrated how this would deem the request 'manifestly unreasonable'.
45. Consequently, the Commissioner considers that the exception at regulation 12(4)(b) is not engaged and he has therefore not gone on to consider the public interest test.

Regulation 14

Regulation 14(2)

46. Regulation 14(2) provides that where a public authority applies an exception under regulation 12, it should make this refusal as soon as possible and within 20 working days of receiving the request.

47. Upon internal review, the Council applied the exception at regulation 12(4)(b). The complainant's original request was made on 24 June 2010, and the Council informed the complainant that it relied on regulation 12(4)(b) on 11 November 2010. The Commissioner consequently finds that the Council has breached regulation 14(2).

The Decision

48. The Commissioner's decision is that Selby District 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 on request within the statutory time for compliance.
 - The Council has breached regulation 8(3) including activities it was not entitled to take into account in its charges.
 - The Council has breached regulation 11(4) by failing to provide its internal review outcome within the statutory time for compliance.
 - The Commissioner finds that the Council applied the exception at regulation 12(4)(b) incorrectly.
 - The Council breached regulation 14(2) by failing to provide a refusal notice citing the exception at regulation 12(4)(b) within the statutory time for compliance.

Steps Required

49. The Commissioner requires that the Council make the requested information available for the complainant in a format other than inspection. The Council must only levy the costs of disbursements for providing this information.
50. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

51. 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

52. 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 11th day of May 2011

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Annex A - CON29R Enquiries

3.7 Do any statutory notices which relate to the following matters subsist in relation to the property other than those revealed in a response to any other enquiry in this Schedule:

- a) building works
- b) environment
- c) health and safety
- d) housing
- f) public health

3.12 Do any of the following apply (including any relating to land adjacent to or adjoining the property which has been identified as contaminated land because it is such a condition that harm or pollution of controlled waters might be caused on the property):

- a) a contaminated land notice
- b) in relation to a register maintained under section 78R of the Environmental Protection Act 1990:
 - (i) a decision to make an entry
 - (ii) an entry
- c) consultation with the owner or occupier or the property conducted under section 78G of the Environmental Protection Act 1990 before the service of a remediation notice?

3.13 Do records indicate that the property is a 'Radon Affected Area' as identified by the Health Protection Agency?

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

Regulation 11 - Representation and reconsideration

Regulation 11(1)

Subject to paragraph (2), 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)

The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4)

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

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(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(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.