

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

Decision Notice

Date: 11 May 2011

Public Authority: City of York Council
Address: The Guildhall
York
YO1 9QN

Summary

The complainant submitted a request to the City of York Council ('the Council') for information from environmental records held on a property in York. The Council stated that it would only provide a collated version of this information upon provision of a fee. During the course of the investigation, the Council also informed the Commissioner that it relied on the exception at regulation 12(4)(b), which applies to manifestly unreasonable requests. The Commissioner finds that Council has breached regulations 5(1) and 5(2) of the EIR as it failed to make the requested information available on request within the statutory time for compliance. The Council has also breached regulation 6(2)(c) by failing to make the complainant aware of the appeal provisions of the EIR when refusing to provide information in a specific format. The Council has breached regulation 8(3) by charging an unreasonable fee for providing some of the information. The Commissioner finds that the Council applied the exception at regulation 12(4)(b) incorrectly. The Council has breached regulation 14(3)(a) by failing to cite the exception it relied upon in its response to the complainant, and regulation 14(3)(b) by failing to inform the complainant of the details of its public interest test in relation to the exception. The Commissioner requires the Council to make the requested information available for the complainant in the form of a print-out within 35 days of this notice.

The Commissioner's Role

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

Background

2. Section 3 of the Local Land Charges Act 1975 compels all local authorities to generate, maintain and update a Local Land Charges Register and to provide local searches. In order to obtain information from a local search, an application for an Official Search must be submitted to the relevant Local Authority on form LLC1. This is usually accompanied by form CON29R.
3. The CON29R form is comprised of two parts. Part 1 contains a list of standard enquiries about a property. Optional enquiries are contained in Part 2.
4. When a property or piece of land is purchased or leased, a request for a search is sent to the relevant local authority.
5. The complainant represents a company which provides information about property and land issues.

The Request

6. On 24 June 2010 the complainant requested access, free of charge, to records containing the information necessary to complete a CON29R form.

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

7. On 7 July 2010, the Council wrote to the complainant and informed him that it was waiting for "definitive guidance from Central Government" on the interaction between the EIR and Local Land Charges services. The complainant was informed that he could access the request information by submitting a LLC1 and CON29R with the fee of £84 applicable for a standard residential search.
8. On 12 July 2010, the complainant wrote to the Council to request an internal review of this decision.
9. On 7 September 2010, the Council wrote to the complainant to reiterate its previous response.

The Investigation

Scope of the case

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

Chronology

11. On 20 September 2010, the Commissioner wrote to the Council and drew its attention to the decision notice [FER0236058](#), and the subsequent Information Tribunal decision, [East Riding of Yorkshire Council v Information Commissioner \(EA/2009/0069\)](#), which had dealt with a similar request for access to building control information. The Commissioner asked the Council to answer a series of questions about its position on access to the requested information.
12. On 23 September 2010, the Council telephoned the Commissioner to acknowledge his email of 20 September and to discuss the case.
13. On 13 October 2010, the Council provided the Commissioner with a submission responding to his queries of 20 September 2010. The Council also explained that it relied on the exception at regulation 12(4)(b) in refusing to comply with the complainant's request. This exception covers requests that are 'manifestly unreasonable'.
14. On 19 October 2010, the Commissioner wrote to the Council to ask it to provide details of the public interest considerations it took into account in applying the exception at regulation 12(4)(b).

15. On 29 October 2010, the Council wrote to the Commissioner to explain the details of its public interest test.

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 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 these elements". Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The Commissioner therefore considers the information requested by the complainant to be environmental information. The Council also accepts that this is the case.

Regulation 5

18. 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.
19. As yet, the Council has not provided the complainant with the requested information. However, it has explained that it will permit a personal inspection of the Local Land Charges Register free of charge and provide CON29R information if the complainant pays a set fee.
20. The complainant's original request was submitted on 24 June 2010. The Commissioner therefore finds that the Council has breached regulation 5(1) by failing to provide the requested information, and regulation 5(2) by failing to make the requested information available within the statutory time for compliance.

Regulation 6

Regulation 6(1)

21. 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, in accordance with regulation 6(1)(a), it is reasonable to make the information available in another format, or, in accordance with regulation 6(1)(b) the information is already publicly available in another format.
22. Although the Council has not specifically stated that it relies on regulation 6(1)(a), the Commissioner assumes that this is the case. The Council states that it will not provide the requested information via inspection, but instead in the form of a print out from its Uniform system. Uniform is a spatial system used by many local authorities to manage property search information. The requested information has been computerised and held within this system since 2000. In order to locate the relevant information, a search is conducted of the system for a particular address, and information relevant to that property is returned in the form of a report. The Council explains that because the land charges service is now fully electronic, its paper records are held off site in a storage facility, which is not accessible to the public and has no facilities for inspection.
23. The Commissioner accepts that in the particular circumstances of this case, it would be reasonable for the Council to provide the information in a format other than inspection. This is because of the practical difficulties that allowing inspection would create, because there is no facility for allowing members of the public to inspect information held either in an offsite storage facility or on back office computers. Allowing inspection of the Uniform system by members of the public would also breach the Council's IT code of practice. The Commissioner also accepts that the Uniform system can only generate the relevant information as a result of a search and that the applicant cannot inspect the data its original format on these computers. The Commissioner therefore accepts that it is reasonable for the Council to make the requested information available in another format, specifically as a print-out from the Uniform system, and finds that the Council has complied with regulation 6(1).

Regulation 6(2)

24. Regulation 6(2)(c) states that where a public authority decides it will not provide information in a format requested by the complainant, it should inform the complainant of the appeal and enforcement provisions set out in regulations 11 and 18 of the EIR. The Council did not advise the complainant of her right to request an internal review or how to complain to the Commissioner. Consequently the Commissioner finds that the Council has breached regulation 6(2)(c).

Regulation 8

25. 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(3).
26. Regulation 8(3) states that any charge levied by a public authority for making environmental information available should be 'reasonable'. In [Markinson v Information Commissioner](#), the Tribunal found that these fees could not exceed the cost of providing the information, and should only take into account the costs of disbursements such as packaging and postage.

The Local Land Charges Register

27. The Council confirms that no charge is imposed to allow applicants to inspect the Local Land Charges Register and the Commissioner consequently considers that the Council has complied with regulation 8(2)(b) in relation to this part of the request.

Information relevant to CON29R queries

28. The Commissioner notes that the Council continues to impose a charge to provide the information requested by the complainant. The Council emphasises that this charge is levied in accordance with the [The Local Authorities \(England\) \(Charges for Property Searches\) Regulations 2008](#) ('the CPSR'). However, the Commissioner's position is that regulation 5(6) specifically disapplies the charging provisions under the CPSR. In [Kirklees v Information Commissioner](#), the Upper Tribunal accepted that regulation 5(6) has the effect of disapplying the provisions of the CPSR. The Tribunal also pointed out that regulation 4(2) of the CPSR provides that its charging provisions will not apply when another enactment, such as the EIR, requires information to be made available free of charge.

29. Consequently, the Commissioner considers that if the property records comprise environmental information as defined by regulation 2 of the EIR the CPR 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 CPR, the information should be considered for disclosure under the EIR. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law.
30. The Council has stated that it will levy a charge of £69 to provide the requested information to the complainant in the form of a print out. It states that this charge covers the costs of "resource time to process what is in effect a search request through the land charges system". In this case, the Commissioner has concluded that it was reasonable for the Council to provide the requested information in a format other than inspection, i.e. in hard copy. Regulation 8(3) provides that a public authority can charge a "reasonable" fee for providing electronic information. However, as confirmed by the Tribunal in [Markinson v Information Commissioner](#), this fee cannot include the costs of maintaining, identifying, locating or retrieving from storage the information in question, or the costs of staff time spent in dealing with the request. By taking into account additional factors, such as the costs of staff time, the Council has breached regulation 8(3).

Regulation 12(4)(b)

31. In its email to the Commissioner of 24 August 2010, the Council argued that the complainant's request was "mischievous" and that the exception at regulation 12(4)(b) applied.
32. Regulation 12(4)(b) provides an exception for requests that are 'manifestly unreasonable'. Whilst the EIR do not define the term, the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
33. There is no single test for what sorts of requests may be considered to be manifestly unreasonable. Instead, each individual case is judged on its own merits taking into account all of the circumstances surrounding the request. It is the Commissioner's view that regulation 12(4)(b) will apply where it is demonstrated that a request is vexatious or that compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

34. The Commissioner notes that the EIR is both applicant and motive blind. However, he appreciates that for vexatious or, as is relevant here, manifestly unreasonable requests, the context of the request and the requester's previous relationship with the public authority may be relevant. The Commissioner has considered the arguments submitted by the public authority in support of applying this exception below.
35. The Council argues that the complainant's request is manifestly unreasonable because the complainant had previously submitted a standard residential search for the property in question on forms LLC1 and CON29R, together with the appropriate fee of £84. The complainant submitted this official search request on 12 May 2010, and the Council provided the requested information on 14 May 2010. The complainant's request under the EIR was submitted on 24 June 2010.
36. The Council therefore considers the request is manifestly unreasonable because it is aware that the complainant is "already in possession of an Official Search containing all the information needed as part of a conveyancing transaction and [the request] is nothing more than a mischievous request and a total waste of Council time..."
37. The Commissioner acknowledges, it is arguable, that repeated requests could potentially be considered to be manifestly unreasonable if an insufficient period of time has elapsed before a request is resubmitted. What constitutes a reasonable interlude between repeated requests may to some extent depend on the nature of the information sought and whether there is a reasonable expectation that it may have changed since it was last provided by a public authority. In its telephone conversation with the Commissioner of 23 September 2010, the Council stated that the results of searches would generally be accepted as valid for 6-9 months after they are provided.
38. However, the Commissioner considers that a period of around six weeks is not an unreasonable interval between the submission of a request for information in relation to the same property. In any event, the Commissioner does not consider that the Council has demonstrated how this would deem the request 'manifestly unreasonable'.
39. The Council also argues that the complainant has submitted over 110 Official Search requests for property search information through its chargeable procedures since January 2010 and has never previously expressed interest in trying to access the information under EIR. The Commissioner does not however consider that this in any way invalidates the complainant's request or renders it 'manifestly unreasonable'. He therefore dismisses this point.

40. The Council argues that the complainant is not in fact interested in the content of the requested information. This is because the complainant represents a company which provides information about property and land issues to its clients. The Council argues in its email of 29 October 2010 that if the complainant required the requested information for his business purposes, i.e. to facilitate a conveyancing transaction, more pressure would have been placed upon the Council to release the requested information, either from the purchaser of a property or their solicitor. As it has not received any communications chasing the release of the information, the Council concludes that the complainant is not genuinely interested in receiving the requested information. The Commissioner however notes that requests under the EIR should be handled consistently regardless of the suspected motive of the applicant. He therefore considers this argument to be irrelevant.
41. Consequently, the Commissioner considers that the exception at regulation 12(4)(b) is not engaged and he has therefore not gone on to consider the public interest test.

Regulation 14

Regulation 14(3)

42. Regulation 14(3)(a) provides that:

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

any exception relied on under regulations 12(4), 12(5) or 13”

43. The Council has applied the exception at regulation 12(4)(b) to the requested information. However, it did not inform the complainant of this in its original response or internal review. Consequently the Commissioner finds that it has breached regulation 14(3)(a).

44. Regulation 14(3)(b) provides that a refusal notice should specify:

“the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b)...”

45. The Council also failed to inform the complainant of any public interest considerations it took into account and so the Commissioner finds that it has breached regulation 14(3)(b).

Regulation 14(5)

46. Regulation 14(5)(a) provides that a refusal notice should inform the complainant of his right to make representations for review to the public authority under regulation 11. The Council failed to do this and so the Commissioner finds a breach of regulation 14(5)(a).
47. Regulation 14(5)(b) provides that a refusal notice should inform the applicant of the enforcement and appeal provisions of the Act applied by regulation 18. The Council failed to do this and so the Commissioner finds a breach of regulation 14(5)(b).

The Decision

48. The Commissioner's decision is that City of York Council did not deal with the request for information in accordance with the EIR. The Commissioner finds that:
 - o The Council has breached regulations 5(1) and 5(2) of the EIR as it failed to make the requested information available on request within the statutory time for compliance.
 - o The Council breached regulation 6(2)(c) by failing to advise the complainant of the appeal and enforcement provisions of the EIR when refusing to provide information in a specific format.
 - o The Council has breached regulation 8(3) by imposing an unreasonable charge for the provision of information relevant to CON29R queries.
 - o The Commissioner finds that the Council applied the exception at regulation 12(4)(b) incorrectly.
 - o The Council has breached regulation 14(3)(a) by failing to cite the exception it relied upon in its response to the complainant, and regulation 14(3)(b) by failing to inform the complainant of the details of its public interest test in relation to the exception. The Council also breached regulation 14(5)(a) by failing to inform the complainant of his right to request an internal review under regulation 11, and regulation 14(5)(b) by failing to inform the applicant of the enforcement and appeal provisions applied by regulation 18.

Steps Required

49. The Commissioner requires that the Council make the requested information available to the complainant in the form of a print-out. The Council is only entitled to charge the complainant a fee that covers the costs of any disbursements.
50. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

51. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

52. 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 11th day of May 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
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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 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 the request involves the disclosure of internal communications.

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.