

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

Decision Notice

Date: 19 August 2010

Public Authority: Cheshire West and Chester Council
Address: County Hall
Chester
Cheshire
CH1 1SF

Summary

The complainant submitted a request to Cheshire West and Chester Council ('the Council') for information from environmental records held on a property in Chester. The complainant specified that he wished to view the records in person. The Council agreed to provide the information requested but only on the provision of a set fee. The Commissioner's decision is that the Council failed to comply with regulation 5(1) as it failed to make information available on request, and 5(2) as it failed to make it available within the statutory time for compliance. The Council breached regulation 6(1) by failing to comply with the complainant's request to make information available in a particular format. The Council has also breached regulation 8(2)(b) by attempting to impose a charge to allow the complainant to inspect information. In addition, the Council breached regulation 11(4) by failing to provide the outcome of its internal review within 40 working days. The Commissioner requires the Council to make the requested information available for the complainant to inspect 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. 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.
6. Cheshire West and Chester Council was established as public authority in April 2009. It was amalgamated from the former borough councils of Ellesmere Port and Neston, Vale Royal, Chester District, and part of the former Cheshire County Council.

The Request

7. On 8 June 2009 the complainant telephoned the Council to request access, free of charge, to the land charges register and to records containing the information necessary to answer question 1.1(f) – (h), 3.4, 3.6 and 3.9 (a) – (n) of the CON29R form.¹

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

¹ Annex A details the nature of the information relevant to each CON29R enquiry.

8. The Council responded to this request on 8 June 2009 via telephone and stated that a charge would be levied to provide the requested information.
9. On 31 July 2009, the complainant submitted a written request for an internal review of this decision to the Council.
10. The complainant wrote to the Council on 1 October 2009 to enquire when he might receive a response to this request.
11. On 7 October 2009, the Council telephoned the complainant to apologise for the delay in providing a response.
12. On 29 October 2009, the complainant again wrote to the Council to complain about its lack of response to his request for an internal review.
13. On 3 November 2009, the Council wrote to the complainant and upheld its original response. The Council explained that it did not consider that the EIR compel it to provide the requested information free of charge. The Council stated that it has "several powers for charging for this information including a power under the Environmental Information Regulations".
14. The complainant wrote to the Council to complain about this decision on 2 February 2010. On 30 March 2010 and 13 April 2010, he wrote to the Council to complain about a lack of response to this letter.
15. On 14 May 2010, the Council wrote to the complainant to state that it was still considering its response to his complainant "in light of the apparently contradictory decisions of the Information Commissioner and Tribunal and the High Court".²

The Investigation

Scope of the case

16. On 16 November 2009, the complainant contacted the Commissioner to complain about the Council's decision to refuse access to the requested information.

² It is likely that the Council refers to the High Court decision in the case of [Onesearch Ltd v City of York Council \[2010\] EWHC 590](#), and the Information Tribunal decision in the case of [East Riding of Yorkshire Council v Information Commissioner \(EA/2009/0069\)](#).

Chronology

17. On 8 April 2010, the Commissioner wrote to the Council and asked that it reconsider its response to the complainant's request under the Environmental Information Regulations. The Commissioner also drew the Council's 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 that this internal review outcome was sent to both the complaint and the ICO by 6 May 2010.
18. On 5 May 2010, the Council telephoned the Commissioner and explained that the Council had been formed on 1 April 2009. Three district Councils had been amalgamated with part of the former Cheshire County Council. The Council therefore had three separate planning systems and was "in the process of rationalising its position" regarding the requested information. The Council therefore requested an extension to the deadline of 6 May. The Commissioner agreed to extend this deadline by an additional two weeks to 20 May 2010. The Council confirmed that it agreed to the new deadline discussed in the telephone conversation in an email on 5 May 2010.
19. On 25 May 2010, the Commissioner wrote to the Council to enquire when it anticipated providing a response.
20. On 28 May 2010, the Commissioner wrote to the Council and explained that if it did not wish to submit any further arguments or response, the Commissioner would proceed to issue a decision notice on the basis of the Council's position as set out in its previous responses to the complainant (on 3 November 2009 and 14 May 2010).
21. On 1 June 2010, the Council wrote to the Commissioner and explained that it intended to provide a further response but was not ready to do so yet. The Council detailed some of the points it was considering. The Commissioner wrote to the Council on 2 June 2010 and asked when the Council anticipated it would complete this response.
22. On 15 June 2010, the Commissioner wrote to the Council and asked that any further representations were submitted by a final deadline of 25 June 2010.
23. On 7 July 2010, the Council provided the Commissioner with a submission in support of its position.

24. On 30 July 2010, the Commissioner wrote to the Council to ask if it would like to reconsider its position in light of the publication of the [Local Land Charges \(Amendment\) Rules 2010](#). The amendment was published on 29 July 2010, and came into force on 17 August 2010. It revoked the set charge of £22 levied for inspection of the Local Land Charges Register.

Analysis

Substantive Procedural Matters

Regulation 2

25. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
26. 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”. 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 High Court decision

27. In its letter to the complainant of 14 May 2010, the Council referred to the High Court decision in the case of [Onesearch Ltd v City of York Council \[2010\] EWHC 590](#) and stated that this is “apparently contradictory” to the Commissioner’s approach. The property search company involved in this case sought a judicial review of a policy of the City of York Council. This policy states that the Council is not obliged to allow open access to all of its unrefined property information.
28. The High Court decision found that whilst the [Local Government Act 1972](#) permits public authorities to allow access to their property search records, it does not compel them to do so. Additionally, the court found that the [Local Authorities \(England\) \(Charges for Property Searches\) Regulations 2008](#) (‘the CPSR’) do not create any obligation to allow searches of property information. Therefore, the High Court found that

York City Council's policy of refusing to provide access to some property search information was lawful.

29. The Commissioner accepts that if a decision of the High Court addressed the same issues as a decision of the First Tier Tribunal, the High Court decision would take precedence. However, the High Court decision in the case of *Onesearch v York City Council* did not address or make any comment on access to the information requested under the provisions of the EIR, and is therefore irrelevant to this complaint.
30. The Commissioner also finds that the High Court decision does not in any case contradict the steps he has required public authorities to take in previously issued Decision Notices, or the decision of the Information Tribunal in the case of *East Riding v Information Commissioner*. This is discussed further in the analysis of regulation 6 below, at paragraph 38.

Regulation 5

31. 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. The complainant's original request for information was made on 8 June 2009. The Council has not provided the complainant with the requested information. The Commissioner therefore concludes that the Council has breached regulations 5(1) by failing to make the information available on request, and regulation 5(2) by failing to make information available within 20 working days following receipt of the request.

Regulation 6

32. 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 it is reasonable to make the information available in another format, or the information is already publicly available in another format.
33. The Council states that the Local Land Charges Register is not available for inspection. However, the Commissioner notes from the Council's website that personal searches of the Register are permitted by appointment and upon provision of a fee.

34. The Council explains that the Register is held on a computer system and upon receipt of a request, the Council produces a paper copy of the search results for the property in question. The Commissioner considers that providing the entries on the Register relevant to a property for inspection in a paper format would satisfy the complainant's request to inspect the requested information. Therefore, the Commissioner finds that the Council has complied with regulation 6(1) in relation to this part of the request.
35. The Council considers that it is "not possible" to make information relevant to the CON29R form available for inspection. Regulation 6(1)(a) provides an exception from a public authority's duty to comply with an applicant's preferred form or format when "it is reasonable for it to make the information available in another form or format". Although this is not explicitly stated, the Commissioner assumes that the Council relies here on regulation 6(1)(a) as it maintains that "at the current time it is reasonable to continue to produce replies to searches in the CON29R format which is agreed between the Law Society and the LGA".
36. The Council argues that information is held in both electronic and paper forms. As the Council has been amalgamated from several separate former authorities, information of this nature has not yet been collated and different computer systems are used at the offices of the former authorities. In addition, the Council states that personal data may need to be redacted from information relevant to questions 3.9(a)-(n).
37. The Commissioner does not accept that the Council has provided sufficient argument to demonstrate that it would be reasonable to provide the information in a format other than inspection. It is unclear whether the information requested by the complainant contains any personal data. In any case, the Commissioner does not accept that it would be unreasonable to expect the Council to redact this information before providing it to the complainant. Whilst the Commissioner understands that the requested information is held on several different computer systems in separate locations, the Council has provided no evidence to demonstrate why this would make it reasonable to provide information in a format other than inspection, and consequently, the Commissioner considers that the Council cannot rely upon regulation 6(1)(a).
38. The Council suggest that the Commissioner's position contradicts the High Court decision. However, the High Court decision found that neither the LGA 1972 nor the CPSR place any obligation on public

authorities to allow inspection. It did not address the issue of access under the provisions of the EIR.

39. The Council has not complied with its duty to provide information in the form or format requested by the complainant. The Commissioner does not accept that regulation 6(1)(a) applies to the requested information. Therefore, by failing to comply with the complainant's preferred form or format for receiving the information, the Council has breached regulation 6(1).

Regulation 8

40. 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(2).
41. Regulation 8(2)(a) states that a public authority shall not make any charge for allowing an applicant to access any public registers or lists of environmental information, and regulation 8(2)(b) states that a public authority shall not make any charge for allowing an applicant to examine the information requested at a place which the authority makes available.
42. The Commissioner notes that the Council claims that it has "several powers" to impose a charge for providing the requested information. In relation to the Local Land Charges Register, the Council refers to the [Local Land Charges \(Amendment\) Rules 2009](#). This amended the Local Land Charges Rules 1977 to allow a fee of £22 to be charged for a personal search of the Land Charges Register in relation to one parcel of land. During the course of the investigation, the [Local Land Charges \(Amendment\) Rules 2010](#) were published. These revoke the fee of £22 levied for inspection of the Local Land Charges Register. Although the Amendment did not come into force until 17 August 2010, the explanatory memorandum that accompanies it stated that

"the Environmental Information Regulations 2004 (EIR) provide that access to environmental information must be available free of charge. As the vast majority of local land charges contain environmental information, this instrument revokes the fee for inspection in person of the registers to ensure that the two pieces of legislation are consistent"

This supports the Commissioner's view that the existing charging provisions were disapplied by the EIR. .

43. Although the Council does not specifically refer to it, the [Local Authorities \(England\) \(Charges for Property Searches\) Regulations 2008](#) ('CPSR') set out fees that can be charged for the provision of answers to the CON29R form.
44. The Commissioner's position is that regulation 5(6) specifically disapplied the charging provisions under the LLCR and the CPSR. This regulation provides that "any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply".
45. Consequently, the Commissioner considers that if the property records comprise environmental information as defined by regulation 2 of the EIR, neither the LLCR nor the CPSR can 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, regardless of the charging provisions of the LLCA and CPSR, the information should be considered for disclosure under the EIR. For the reasons set out above, the Commissioner considers that the EIR entitle the complainant to request to inspect the requested information free of charge, and the Local Land Charges Act cannot apply. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law.
46. Regulation 8(2)(b) provides that a public authority is not entitled to charge a fee for allowing inspection of information. As the Commissioner has concluded that the Council has refused to allow the complainant to inspect the requested CON29R information, it follows that in this particular case the Council could not have actually attempted to charge for allowing inspection. In light of this the public authority has not breached regulation 8(2)(b). However, the Council must not impose a charge for allowing the complainant to inspect the requested information.
47. The Commissioner has concluded that the Council complied with regulation 6(1) in relation to the Local Land Charges Register. However, by attempting to impose a charge to allow the complainant to inspect this information, the Council has breached regulation 8(2)(b).

Regulation 11

48. Regulation 11(3) provides that a public authority must reconsider its response to a request for information upon receiving representations from an applicant. Regulation 11(4) provides that the outcome of a

decision under regulation 11(3) must be communicated to the applicant as soon as possible and within 40 working days after representations were received.

49. The complainant requested an internal review on 31 July 2009. The outcome of this review was not provided until 3 November 2009. Therefore, the Commissioner finds that the Council has breached regulation 11(4).

The Decision

50. The Commissioner's decision is that Cheshire West and Chester Council did not deal with the request for information in accordance with the EIR. The Council has breached regulations 5(1) by failing to make information available upon request, and regulation 5(2) by failing to make it available within the statutory time for compliance. In relation to information relevant to CON29R queries, the Council has breached regulation 6(1) as it failed to comply with the complainant's request to make the information available in a particular format. In relation to the Local Land Charges Register, the Council has breached regulation 8(2)(b) by attempting to impose a charge to allow the complainant to inspect information. The Council has also breached regulation 11(4) as it did not provide the outcome of its internal review within 40 working days.

Steps Required

51. The Commissioner requires that the Council make the requested information available for the complainant to inspect free of charge.
52. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

53. 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 19th day of August 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

**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 –

- (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 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 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(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

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 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Annex A - CON29R Enquiries

- 1.1** Which of the following relating to the property have been granted, issued or refused or (where applicable) are the subject of pending applications:
- a) a planning permission
 - b) a listed building consent
 - c) a conservation area consent
 - d) a certificate of lawfulness for existing use or development
 - e) a certificate of lawfulness for proposed use or development
 - f) building regulations approval
 - g) a building regulations completion certificate
 - h) any building regulations certificate or notice issued in respect of work carried out under a competent person self-certification scheme
- 1.2** What designations of land use for the property or the area, and what specific proposals for the property are contained in any existing or proposed development plan?
- 2.** Which of the roads, footways and footpaths named in the application for this search are:
- a) highways maintainable at public expense
 - b) subject to adoption and supported by a bond or bond waiver
 - c) to be made up by a local authority who will reclaim the cost from the frontagers
 - d) to be adopted by a local authority without reclaiming the cost from the frontagers
- 3.1** Is the property included in land required for public purposes?
- 3.2** Is the property to be acquired for road works?
- 3.3** Do either of the following exist in relation to the property:
- a) An agreement to drain buildings in combination into an existing sewer by means of a private sewer, or
 - b) An agreement or consent for (i) a building or (ii) extension to a building on the property to be built over or in the vicinity of a drain, sewer or disposal main?
- 3.4** Is the property (or will it be) within 200 metres of any of the following:

- a) the centre line of a new trunk road or special road specified in any order draft order or scheme
- b) the centre line of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway
- c) the outer limits of construction works for a proposed alteration or improvement to an existing road involving (i) construction of a roundabout (other than a mini roundabout) or (ii) widening by construction of one or more additional traffic lanes
- d) the outer limits of (i) construction of a new road to be built by a local authority, (ii) an approved alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway or (iii) construction of a roundabout (other than a mini roundabout) or widening by construction of one or more additional traffic lanes
- e) the centre line of the proposed route of a new road under proposals published for public consultation
- f) the outer limits of (i) construction of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway or (ii) construction of a roundabout (other than a mini roundabout) or (iii) widening by construction of one or more additional traffic lanes under proposals published for public consultation.

3.5 Is the property (or will it be) within 200 metres of the centre line of a proposed railway, tramway, light railway or monorail?

3.6 Has a local authority approved but not yet implemented any of the following for the roads, footways and footpaths which abut the boundaries of the property:

- a) permanent stopping up or diversion
- b) waiting or loading restrictions
- c) one way driving
- d) prohibition of driving
- e) pedestrianisation
- f) vehicle width or weight restrictions
- g) traffic calming works including road humps
- h) residents parking contracts
- i) minor road widening or improvement
- j) pedestrian crossings
- k) cycle tracks
- l) bridge building

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
- e) highways
- f) public health

3.8 Has a local authority authorised in relation to the property any proceedings for the contravention of any provision contained in Building Regulations?

3.9 Do any of the following subsist in relation to the property or has a local authority decided to issue, serve, make or commence any of the following:

- a) an enforcement notice
- b) a stop notice
- c) a listed building enforcement notice
- d) a breach of condition notice
- e) a planning contravention notice
- f) another notice relating to breach of planning control
- g) a listed buildings repair notice
- h) in the case of listed building deliberately allowed to fall into disrepair, a compulsory purchase order with a direction for minimum compensation
- i) a building preservation notice
- j) a direction restricting permitted development
- k) an order revoking or modifying planning permission
- l) an order requiring discontinuance of use or alteration or removal of building or works
- m) a tree preservation order
- n) proceeding to enforce a planning agreement or planning contribution

3.10 Do the following apply in relation to the property:

- a) the making of the area a Conservation Area before 31 August 1974
- b) an unimplemented resolution to designate the area a Conservation Area

3.11 Has any enforceable order or decision been made to compulsorily purchase or acquire the property

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?

c)