

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

Decision Notice

Date: 15 July 2010

Public Authority: Walsall Council
Address: Civic Centre
Walsall
WS1 1TP

Summary

The complainant submitted a request to Walsall Council ('the Council') to inspect building control information. The complainant specified that he wished to view the records in person. The Council withheld the information under the exception at Regulation 12(5)(c), on the grounds that disclosure would be detrimental to the Council's intellectual property rights. The Commissioner's decision is that regulation 12(5)(c) is not engaged. During the course of the investigation, the Council decided to rely on the exception at regulation 12(4)(b) (manifestly unreasonable). The Commissioner has upheld this exception. The Council also breached regulation 14(2) by failing to provide a refusal notice within the statutory time for compliance, and regulation 14(3) by failing to cite an exception that it later relied upon in its refusal notice. The Council also breached regulation 9(1) by failing to offer the complainant appropriate advice and assistance. The Commissioner requires the Council to provide appropriate advice and assistance to the complainant about how he might refine his request so that it is no longer manifestly unreasonable. The Council must take these steps within 35 calendar 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 (LLCA) compels all local authorities to generate, maintain and update a Local Land Charges Register and to provide local searches. Under the LLCA applicants can obtain an 'Official Search' of the register by submitting form LLC1 to the relevant Local Authority. 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. The Council divides the information required to complete questions on the CON29 form into five 'bundles'. The standard charge for each of these bundles is £20.40. A fee of £22 is levied for inspection of the Local Land Charges Register.

The Request

7. On 8 July 2009 the complainant requested access to inspect the building control registers.
8. On 17 July, the Council contacted the complainant and advised that it considered that any information provided under the EIR was covered by copyright, preventing its re-use without a licence or permission. The Council therefore asked the complainant to clarify his intended use of the information.
9. On 31 July, the complainant confirmed in a telephone conversation with the public authority that he wished to access the information relevant to point 1.1(f) – (h) and 3.8 of the CON29R form, and that he intended to offer this information for resale.

10. The Council wrote to the complainant on 31 July and explained that in light of his intended use of the information, the Council was likely to apply the exception at regulation 12(5)(c). However, the Council advised that this was subject to the outcome of a public interest test and a more substantive response would follow.
11. The Council sent a refusal notice to the complainant on 4 September 2009. The Council withheld under the exception at regulation 12(5)(c) and provided a précis of the public interest test it had conducted in support of applying the exception.
12. On 17 September 2009, the complainant wrote to the Council and asked it to review its decision.
13. On 20 October 2009, the Council convened a panel which carried out an internal review of the response to the complainant's request. The review upheld the original decision to withhold the requested information. The outcome of the internal review was communicated to the complainant on 4 November 2009.

The Investigation

Scope of the case

14. On 13 November 2009, the complainant submitted a complaint to the Commissioner about the Council's decision to refuse him access to inspect building control information free of charge.
15. A significant amount of the requested information is contained in an electronic database. This has been withheld under regulation 12(5)(c). The remainder of the information is contained on microfiche and in paper files. During the course of the investigation, the Council also decided to withhold all of the information under the exception at regulation 12(4)(b).

Chronology

16. The Commissioner wrote to the Council on 3 December 2009 to inform it that a complaint had been received.
17. On 15 December 2009, the Council responded and provided some additional information about its decision to apply the exception at regulation 12(5)(c).

18. On 20 January 2010, the Commissioner contacted the Council and asked that it provide an explanation of why it considered the withheld information constituted its intellectual property.
19. On 19 February 2010, the Council wrote to the Commissioner with a detailed explanation of its reliance on the 12(5)(c) exception.
20. On 11 June 2010, the Council provided the Commissioner with an explanation of why it felt that the exception at regulation 12(4)(b) also applied to the requested information.

Analysis

Substantive Procedural Matters

21. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
22. 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.

Regulation 12(5)(c)

23. The Council has advised the Commissioner that it considers that the withheld information falls under the exception under 12(5)(c) of the EIR (intellectual property rights).
24. Regulation 12(5)(c) states that,

" a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(c) intellectual property rights"

25. A significant amount of the requested information is contained in an electronic database. The Council considers that it owns the database rights in respect of this information, and that it also owns copyright over the database. Whilst the majority of the requested information is held in this database, the Council also holds some information on microfiche or in paper files. The Council has argued that the information constitutes its intellectual property by virtue of its inclusion in a database, and so the Commissioner has therefore considered the application of the exception at regulation 12(5)(c) only to the information held electronically.
26. The Commissioner has considered whether the withheld information is the subject of an intellectual property right.

Database rights

27. Section 3A of the Copyright, Designs and Patents Act 1998 ('CDPA') defines a database as:

"...a collection of independent works, data or other materials which –

*(a) are arranged in a systematic or methodical way, and
(b) are individually accessible by electronic or other means.*

(2) For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation".

Regulation 13 of the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) ('CRDR') provides that,

" (1) A property right ("database right") subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database".

Regulation 12 (1) of the CRDR states the following,

" "substantial" in relation to any investment, extraction or re-utilisation, means substantial in terms of quantity or quality or a combination of both".

Regulation 16 of the CRDR states that

"Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database"

28. It is the Council's opinion that the information requested constitutes a "database". The Commissioner is satisfied that the information constitutes a database. The data is arranged in a systematic way and is individually searchable by electronic means. The Council can therefore be considered the maker of this database for the purposes of the CRDR.
29. The Council also considers that database rights are conferred by the substantial time the Council spends in "creating, compiling, collating, verifying and presenting" the information contained in the database.
30. The Commissioner accepts that the compilation of information into the database and its maintenance is likely to require a significant amount of time by the Council on an on-going basis.
31. However, to establish a database right the maker must demonstrate that a substantial investment has been made in obtaining, verifying or presenting the contents of a database. The Commissioner understands that this refers to an investment in the creation of the database and the collation of existing data within it, rather than investment in creating the data itself. A database right protects processing or storage systems developed by a public authority for existing information, rather than the creation of materials which might be subsequently collated into a database.
32. This view was supported by the European Court of Justice ('ECJ') judgment in the case of the British Horseracing Board v William Hill (Case C-203/02). The ECJ judgment, on 9 November 2004, commented that "the expression 'investment in ... the obtaining ... of the contents' of a database must, as William Hill and the Belgian, German and Portuguese Governments point out, be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials" (paragraph 31).
33. The Council has stated that the database contains "data collated from the original application, inspection notes / outcomes, correspondence, Initial Notices and GIS data". The Commissioner appreciates that the creation of this data requires a significant amount of work by the Council and its officers. However, the Council has not demonstrated that to collate or arrange this data into the database requires a

substantial time or cost investment. Therefore, the Commissioner is not satisfied that the information attracts a database right.

Copyright

34. Section 1(1) of the Copyright Designs and Patents Act 1988 ('CDPA') provides that –

“Copyright is a property right which subsists in accordance with this Part in the following descriptions of work –

a) original literary, dramatic, musical and artistic works”

35. Section 3(1) of the CDPA as amended defines a literary work as:

“...any work, other than a dramatic or musical work, which written, spoken or sung and accordingly includes –

- a. [a table of compilation (other than a database*
- b. a computer program*
- c. preparatory design material for a computer program and*
- d. a database]*

36. In order for copyright protection to apply, the database must have originality in the selection or arrangement of the contents. The Commissioner is not satisfied that the way the contents of the database are arranged demonstrate original intellectual creativity. The Commissioner also understands that, after a certain date, all building control information for each property is collated onto the database. Therefore, there is no originality in the selection of material to be included.

37. The Commissioner's opinion is that the database does not attract database rights or copyright. Therefore, it does not constitute the Council's intellectual property and the exception at 12(5)(c) is not engaged.

Copyright of information within the database

38. Whilst the Commissioner does not accept that the database as a whole is subject to copyright protection, he acknowledges that information contained within it may attract copyright. The Council point out that some of the information contained within the database is based on the judgment and skill of its officials, for example inspection notes and outcomes.

39. The Council considers that if the requested information were to be disclosed free of charge, the Council could potentially be deprived of a substantial revenue stream. Currently, the Council charges for the provision of CON29 data. In its letter of 19 February 2010, the Council stated that since April 2009, it had seen a return of over £150,000 for providing CON29 searches containing Building Regulations data.
40. The Council is therefore of the opinion that to disclose the information would have an adverse effect upon its ability to exploit the information through licensing in order to create a revenue stream.
41. In this case, the applicant has already – at the Council's request - confirmed his intention to offer the information for re-sale. However the Commissioner notes that applications for information under the EIR should be treated as motive-blind by public authorities and that copyright is not in itself infringed simply by the act of making the information available under the EIR.
42. Therefore it is the Commissioner's opinion that the intended re-use of the information cannot be taken into account when considering information for disclosure under the EIR. The Commissioner notes that section 7.5.4 of the Defra guidance on exceptions under the EIR states that "*copyright does not prevent authorities releasing information they hold. However, where such information is subject to copyright, it should be made clear to applicants that the copyright still exists*". Further, "*if an applicant wishes to use any such information in a way that would infringe copyright...he or she would require a licence from the copyright holder*". The Commissioner therefore takes the view that the Council could release the requested information and make the complainant aware that it is subject to copyright. It is also open to the Council to consider licensing the re-use of the information in accordance with the [Re-use of Public Sector Information Regulations 2005](#).

Regulation 12(4)(b)

43. In this case, the complainant requested access to all of the information needed to complete questions 1.1(f)-(h) and 3.8 of the CON29R form. The Council has applied the exception at regulation 12(4)(b) to this information. Regulation 12(4)(b) provides an exception for requests that are manifestly unreasonable.
44. In its original refusal notice and internal review, the Council did not rely upon regulation 12(4)(b). In this case, the Commissioner has chosen to exercise his discretion to consider the late application of this exception in the alternative.

45. The Council has confirmed that whilst some of the requested information is held in a computer database, other parts of the information are held in other formats.
46. All Local Authority decisions prior to 2006 are held on an electronic document viewer. This can only be searched by application number rather than property address, so the entire set of records would have to be made available for the complainant to search.
47. Approved Inspector Data collected prior to 2004 is stored on microfilm. This would have to be manually searched in order to access information on each specific property.
48. Approved Inspector Data certificates issued between 2005 and May 2010 are held in paper format. In addition, completions submitted to the Council by Approved Inspectors are held in paper format prior to being scanned onto the Council's information management system, and certain records on unauthorised or dangerous buildings are held on paper. All of these paper records would have to be searched to see if they hold information requested by the complainant and provided for inspection.
49. Limited completion information collected prior to 2006, and Approved Inspector applications generated after 2006, are stored on the Council's management information database. The Council is currently engaged in a program of scanning information onto this system which began in May 2010. Until this process is completed, the Council is unable to create reporting tools to generate information, and as such records would have to be accessed individually.
50. Information relating to the competent person scheme is held on the Council's internal server but is not in a format that would be easily accessible to an individual who had not received training on this system, as it is in XML (Extensible Markup Language) data. Each record would therefore have to be individually imported into the Council's case management system to make this accessible.
51. The Commissioner must decide whether complying with the request would place a burden on the Council that is manifestly unreasonable and engage the exception at regulation 12(4)(b).
52. In determining the threshold needed to engage this exception the Commissioner has taken into account the comments of the Information Tribunal in *DBERR v Information Commissioner and Platform* (EA/2008/0096), which stated that:

“It is clear to us that the expression [manifestly unreasonable] means something more than just “unreasonable”. The word “manifestly imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable”.

53. The Commissioner accepts that it would take the Council a considerable amount of time to collate all the information requested by the complainant, especially given the variety of formats in which it is held. The Commissioner also accepts that providing this information for the complainant to inspect will create disruption across many business areas within the Council as several areas will need to be searched in order to ensure all relevant information is provided.
54. The Commissioner also considers that it would take the complainant an obviously excessive amount of time to inspect all the information held by the Council relevant to questions 1.1(f)-(h) and 3.8 of the CON29R form in respect of all of the properties within its boundaries. The Commissioner considers that a request for all the held information can correctly be classed as manifestly unreasonable, as compliance would require a disproportionate amount of work on the public authority's part in relation to its resources and an unreasonable diversion of the Council's resources away from its core functions. He therefore accepts that the exception at regulation 12(4)(b) is engaged.

Public interest test

55. However, regulation 12(4)(b) is a qualified exception and therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

56. There is an inherent public interest in disclosure of information to ensure that the Council is transparent about the nature and extent of the building control information that it gathers, and how this information is used. Increased transparency and accountability could lead to the Council being more aware that its processes could be open to public scrutiny. In order to facilitate increased scrutiny, the Council might improve its record management, processes for collating information, and facilities for accessing such information.

Public interest arguments in favour of maintaining the exception

57. There is a strong public interest in the Council being able to carry out its core functions without the disruption that would be caused by complying with requests that would impose a significant burden in terms of time and resources. The Commissioner considers that the Council's ability to comply with other more focused requests for information would be undermined if it had to routinely deal with requests for inspection of all the information held relevant to questions 1.1(f)-(h) and 3.8 of the CON29R form in respect of all the properties within its boundaries. Furthermore, by complying with more focused requests the Council would have the opportunity to demonstrate the extent of its transparency and accountability.

Balance of public interest arguments

58. The Commissioner has weighed the arguments of increased transparency and access to environmental information against the arguments of compliance with the request placing a clearly disproportionate burden on the Council's resources. The Commissioner accepts that the Council would have to spend an obviously excessive amount of time on providing all the requested information for inspection. He believes that the obvious burden that this would place on the public authority and the consequent distraction from its other core functions that this would cause outweighs the benefits to the public interest that would be served by complying with the request. The Commissioner therefore concludes that the Council were correct to withhold information under this exception.

Procedural requirements

Regulation 9 – Advice and assistance

59. The Commissioner has considered whether the Council should provide the complainant with advice and assistance as to how his request may be narrowed and therefore deemed a reasonable request.
60. Regulation 9(1) provides that –

“A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.”

Regulation 9(3) stipulates that where a public authority complies with the Code of Practice issued under regulation 16 in respect of the provision of advice and assistance, it will have complied with regulation

9(1). The Commissioner has therefore considered the Council's obligation to assist and advise with reference to the Code of Practice.

61. The Code of Practice states that public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant. As the complainant is seeking recorded information in order to complete a CON29R form, it seems likely that the request could be narrowed so that it is no longer manifestly unreasonable, for example if information was requested for a single property.
62. The Commissioner considers that it would be reasonable for the Council to indicate information it is able to disclose to him in relation to a number of properties without requiring a manifestly unreasonable amount of work and diversion of resources away from its core functions. Therefore, he finds that the Council has breached regulation 9(1).

Regulation 14

63. The complainant submitted his original request for information on 8 July. The Council did not provide a substantive response until 4 September. The Council has therefore breached regulation 14(2) as it failed to provide a refusal notice within 20 working days of receipt of the request.
64. Originally the Council withheld the requested information solely under the exception at regulation 12(5)(c). During the course of the Commissioner's investigation, the Council also decided to rely on the exception at 12(4)(b). Although the Commissioner has concluded that this exception was correctly applied, the Council have breached regulation 14(3)(a) by failing to inform the complainant of this in its refusal notice.

The Decision

65. The Commissioner's decision is that the Council appropriately withheld the requested information under the exception at regulation 12(4)(b).
66. However, the Commissioner has also found that the Council applied the exception at regulation 12(5)(c) incorrectly. The Council also breached regulation 14(2) by failing to provide a refusal notice within the statutory time for compliance, and regulation 14(3) by failing to cite the exception at 12(4)(b) in this refusal notice.

67. The Council also breached regulation 9(1) because it did not offer the complainant advice and assistance in accordance with the Code of Practice.

Steps Required

68. In accordance with regulation 9 of the EIR, the Commissioner requires the Council to contact the complainant and offer advice and assistance by informing him how he might narrow his request to information in relation to a number of properties so that it would no longer be manifestly unreasonable. This should include advising how he can inspect the environmental information free of charge.
69. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

70. 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 15th day of July 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 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

Regulation 9(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

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

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

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