

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

Decision Notice

Date: 26 July 2010

Public Authority: Kirklees Council
Address: Civic Centre III
Market Street
Huddersfield
HD1 1WG

Summary

The complainant submitted a request to Kirklees Council ('the Council') for information from environmental records held on a property in Huddersfield. 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 regulation 5(2) as it failed to make it available within the statutory time for compliance. The Commissioner found that the Council breached regulation 6(1) by failing to comply with the complainant's request to make the requested information available in a particular format. In addition, the Council breached regulation 11(4) by not conducting an 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 (LLCA) compels all local authorities to generate, maintain and update a Local Land Charges Register. 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.

The Request

6. On 16 December 2009 the complainant requested access, free of charge, to records containing the information necessary to answer question 1.1 (a) to (h), 1.2, 2(a) to (d), 3.1, 3.2, 3.3, 3.4(a) to (f), 3.5, 3.6(a) to (l), 3.7(a) to (f), 3.8, 3.9(a) to (n), 3.10(a) and (b), 3.11, 3.12(a), (b) (i) and (ii) and (c), 3.13. of the CON29R form.¹

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

7. The Council responded to the complainant on 20 January 2010. The Council stated that information relating to the CON29R form would not be considered for disclosure under the provisions of the Environmental Information Regulations (EIR), but under the Local Authorities (England) (Charges for Property Searches) Regulations 2008 (CPSR). The Council would provide answers to the questions on this form upon provision of a fee.

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

8. On 21 January 2010, the complainant wrote to the Council and requested an internal review of this decision.
9. The Council acknowledged this request on 22 January 2010. On 9 February 2010, the Council wrote to the complainant and stated that it would not be able to provide a response within its normal timescales and confirmed that a response would be sent by 26 February 2010. After this date, the complainant sent a series of emails and telephone calls enquiring when he might receive a response to his request for an internal review.
10. On 20 April 2010, the Council provided its internal review outcome to the complainant. This stated that the Council would continue to charge for the requested information in line with the CPSR. The Council argued that it was supported in this position by the decision in the case of [R – v- York City Council ex parte OneSearch Direct Holdings Ltd \(2010\) EWHC 590 \(Admin\)](#) ('the High Court decision').

The Investigation

Scope of the case

11. On 10 May 2010, the complainant contacted the Commissioner to complain about the Council's compliance with the provisions of the EIR.

Chronology

12. On 12 May 2010, the Commissioner wrote to the Council and explained that as the requested information was environmental in nature, it should be considered for disclosure under the provisions of the EIR, rather than the CPSR. 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 Council was asked to reconsider its response to the complainant's request.
13. On 9 June 2010, the Council emailed the Commissioner and stated that it believed that the High Court decision supported its position, and that this should take precedence over any decision notice issued by the Commissioner, or finding of the First Tier Tribunal (Information Rights). The Council explained that it viewed the decisions of the High Court and the Tribunal as contradictory, and invited the Commissioner to

review his guidance on how property search requests should be interpreted in light of this.

14. On 9 June 2010, the Commissioner telephoned the Council to explain that as the High Court decision made no comment on access to information under the EIR, it was irrelevant to the investigation of this complaint. The Council did not accept this viewpoint. The Commissioner wrote to the Council on the same day to reiterate the position set out in the telephone conversation, and invited any further arguments the Council wished to submit.
15. On 9 June 2010, the Commissioner and the Council agreed that the Commissioner would issue a Decision Notice which addressed the arguments proposed by the Council.

Analysis

Substantive Procedural Matters

Regulation 2

16. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
17. 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.
18. In its letter of 5 July 2010, the Council disputes that it is compelled to consider the request for information under the EIR. The Council explains that it feels that the complainant has submitted "an enquiry" rather than "a request". This is because the Council feels that the complainant's request required the Council

"to evaluate all the information which it held in order to determine which of it would be required... in order to complete

the CON29R form....the EIR do not impose...a specific obligation to undertake that evaluative exercise”

However, the terminology used in the request adequately describes the information sought and consequently, the Commissioner considers that it is a valid request under the EIR. Given that the Council routinely deals with requests for CON29R information, the Commissioner expects that the Council should be able to easily identify the information necessary to satisfy the request. The fact that the public authority would have to undertake an exercise in order to ascertain what relevant information it holds, does not make a request invalid. The Council argue that the EIR do not impose any requirement to undertake work to ascertain what relevant information is held. However, the Commissioner considers that this does not provide an exemption from the duty to comply with regulation 5(1).

The High Court decision

19. The Council has explained that it believes the High Court decision contradicts the Commissioner’s guidance, his findings in previously issued Decision Notices on similar issues, and the decision of the Information Tribunal in the case of *East Riding v Information Commissioner*. In its letter of 9 June 2010, the Council argues that the decision of the First Tier Tribunal, which heard the *East Riding* case, is superseded by the decision of the High Court:

“In a situation such as this, where a decision of the High Court is in conflict with the Information Commissioner’s previous decision notices and guidance, and a decision of the First Tier Tribunal, the decision of the High Court must take precedence with the attendant consequences for local authorities and private search companies across England”

20. The High Court decision found that whilst the [Local Government Act 1972](#) (‘the LGA’) 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 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.
21. 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. The High Court decision relates solely to the Council's duties under s111 of the LGA, and how that provision should be interpreted in light of the CPSR. It did not address the public authority's obligations under the EIR and therefore provides no precedent relevant to this complaint.

22. The Council suggested in a telephone conversation of 9 June 2010 that if the EIR created a separate obligation to allow inspection of property information, then it would have been considered in the judgment, as potentially, the provisions of the EIR make the High Court decision redundant. However, the Commissioner is of the opinion that only the contents of the promulgated High Court decision can be taken into account. The decision did not consider access to the requested information under the EIR.
23. 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.

Regulation 5

24. 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 16 December 2009. As yet, the Council has not provided the complainant with the requested information, although it has stated that it will do so if the complainant pays a set fee. The Commissioner therefore concludes that the Council has breached regulation 5(1) as it failed to make information available on request and regulation 5(2) by failing to make the requested information available within 20 working days following receipt of the request.

Regulation 6

25. 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.

26. The Council has not indicated whether it is willing to allow the complainant access to inspect the requested information, although its current policy states that it will provide answers to the CON29R questions upon provision of a fee.
27. The Council suggest that if it is directed to allow access to the requested information, it would be placed in a position where it is compelled to go against 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. In any case, the High Court did not find that public authorities could not choose to provide inspection of property records.
28. The Council has not relied on either of the two exemptions to the obligation to provide information in the format requested by the complainant. As the Council's current policy does not allow information relevant to the CON29R form to be inspected, the Commissioner has concluded that the Council is not prepared to allow the complainant to inspect the requested information. The Council has therefore breached regulation 6(1). The Council has not chosen to rely on regulation 6(1)(a) or 6(1)(b), which provide exceptions from the duty to supply information in a form or format specified by an applicant. In the absence of any arguments of this nature, the Commissioner finds that the Council is in breach of regulation 6(1) and that the complainant should be permitted to inspect the requested information.

Regulation 8

29. 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).
30. 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.
31. The Commissioner notes that the Council continue to impose a charge to provide the information requested by the complainant. The Council has emphasised that this charge is levied in accordance with regulation 8 of the CPSR. Regulation 6(1) of the CPSR provides that the charge

imposed by public authorities for access to property records “be no more than the costs to the local authority of granting access to property records.”

32. It is the Council's position that the provisions of the CPSR continue to apply to the requested information. The Council is therefore of the opinion that the EIR do not apply in this case. However, the Commissioner's position on this is that regulation 5(6) of the EIR specifically disappplies the charging provisions under the CPSR.
33. Consequently, the Commissioner considers that if the property records comprise environmental information as defined by regulation 2 of the EIR the CPSR 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 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 CPSR cannot apply. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law.
34. 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 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.

Regulation 11

35. 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.
36. The complainant requested an internal review on 21 January 2010. The outcome of this review was not provided until 20 April 2010. Therefore, the Commissioner finds that the Council has breached regulation 11(4).

The Decision

37. The Commissioner's decision is that Kirklees Council did not deal with the request for information in accordance with the EIR. The Council has breached regulation 5(1) as it failed to make information available on request and regulation 5(2) of the EIR as it failed to make the requested information available within the statutory time for compliance. The Council has breached regulation 6(1) by failing to provide the complainant with information in the requested format. The Council has also breached regulation 11(4) by not providing the outcome of its internal review to the complainant within 40 working days.

Steps Required

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

Right of Appeal

40. 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 26th 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 –

- (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.

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 repairs 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 Conservation Area before 31 August 2974
 - 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 of 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?