

## Environmental Information Regulations 2004

### Decision Notice

Date: 12 November 2009

**Public Authority:** Powys County Council  
**Address:** County Hall  
Llandrindod Wells  
Powys  
LD1 5LG

#### Summary

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The complainant requested information from Powys County Council (the Council) relating to discussions of proposed gypsy sites in south Powys. The Council refused the request under regulation 12(4)(e) (internal communications). The Commissioner finds that the Council did not provide an appropriate response to this request since it has failed to conduct a thorough search of its records and has not therefore identified all information falling within the scope of the request. The Council has also breached regulations 5(2) and 14(3)(a) in its handling of this request. In light of these procedural breaches the Commissioner requires the Council to provide a revised response which complies with the requirements of the EIR. The Council is required to either provide the information requested or issue a valid refusal notice.

#### The Commissioner's Role

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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.

#### The Request

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2. On 21 September 2007 the complainant emailed the Council to request the following information:

*"...emails from and to [a Council Official] regarding gypsy sites. And any site notes or minutes of meeting [sic] to discuss the proposed 23 gypsy site [sic] in south Powys that the Council has identified."*

3. On 16 October 2007 the Council issued a refusal notice to the complainant citing regulation 12(4)(e) of the EIR. The complainant expressed his dissatisfaction with this response to the Council on 23 November 2007 and the Council conducted an internal review of its decision. The outcome of the review was that the Council maintained its original decision.

## The Investigation

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### Scope of the case

4. On 2 February 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 the following points:

*"I am asking for an external review of the council's decision not to supply me with the information requested."*

### Chronology

5. On 3 April 2009 the Commissioner wrote to the Council asking for:

*"...a list of all relevant information within the scope of this request and a copy of all withheld information relevant to this complaint."*
6. The Commissioner also asked the Council to provide further information in relation to the exception claimed.
7. On 5 May 2009 the Council telephoned the Commissioner to inform him that the information relevant to this request was now in the public domain and that the Council no longer had an objection to the complainant receiving the information.
8. On 29 May 2009 the Commissioner contacted the Council to clarify when it intended to disclose the relevant information. The Council informed the Commissioner that it had reconsidered its position and intended to rely on Regulation 12(4)(e) of the EIR for some of the information. The Commissioner therefore asked the Council to provide him with all the information he had requested in his letter of 3 April 2009 so that he could make an assessment of the complaint.
9. On 29 May 2009 the Council wrote to the Commissioner enclosing what it considered to be the entirety of the information it held in relation to this request.

10. On consideration of the information provided it appeared to the Commissioner that the Council had not provided him with all the relevant information. The Commissioner raised this with the Council.
11. The Council contacted the Commissioner on 16 June 2009 and provided further information that fell within the scope of the request. It also informed the Commissioner that it now wished to claim reliance on regulation 13 as the basis for withholding some of the requested information.
12. Despite the further submission from the Council, the Commissioner was concerned that he had still not been provided with all the information that fell within the scope of the request. The Commissioner therefore wrote to the Council on 17 July 2009 requesting further information. The Commissioner also asked the Council to clarify which information it considered to have engaged regulation 13 and to confirm whether this was in addition to or as well as Regulation 12(4)(e). He also pointed out to the Council that he required both redacted and unredacted copies of the information in order to assess the Council's handling of the request. The Commissioner asked for a full response to this request by 31 July 2009. However, on 30 July 2009 the Commissioner received a telephone call from the Council requesting an extension to this deadline. The Commissioner agreed to extend the deadline to 12 August 2009.
13. The Council provided its response on 12 August 2009. However, following an examination of this information the Commissioner remained concerned that he had still not received all information the Council held in relation to the request. The Commissioner was mindful of the fact that he had given the Council a number of opportunities to clarify exactly what information was held in relation to the request. Given the inadequate responses of the Council it appeared to the Commissioner that the Council had not ascertained the extent of the information it held. Therefore the Commissioner considered it appropriate to make a decision based on the Council's handling of the request.

## Analysis

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### Procedural Requirements

14. Under regulation 5(1) of the EIR a public authority has a duty, subject to exceptions, to make environmental information available on request. If no exceptions apply then the public authority must disclose the information. Regulation 5(2) sets the time for compliance with regulation 5(1). The maximum time for compliance under the EIR is 20 working days. In this case the Council has accepted that some information is not exempt but has not yet provided this to the complainant. Its failure to make this information available on request therefore represents a breach of regulation 5(2) of the EIR.
15. Regulation 14 of the EIR is concerned with the refusal of information. Regulation 14(3)(a) states that:

*“The refusal shall specify the reasons not to disclose the information requested, including -*

*(a) any exception relied on under the regulations 12(4), 12(5) or 13...*

16. As the public authority did not inform the complainant that it also intended to rely on regulation 13 for some of the information, this represents a breach of regulation 14(3)(a).

### **The relevant legislation**

17. In its handling of this request for information, the Council considered the correct access regime for this information to be the EIR. The Commissioner has therefore considered whether EIR was the correct legislation under which to consider this request.

18. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. Regulation 2(1)(c) of the EIR states that information on the following can be environmental information;

*“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.”*

19. In order for information on any of the above measures to be considered environmental it must be possible to link it to the elements and factors referred to in regulation 2(1)(a) and (b).

20. The decision on whether the information is environmental or not should, wherever possible, be made on the basis of the information that has been identified as held by the public authority rather than on an assessment of the request. However, in this case, the Commissioner is not satisfied that the Council has identified all information falling within the scope of the request. He has therefore based his decision partly on the Council department responsible for the matter at the time and also on the information provided by the Council to date.

21. At the time of the request, the Environmental Health Department had overall responsibility for the project. The project itself included environmental and planning implications of its policy and plans to find both a temporary and permanent site for a gypsy family in South Powys.

22. The actual information provided to the Commissioner mainly consists of emails and minutes of meetings regarding the project and includes criteria for assessing the various sites under initial consideration and the impact building the site would be likely to have on the local environment. Some sites were discounted on the

basis that they were liable to flooding, there were potential highway issues, or lack of adjacent mains services.

23. In terms of the chosen site, the information contains proposed details for developing it into a permanent site for the gypsy and traveller family and the need for planning permission. The development of the site would clearly impact on both the land and landscape and therefore have a direct link to the elements referred to in regulation 2(1)(a).
24. The Commissioner is therefore of the view that the information relates to measures and activities which are likely to affect the elements referred to in 2(1)(a) of the EIR and therefore that the request has been considered by the Council under the correct legislation.

### **Exceptions**

25. The Council has cited both regulation 12(4)(e) which relates to internal communications and regulation 13 which deals with third party personal data, as exceptions for some of the information falling within the scope of the request. However, the Commissioner is of the view that the Council failed to ascertain what information it held, therefore the Council cannot be sure the extent to which it was withholding information. As the Commissioner cannot inspect the withheld information, he cannot make a decision as to whether or not it was correctly withheld.

### **The Decision**

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26. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR and that it breached regulations 5(2) and 14(3)(a).

### **Steps Required**

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27. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
28. The Council needs to identify all the relevant information it holds that falls within the scope of the request and, subject to exceptions, disclose it to the complainant.
29. To ensure compliance with regulation 14(3)(a) of the EIR, the Council must cite all exceptions it intends to rely on in respect of this request for information and provide a full explanation of why each exception is engaged.
30. 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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31. 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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32. The Commissioner notes that the complainant requested an internal review of the Council's original decision on 23 November 2007. The Council provided the complainant with the outcome of its internal review on 22 January 2008. Regulation 11(3) of the EIR specifically states that following receipt of representations from an applicant, a public authority must provide a response no later than 40 working days after receipt of the request. Part XII of the EIR Code of Practice<sup>1</sup> states that complaints must be acknowledged, given a target date for review and considered promptly.
33. The Council took 40 working days to communicate the outcome of its internal review to the complainant, which meets the maximum time for compliance provided by regulation 11(3). However, the Commissioner notes that there is no evidence that the applicant's request for an internal review was acknowledged by the Council or that it explained to the complainant the reason why its review took the full 40 days. The Commissioner hopes that the Council will take these matters into consideration when dealing with future requests.

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/environmental\\_info\\_reg/detailed\\_specialist\\_guides/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf)

## Right of Appeal

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34. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

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 12th day of November 2009**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### Regulation 2 - Interpretation

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

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

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

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

“the Commissioner” means the Information Commissioner;

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

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

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- (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 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 12 - Exceptions to the duty to disclose environmental information**



**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
- (e) the request involves the disclosure of internal communications.

### **Regulation 13 - Personal data**

**Regulation 13(1)** To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
  - (i) any of the data protection principles; or
  - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

**Regulation 13(3)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**Regulation 13(4)** In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**Regulation 13(5)** For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data

- Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

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

**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).