

***Freedom of Information Act 2000  
Environmental Information Regulations 2004***

**Decision Notice**

**Date: 31 March 2010**

**Public Authority:** Torrridge District Council  
**Address:** Riverbank House  
Bideford  
Devon  
EX39 2QG

**Summary**

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The complainant requested sight of a file containing information regarding a Judicial Review (the "Judicial Review file") concerning a dispute between Torrridge District Council (the "Council") and a third party. The Council cited section 42 of the Freedom of Information Act 2000 (the "Act") and refused the request. During the Commissioner's investigation, and owing to the passage of time, the Council withdrew its reliance on section 42 and made the Judicial Review file available. However, the file did not contain any documentation that detailed the final outcome of the Judicial Review and the Council has confirmed that it does not hold this information. The Commissioner's decision is that on the balance of probabilities, the Council does not hold information of this description. The Commissioner has also concluded that since the request concerned environmental information the Council should have considered this request under the provisions of Environmental Information Regulations 2004 (the "EIR") rather than the Act.

**The Commissioner's Role**

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1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## The Request

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2. On 31 March 2008 the complainant asked the Council:

*"Ref the below email is it possible to view this file now that it is 'finalised'?"*

3. Following a request for clarification from the Council, the complainant subsequently confirmed that it was the file relating to the judicial review proceedings finalised in June 2005.

4. On 2 May 2008 the Council issued a refusal notice to the Complainant stating that:

*"Whilst this matter was finalised in 2005, the file will contain information which still benefits from legal privilege. As such, the exemption under s42 of the Freedom of Information act [sic] 2000 will apply".*

5. The Council did however inform the complainant that:

*"...if there is specific information that you require from the file, I will endeavour to meet that request where possible."*

6. On 12 May 2008 the complainant hand delivered a letter to the Council expressing dissatisfaction with its response to his request for information.

7. On 21 May 2008 the Council acknowledged the above letter and informed him that his letter was being treated as a complaint and had been referred to 'the relevant officer'.

8. On 1 June 2008 the complainant contacted the Council to express concern that his letter of 12 May 2008 was being treated as a complaint as opposed to an appeal of its original decision to refuse the information.

9. On 3 June 2008 the Council communicated the outcome of its internal review to the complainant. The letter stated:

*"The view of the Panel is that the file contains some information which benefits from legal privilege. ..If there is specific information that you require from the file then this should be looked at on an individual basis."*

10. Further communication between the complainant and the Council relating to this request continued up to 12 July 2008.

## The Investigation

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### Scope of the case

11. On 30 July 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
13. In October 2009, the Council decided that the section 42 exemption no longer applied to the disputed information due to the time that had elapsed since the complainant's original request. The Council therefore provided the complainant and the Commissioner with a copy of the whole file.
14. However, on 4 November 2009 the complainant expressed concern that:

*"No offers from the other side are evident and the chronological thread seems to (from Feb 05) just turn into invoices with no real conclusion or report."*
15. During the Commissioner's investigation it became clear to him that the complainant wanted sight of information that explained how the Judicial Review was resolved. In addition to written information regarding the final outcome of the review, the Complainant also drew the Commissioner's attention to a note dated 10 February 2005 sent to the Chief Executive which stated:

*"... things could be close to a settlement, to avoid court action, but it will need a meeting to sort it out ..."*
16. The Council has stated that it does not know whether the suggested meeting took place and has confirmed that it does not hold any written information documenting such a meeting.
17. However, the complainant has recently informed the Commissioner that he has received confirmation from a source external to the Council that the meeting did in fact take place. Therefore, whilst the

Commissioner's investigation is primarily concerned with whether the Council holds any written information detailing the final outcome of the Judicial Review it will also consider whether it holds any information regarding the suggested meeting.

## **Chronology**

18. On 9 October 2008 the Commissioner requested a copy of the withheld information from the Council. The Council responded by sending a copy of the whole file to the Commissioner on 24 October 2008.
19. On 7 September 2009 the Commissioner returned the file to the Council and asked it to clarify which items constituted the withheld information and which items the complainant had been allowed to view. The Commissioner asked the Council to respond by 5 October 2009.
20. Having received no response from the Council, on 9 October 2009 the Commissioner contacted the Council and asked it to provide a response by 16 November 2009. He informed the Council that if he had received no response by that date he would consider serving it with an Information Notice, under the powers provided by section 51 of the Act, which would require the Council to provide him with information to allow him to reach a decision in this matter.
21. The Commissioner did not receive the Council's response by the requested deadline and on 19 October he served an Information Notice.
22. The Council contacted the Commissioner on 20 October 2009 and confirmed that due to the time that had elapsed since the complainant's original request, it was now prepared to disclose the contents of the whole file. The Council sent a copy of the file to both the complainant and the Commissioner.
23. However, having had the opportunity to consider the contents of the file, on 4 November 2009 the complainant contacted the Commissioner to confirm that he was not satisfied that the information was complete. In particular he expressed concern that it contained:  
  

*"...no real conclusion or report."*
24. The Commissioner contacted the Council on 14 December 2009 querying the lack of any information confirming the outcome of the Judicial Review and pointing out that even if there was no formal

ruling it is not unreasonable to expect the outcome to be recorded in some way by the Council.

25. The Council responded on the same date informing the Commissioner that:

*"...the Council's legal section did not deal with the Judicial Review in house...The Council instructed outside solicitors to act on its behalf. Their file will contain the bulk of the information relating to how the court proceedings were conducted..."*

26. On 18 December 2009 the Commissioner drew the Council's attention to section 3(2)(b) of the Act (regulation 3(2)(b) of the EIR) which confirms that where information is held by another person on behalf of the public authority that the public authority is in fact considered to hold that information. The Commissioner also referred to his own internal guidance regarding documents created or received by the solicitor whilst acting as the client's agent, informing the Council that they are normally considered to belong to the client.

27. The Commissioner informed the Council that he would have expected that at least part of the information held by the external solicitor's would be owned by the Council and asked it to contact the external solicitors for the relevant information.

28. Following an application from the Council to narrow the scope of the request, the Commissioner confirmed that the complainant was particularly interested in the final agreement and anything from February 2005 (with the exception of invoices).

29. On 18 January 2010 the Council confirmed that its solicitors had provided it with:

*"...7 storage boxes full of files. Not all of them relate toe [sic] the time period specified by [complainant's name], but an awful lot of them do...Incidentally, I have not found a final copy of the Court Order within the papers, only a draft that appeared to be agreed by all parties."*

The Council also suggested that the complainant may find it beneficial to view the files at its premises.

30. The Commissioner contacted the Council on 20 January 2010 in respect of the final court order, asking it to contact the external solicitors to query the absence of such an important legal document. The Commissioner impressed upon the Council that it must either

produce the document or declare that it is not held. In the case of the latter, the Council was informed it would need to produce full details of its search. The Commissioner asked the Council to respond by 29 January 2010.

31. On 1 February and 3 February 2010, the Commissioner contacted the Council reminding it that the deadline for a full response had now passed.

32. The Council responded on 3 February 2010 confirming that:

*"...we do not hold a copy of the final judgement from the Court. I have made enquiries with the solicitors who represented that Council and their view is that one was not issued as the matter was disposed of by the Claimant applying for the action to be discontinued."*

33. The Council confirmed that there was reference to the action being discontinued on the Judicial Review file and it said the complainant was welcome to view it. The Commissioner asked the Council to provide him with a copy of the information to which it had referred.

34. On 8 February 2010 the complainant informed the Commissioner that amongst the files he had recently viewed was a request for a meeting between the Council and the claimants. However, there were no details of the meeting contained within the files. The Commissioner queried this with the Council on 11 February.

35. On 11 February 2010 the Commissioner again contacted the Council and asked it to provide him with a copy of the final agreement or confirm that it did not hold the information. In the case of the latter, the Commissioner stated that the Council would need to provide details of the searches and /or an explanation of why the information was not held. The Commissioner asked for a full response by 25 February 2010.

36. On 22 February the Council contacted the Commissioner to confirm that the complainant had now had access to the planning files. In terms of the final outcome it confirmed:

*"...there was no final executed Consent Order. It appears that the matter was discontinued by the Claimants and so there is no written final agreement."*

The Council added that:

*"In reality, a short judgement/order would probably have been issued by the Court, but I am afraid that I do not have a copy. All I can surmise is that the matter was disposed of by the claimants applying to discontinue the action."*

37. On 24 February 2010 the Commissioner contacted the Council pointing out that the request for a copy of the final written agreement was not confined to a Consent Order as this is only one of four scenarios where a Judicial Review may be withdrawn before reaching a formal court order. The Commissioner reminded the Council that each scenario required a written record of the outcome, he outlined each scenario and specified the precise nature of the information required in each situation.

38. The Commissioner also asked the Council to clarify precisely which scenario applied to this Judicial Review as the Council's comments appear contradictory in this regard.

39. On 8 March 2010 the Council informed the Commissioner:

*"From my reading of the files, it appears that the matter was to be disposed of by way of agreed Consent Order...However, when I queried with the Council's solicitors why there was no final signed copy, ...it was the solicitors recollection that the [name of claimants] claimants simply discontinued...I do not hold a copy of any discontinuance application and there is no copy with the file from the external solicitors."*

40. On 8 March 2010 the Council also confirmed in respect of the proposed meeting:

*"There is no indication that the meeting took place and there is certainly no note of any such meeting".*

## **Findings of fact**

41. In the course of his investigation of this complaint the Commissioner contacted Cardiff Civil Justice Centre (CCJC) (regional branch of the Administrative Court Office) for generic advice regarding Judicial Reviews. In particular, the Commissioner was looking for a definitive list of recorded information he could reasonably expect to see in cases where the Judicial Review is closed without a hearing. The CCJC informed the Commissioner that there are four scenarios when a Judicial Review may be closed before a hearing and confirmed that each of these require some form of written record of the outcome.



42. One scenario is where the parties reach consent. In this situation there should be a Consent Order on file signed by all parties setting out the terms of the agreement and sealed by the court.
43. A second scenario is where the case is discontinued either 'before' or 'after' service. In either case, a notice of discontinuance (form N279) should be completed.
44. Thirdly, where there has been a lack of service in the proceedings the court will issue a letter informing each party that the case is closed for lack of service.
45. There are also cases where a Single Judge has refused permission on papers and the claimant does not seek to renew the application within seven days from the service of the order. In this scenario, the order of the Single Judge on the papers will be the final order on the file.
46. Finally, if following the grant of permission a claimant fails to pay the continuance fee for the Judicial Review or lodge an application for remission of that fee (if appropriate), the court will issue a chase letter for the fee before closing the file. All parties will be advised in writing should the file be closed.
47. The Commissioner also enquired about the possible options open to a public authority if a copy of the final agreement was not on file. The CCJC confirmed that this would be highly unusual but even in such an unusual situation it would simply be a question of requesting a copy from the Administrative Court Office.
48. The CCJC also informed the Commissioner that the written records documenting the final outcome of a Judicial Review are available to the public on request to the Administrative Court Office and subject to payment of a fee.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Access Regimes**

49. In its handling of this request for information, the Council considered the correct access regime for this information to be the Act. However, the request was for information regarding a Judicial Review set up to



consider a dispute between the Council and a third party in relation to a planning matter.

50. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information and ordinarily considers the correct access regime for planning matters to be the EIR. Regulation 2(1)(c) of the EIR states that information on the following can be environmental information:

*“measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities to protect those elements.”*

51. However, in order for information on any of the above measures to be considered environmental information it must be possible to link it to the elements and factors referred to in regulation 2(1)(a) and (b).
52. The decision on whether the information is environmental or not should, wherever possible, be made on the basis of the information that has been identified as held by the public authority rather than on an assessment of the request. However, in this case, the Council has stated that the information is not held. The Commissioner has therefore based his decision on the subject matter of the Judicial Review itself.
53. The claimants in the Judicial Review were living within the Council's boundary and believed the Council had failed to protect their land from being locked-in and in their words “subject to ransom” from the developers.
54. The proposed development would clearly impact on the land and landscape of the area in question and therefore have a direct link to the elements referred to in regulation 2(1)(a).
55. The Commissioner is therefore of the view that the information relates to measures and activities which are likely to affect the elements referred to in 2(1)(a) of the EIR and has concluded that the request should have been considered under the EIR.

#### **Regulation 12(4)(a) - Information held/not held**

56. Regulation 12(4)(a) states that a public authority is not required to disclose information if it was not held at the time of the request.

57. The Commissioner has considered the Council's arguments that the information is not held and is mindful of the Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within a public authority's records. When requesting whether a public authority does hold any requested information the normal standard of proof to apply therefore is the civil standard of the balance of probabilities.
58. In his determination of where the balance lies, the Commissioner has taken into consideration whether it is appropriate to expect the Council to have recorded details of a meeting that may or may not have taken place and what information would ordinarily be contained in a Judicial Review file in respect of its final outcome. He has balanced this against the Council's statement that this specific information is not held.
59. In terms of a written record of a potential meeting, the Council has indicated that there is no evidence that the meeting ever took place. The complainant on the other hand has stated that he has received verbal confirmation from a source external to the Council that the meeting did in fact take place. However, this does not by itself constitute irrefutable evidence and without firm evidence that the meeting ever took place the Commissioner can only conclude that the balance of probabilities suggests that any written records relating to it are not held.
60. With regard to a written record of the final outcome of the Judicial Review, paragraph 38 explains that there should always be some form of written record detailing the final outcome of the Judicial Review. It is not therefore an unreasonable expectation that the Council would hold some written record of the final outcome of the Judicial Review yet it has asserted that the information is not held. However the question here is not whether an authority *should* hold a particular document, but whether it actually *does* hold it. The relevance of the arguments relating to the former is that they are likely to be of significance when assessing the balance of probabilities. The Commissioner has therefore considered the nature of the search the Council has conducted for the disputed information for it to have reached this conclusion.
61. The Council has confirmed that it has checked both the internal solicitor's file and those of the external solicitor. The Commissioner is aware that the complainant has also had access to the relevant files. Whilst the Commissioner notes that the scope of the search was restricted to these files and was therefore somewhat limited, he

considers the search to be appropriate on the basis that this is the most likely place the information would be held.

62. Whilst the Commissioner cannot be certain that a record of the final outcome of the Judicial Review is not held somewhere within the Council's records, he does not consider it proportionate to expect the Council to extend the search beyond that already conducted. The Commissioner has therefore concluded that based on the balance of probabilities, in the three years between the closure of the file and the making of the request, the information may have been lost or destroyed, and the Council does not hold the disputed information.
63. Regulation 12(1)(b) provides that all exceptions are subject to a public interest test, however the Commissioner does not consider that it will usually be possible to consider the public interest in respect of information which is not held.

### **Procedural Requirements**

64. By failing to respond to the request under the EIR the Council breached regulation 14(2) and 14(3) which provides that a refusal of a request must be made no later than 20 working days and shall specify the reasons not to disclose the information, including details of the exception relied on and matters the Council took into consideration with respect to its public interest test.

### **The Decision**

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65. The Commissioner found that the Council breached regulations 14(2) and 14(3) by failing to respond to the request under the EIR.
66. Although the Council did not specifically cite regulation 12(4)(a) of the EIR when responding to the complainant's request, the Commissioner is satisfied that this exception applies to the circumstances of the case and that on the balance of probabilities the Council does not hold either any written record of the proposed meeting or of the final outcome of the Judicial Review.

## **Steps Required**

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67. The Commissioner requires no steps to be taken.

## **Other matters**

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68. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

### **Records Management – Section 46 Code of Practice**

69. The Code of Practice issued under section 46 of the Act (and the EIR) sets out the practice which it would be desirable for public authorities to follow in connection with the keeping, management and destruction of their records. An updated version of the section 46 Code was issued on 16 July 2009.

70. Paragraphs 41 to 46 of this Notice demonstrate that each Judicial Review file should contain a written record of its final outcome. The Council's confirmation that it does not hold such a record in this particular case is therefore a matter of concern regarding the quality of its record keeping.

71. The Commissioner would like to remind the public authority that the implementation of adequate records management in line with the section 46 Code of Practice is essential to effective access to information and will help the public authority to comply with its duties under both the Act and the EIR. Without reliable records management a public authority is unable to say with any level of certainty what information is held and what has been destroyed.

72. Additionally, the Commissioner notes the section 5(1)(g) of the Solicitor's Code of Conduct 2007 specifically refers to the safekeeping of documents and assets entrusted to solicitors and would therefore have expected higher standards of record keeping with regard to the Council's legal files.

### **Engagement with the ICO**

73. In investigating complaints received under section 50(1) of the Act, the Commissioner is, in the majority of cases, reliant upon substantive submissions from public authorities. When public authorities do not

respond to the ICO's enquiries either within a reasonable timescale or in a satisfactory manner, the outcome is that an investigation is unnecessarily prolonged whilst the Commissioner attempts to secure a satisfactory response. Given that the Act and the EIR are designed to facilitate access to information held by public authorities, behaviour which inhibits this process amounts to a failure to engage with the spirit of the Act.

74. During the course of the investigation, the Commissioner has encountered repeated delays and/or unsatisfactory responses to his requests for information, culminating in the issuing of an Information Notice.
75. Whatever the reasons for this, we expect that in future, the Council will provide substantive responses to the Commissioner's enquiries both within the timescales set in his correspondence and of a satisfactory standard to aid his investigation.
76. Accordingly the Commissioner does not consider the Council's approach to this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the Council's future engagement with the ICO and would expect to see improvements in this regard.

### **Piecemeal disclosure of information**

77. The Commissioner considers that the disclosure of information outlined in the chronology section of this Notice is indicative of piecemeal disclosure of information.
78. Piecemeal disclosure is where a public authority releases information over a period of time well in excess of the statutory time limit and, often, only after being prompted to do so by an applicant or the Commissioner.
79. It can also describe situations where it is clear that information should have been disclosed but has erroneously withheld because of an apparent lack of understanding of the application of the exemptions or exceptions.
80. Piecemeal disclosure can be indicative of a number of failings within public authorities. For example, it may be that staff have not been given adequate training or that insufficient resources have been allocated to request handling. It may also be that an authority, because of poor records management, is unable to effectively ascertain the extent of information held. More seriously, it may also suggest a deliberate attempt to block or delay disclosure.

81. Whilst the Commissioner has drawn no conclusions as to the cause in this particular case, he will be monitoring the Council's future provision of information both with complainants and the ICO and would expect to see improvements in this regard.

## Right of Appeal

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82. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 31<sup>st</sup> day of March 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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



## **Legal Annex**

### **Legal Professional Privilege**

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

**Section 42(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

### **Regulation 4 - Dissemination of environmental information**

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

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

**Regulation 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).