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

Decision Notice

Date: 19 December 2011

Public Authority: Leeds City Council
Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Summary

1. The complainant submitted a request to Leeds City Council ('the council') for information from environmental records held on a property in Leeds. The complainant specified that he wished to view the records in person. The council stated that the requested information could only be accessed on the provision of a fee based on the property search regulations. The council argued that it was reasonable to make the requested information available in a format other than inspection under regulation 6(1)(a). It also applied the exception at regulation 12(5)(c) ('intellectual property') to the requested information.

2. The Commissioner's decision is that the council breached regulations 5(1) and 5(2) as it failed to make the requested information available within the statutory time for compliance. Whilst the Commissioner concludes that the council was entitled to rely on regulation 6(1)(a) to make information available in a format other than inspection, he finds that the council has breached regulation 8(3) by levying an unreasonable charge for the provision of that information. The Commissioner also finds that the council was not entitled to rely on the exception at regulation 12(5)(c).

3. The Commissioner requires the council to make the requested information available to the complainant in a format other than inspection. It is entitled to levy a charge only for the costs of disbursements incurred in complying with the request, provided that it has already published these charge in accordance with regulation 8(8).

4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply 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.

The Commissioner's Role

5. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Environmental Information Regulations 2004 ('the EIR'). This Notice sets out his decision.

Background

6. Section 3 of the Local Land Charges Act 1975 compels all local authorities to maintain 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. 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.

7. When a property or piece of land is purchased or leased, a request for a search is sent to the relevant local authority. The complainant represents a company which provides information about property and land issues.

The Request

8. On 20 October 2010 the complainant wrote to the council to request access to the information necessary to complete form CON29R.[1] The complainant requested this information in relation to a specific property and specified that she wished to inspect the information.

9. The council provided a detailed response to the complainant on 9 November 2010. The council stated that it did not accept that 'inspection' was a format under regulation 6(1) of the EIR. It also explained that in any case, it felt it was reasonable to make information available in another format under regulation 6(1)(a). The

[1] A list of CON29R enquires is provided at Annex A

council set out why it believed that the fees charged for providing this information were reasonable under regulation 8(3). It also applied the exception at regulation 12(5)(c) ('intellectual property') and provided details of the public interest test conducted in relation to this.

10. On 10 November 2010 the complainant wrote to the council to request that it conduct an internal review of its response. The council provided the outcome of its internal review to the complainant on 30 December 2010. This upheld the council's original response.

The Investigation

Scope of the case

11. On 3 February 2011, the complainant contacted the Commissioner to complain about the council's compliance with the provisions of the EIR.

12. The council has confirmed that information relevant to CON29R queries 1.1(a)-(e), 1.2, 2(a), 3.4(a), 3.4(e)-(f), 3.12(a) and 3.12(b)(ii) can be accessed free of charge, and that information relevant to CON29R query 3.3(b) is held by the relevant water authority rather than the council. The Commissioner accepts that this is the case, and so has also excluded these parts of the request from the scope of the investigation.

Reasons for decision

Substantive Procedural Matters

Regulation 2

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

14. 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,

which is about measures that will affect elements of the land and landscape, to be environmental information

Procedural Requirements

Regulation 5

15. 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 20 October 2010. As yet, the council has not provided the complainant with the requested information, although it has offered to do so upon provision of a fee. The Commissioner therefore concludes that the Council has breached regulations 5(1) and 5(2) by failing to make the requested information available within 20 working days following receipt of the request.

Regulation 6

Regulation 6(1)

16. 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.

17. A public authority should comply with this preference unless one of two exceptions applies. These exceptions are at regulation 6(1)(a), which provides an exception from the duty to comply with preference for a particular format where it is reasonable to make the information available in another format, or 6(1)(b), which applies when the information is already publicly available in another format.

18. The council has stated that it will comply with the complainant's request to inspect certain parts of the requested information. These include the information relevant to CON29R queries 1.1(a)-(e), 1.2, 2(a), and 3.12(b)(ii), which are publicly accessible. The council has therefore complied with regulation 6(1) in relation to these parts of the information.

Does regulation 6(1) include the right to request inspection?

19. The Commissioner has previously set out his interpretation of regulation 6(1) in decision notice FER0236058. The Commissioner considers that "although regulation 6(1) may appear to be primarily concerned with the particular physical form or format in which the information is provided, it should be interpreted broadly and does provide a right to request the inspection of environmental information".

20. The council does not concur with the Commissioner's interpretation. Specifically, it rejects that 'inspection' constitutes a "form or format". Therefore, it does not accept that regulation 6(1) gives an applicant the right to request to inspect information. The council makes several arguments in support of its position. The Commissioner has considered these in turn below.

21. The council points out that other access regimes, such as the Freedom of Information Act, and the Local Authorities (Executive Arrangements) (Access to information) (England) Regulations 2000, make specific reference to the term "inspection", whereas the EIR do not. In addition, Regulation 8(2)(b) of the EIR, and Article 5.1 of the Directive refer to "examination" of information rather than "inspection". The council contends that these terms are not synonymous.

22. However, the Commissioner concludes that 'form or format' includes inspection, despite the fact that this term is not specifically used in the EIR. In reaching this view, he has considered regulation 6(1) in conjunction with regulation 8(2)(b), which implies that the EIR set out a right to request to inspect.

23. In addition, the Commissioner notes that the Directive underpinning the EIR promotes a liberal access regime. Article 1(b) of the Directive refers to public authorities having a duty to ensure the widest possible systematic availability and dissemination to the public of environmental information. Recital 15 requires member states to make arrangements that shall guarantee information is effectively and easily accessible. Paragraph 5(c) of Article 3 of the Directive obliges public authorities to make arrangements to ensure that information is easily accessible, for example by

> "the establishment and maintenance of facilities for the examination of the information required"

The Commissioner notes that as the principles behind the EIR seek to make environmental information available as easily as possible, and the EIR at regulation 8(2)(b) clearly envisage a situation where

inspection would be possible. Therefore, he considers that inspection is a valid "form or format" under regulation 6(1) and is permitted under the EIR.

24. The council contends that the phrase "particular form or format" as set out in regulation 6(1) suggests a medium, such as hard copy or electronic document. The council rejects the argument that 'inspection' qualifies as a "form or format", and points to the decision of Lord Reed in the case of Glasgow City Council and Dundee City Council v Scottish Information Commissioner (CSIH 73) as an analogy.

25. Paragraph 57 of this judgment commented on whether section 11 of the Freedom of Information Act entitled an applicant was entitled to request a copy of a specific document, or simply a copy of the information contained within these documents. As part of this discussion, the judgment comments that the word 'form', as included in section 11(2)(a) of the Act

> "appears to us to have in mind such possible forms as electronic files, paper documents, audio or video tapes, or verbal communication".

26. However, the Commissioner considers these comments irrelevant as they do not consider in any way the issue of inspection. The Commissioner accepts that the EIR provides a right of access to information rather than specific documents. The Commissioner also notes that the comments in the above case refer to the Act rather than the EIR, and originate from a judgment against the Scottish Information Commissioner.

27. The council points out that the Information Tribunal in the case of East Riding of Yorkshire Council v Information Commissioner did not specifically accept the Commissioner's position that regulation 6(1) allows an applicant to request to inspect information.

28. The Commissioner, however, considers that the Tribunal's comments at paragraph 36 support his view that inspection constitutes a valid form or format. When discussing the provisions of regulation 8(2), the Tribunal stated that:

> "regulation 8(2) does not create a separate obligation to permit inspection, but simply provides that, where the person making the request asks for the information to be made available by inspection then, unless the public authority has the right under regulation 6 to override that preference and to make the

> information available in the form of a copy, it may not make any charge"

The Commissioner is of the opinion that the Tribunal here concurs with his interpretation that regulation 6(1) allows inspection to be specified as a preferred form or format.

29. Finally, the council argues that if the term "form or format" were to include inspection, then a public authority "could make information publicly available for inspection at its premises, and then rely on regulation 6(1)(b) to refuse to provide hard copies to applicants". It contends that this clearly was not the intention of the EIR.

30. Regulation 6(1)(b) provides an exemption from the duty to comply with an applicant's preferred format where

> "the information is already publicly available and easily accessible to the applicant in another form or format".

31. The Commissioner accepts that there are some cases where a public authority would in fact be able to refuse to provide information because it was already available for inspection. However, he does not accept that a public authority would necessarily always be able to rely on this provision to refuse requests for hard copies of information where it is available for inspection. An applicant might reasonably be able to show that this information was not "easily accessible" to them. In addition, a public authority could only use this provision where the information was *already* publicly available for inspection. It could not, as the council suggests, do so in response to a request for information. The Commissioner notes that it is unlikely that a public authority would routinely make all of its environmental information available for inspection, and that this would be reasonably accessible to every applicant. Therefore the situation described by the council would arise comparatively rarely and in such cases, it *would* in fact be reasonable to refuse to provide hard copies.

32. The Commissioner therefore does not accept that the situation proposed by the council supports its argument that "inspection" cannot constitute a form or format.

<u>Regulation 6(1)(a)</u>

33. Despite the fact that the council does not accept that regulation 6(1) includes the right to request to inspect information, it has also chosen to rely on regulation 6(1)(a), and has provided a comprehensive submission to support this position. As the Commissioner does not

accept the council's contention that regulation 6(1) excludes the right to request inspection, he has considered the council's arguments for its reliance on regulation 6(1)(a).

34. The Commissioner has considered the council's arguments below. In assessing the council's submission, the Commissioner has considered the findings of the Information Tribunal in East Riding of Yorkshire Council v Information Commissioner ('the Tribunal decision'). In this case, the Tribunal did not accept that the arguments put forward by East Riding demonstrated that it was reasonable to provide information in another format as set out in regulation 6(1)(a). However, the Tribunal decision emphasised that this did not mean another public authority could not demonstrate that it was reasonable in the circumstances to rely on 6(1)(a) (para 40).

Can the council take into account the impact of multiple requests when assessing whether it is reasonable to provide inspection?

35. The first issue for the Commissioner to consider is whether the council is entitled to take into account the burden that would be caused if it were compelled to comply with multiple requests on the same basis as the one submitted by the complainant. The council anticipates that to comply with requests of this nature on a regular basis would create significant additional costs.

36. The council argues that it is entitled to assess the impact of multiple requests when considering whether to comply with the complainant's preference to inspect information. It offers four main grounds in support of this, which the Commissioner has assessed in turn below.

37. Firstly, the council refers to paragraph 40 of the Tribunal decision to support its approach. York Place, the property search company who were joined as an additional party in the Tribunal decision, argued that the council should assess reasonableness solely by reference to the specific information requested, i.e. environmental records for a particular property. At paragraph 40, the Tribunal decision states:

> "We do not accept that argument. We believe that if a public authority is able to demonstrate that particular restrictions are reasonably necessary to prevent, for example, the inadvertent disclosure of personal data likely to be contained in certain types of record, it should be allowed to rely on a general practice intended to prevent disclosure across that range and should not be required to examine each request for information to see if it should be treated as an exception to the general rule. If the general rule can be shown to be reasonable then the public

> authority should be entitled to apply it in all cases falling within its scope."

38. The Commissioner, however, interprets this passage to mean that the Tribunal accepted that a public authority could adopt a standard policy for handling requests of a similar nature. For example, a public authority might decide that applicants would only be entitled to inspect redacted copies of information relating to property searches. It would be reasonable to apply this policy to all similar requests, rather than examining the information relevant to each request to decide if it was appropriate to allow an applicant to inspect the information in its original format. The Commissioner is of the opinion that the Tribunal comments do not mean that a public authority can take into account the burden potentially caused by complying with a range of similar requests, or the cost of making adjustments and introducing new procedures in order to accommodate them. Nor does it extend to consideration of the accumulative cost of dealing with an anticipated volume of requests.

39. The Commissioner also notes that paragraph 42(i) of the Tribunal decision recounts the comments made by a council official about the number of searches it received per week, and the potential costs of allowing inspection in all cases. The Tribunal made no comment on whether it felt that this was an appropriate method of assessing whether it was reasonable to provide information in a format other than the one specified.

40. Secondly, the council points to the decision in the case of British Oxygen Co. Ltd v Minister of Technology (1971) to support its contention that it is not unlawful for the council to have a "precise policy" for dealing with requests, as long as it does not disregard individual factors where relevant. The Commissioner does not dispute this point, and accepts that the Tribunal decision supports the idea that the council can deal with similar requests in accordance with a set policy. However, he is mindful that his remit is to decide whether the specific request submitted by the complainant has been dealt with in accordance with the EIR. The fact that the council is entitled to operate a set policy does not mean that its procedures do not have to comply with the EIR.

41. Thirdly, the council argues that the correct way to assess 'reasonableness' in this case is to consider the context of "normal English law rules that apply to decisions of public bodies". The council points to the Tribunal's comments in the case of David Markinson v Information Commissioner [EA/2005/014] to support this approach. This case concerned the issue of charging for environmental

information. Regulation 8(3) of the EIR provides that any charge levied "shall not exceed an amount on which the public authority is satisfied is a reasonable amount". The Tribunal found that a public authority should be guided by existing precedent, guidance and rules in order to establish what it felt was a 'reasonable' amount. The council argues that it is therefore correct to take into account other existing provisions and rules when assessing 'reasonableness' under regulation 6(1)(a).

42. The council also relies on the comments of Richards LJ in the Court of Appeal decision in the case of The Office of Communications v The Information Commissioner [2009] EWCA Civ 90. This found that

> "What can and cannot be taken into account by a decision-maker acting under a statutory power depends in the first place on the governing statute. The statute may expressly or impliedly require or permit certain matters to be taken into account, or it may expressly or impliedly require certain matters not to be taken into account."

43. The council submits that if it were to comply with the complainant's request, it would be compelled to deal with all similar future requests in the same way. This would create a potential financial burden. Based on the argument that reasonableness is assessed in the context of existing laws and principles, the council feels that it must here take into account the judgment in the case of Bromley LBC v Greater London Council [1983], which found that:

> "a local authority owes a general fiduciary duty to the ratepayers … this includes a duty not to expend those monies thriftlessly but to deploy the full financial resources available to it to the best advantage";

The council therefore argues that it is *compelled* to take into account the impact of complying with potential similar requests when assessing whether it is reasonable to make the information requested by the complainant available for inspection.

44. The Commissioner however maintains that the council can only take into consideration whether it would be reasonable to allow the complainant to inspect information relevant to his specific request. He does not accept that the council is permitted to assess the impact of other, hypothetical requests. The Commissioner's role is to assess whether complying with the complainant's specific request has been handled correctly. Whilst the Commissioner is aware that the council has wider responsibilities, he does not believe that assessing the impact of potential multiple requests is the correct basis to assess whether it is reasonable to comply with the specific request in

question. This could potentially create a situation whereby a public authority would be entitled to refuse to comply with any request on the basis that it might, at some point in the future, be compelled to comply with a large number of similar requests.

45. Finally, the council submits that it is entitled to take into account the purpose and principles of the EIR as derived from the Directive. In particular, it refers to para 56 of the decision in the Office of Communications v Information Commissioner, which describes the principles of the EIR as:

> "a greater awareness of environmental matters, free exchange of views, and more effective participation by the public in environmental decision making, all of which are referred to in recital (1)".

The council argues that the sole purpose of the complainant's request is to obtain information which he can then sell on for financial gain. It feels that this would not contribute to the principles of greater public understanding of environmental issues underlying the EIR.

46. However, the EIR are motive and applicant blind. The Commissioner's opinion is that if the requested information is environmental in nature, then it should be dealt with in accordance with the EIR, regardless of why the public authority believes the complainant wishes to access it. The Commissioner also notes that this consideration is largely irrelevant to the council's argument that it should not be compelled to comply with the complainant's request to inspect the requested information. The council argues that "none of the principles in the Directive will be prejudiced by the Council's decision to make this information available in another form or format". The Commissioner however does not accept that the intended purpose is a factor that the council is entitled to consider in deciding whether to comply with a request for inspection.[2]

47. The Commissioner therefore does not accept the council's contention that it is appropriate to consider the impact of complying with a large range of similar requests when assessing whether regulation 6(1)(a) applies. Instead, he considers that each request for information should be considered on an individual basis.

[2] The council also states that the appropriate access regime for the complainant to utilise is the Re-Use of Public Sector Information Regulations 2005. The Commissioner's remit is only to decide whether the request has been dealt with in accordance with the EIR. Any subsequent use of that information is not a matter that falls within the Commissioner's remit.

Is it reasonable for the Council to provide the requested information in a format other than inspection?

48. The council has submitted very detailed arguments to support its contention that it is reasonable to provide the complainant with the requested information in a format other than inspection. Many of its arguments are on the impact that dealing with a large number of requests for inspection of information of this nature would cause, rather than the impact of complying with this specific request.

49. The council states that in the financial year 2009/10, it received 11,420 property search requests. The council acknowledged that not all applicants for property searches are likely to opt to inspect the information. Instead, the council's arguments are based on the assumption that it would be compelled to deal with 7,500 requests for access to property search information free of charge. In the financial year 2009/10, the council received 11,420 property search requests. Its figures are therefore based on the hypothesis that over half of these applicants would opt, if permitted, to inspect the information in person.

50. The CON29R information requested by the complainant is not held centrally, and is instead held at a variety of locations around the council's offices. These are not organised as "front-line" services. The council has provided submissions from the managers of each of these services which detail the additional resources that would be needed to deal with routine requests for inspection of information. The departments are Highways and Transportation, Planning and Development Services, Parks and Countryside and Environmental Health. To summarise, the council's estimate is that the total cost of complying with requests similar to the complainant's is over £200,000. This figure is based on the lower estimate of dealing with 7,500 requests of this nature.

51. As the Commissioner has concluded that evaluating the impact of potential requests is not the correct basis for assessing whether it is reasonable to comply with the complainant's request for inspection, he has not gone on to consider the validity of the Council's projected costs in any detail. However, the Commissioner believes that in any case, certain factors listed by the council could not be taken into account in estimating the cost of compliance with a request. These include the costs of advertising for additional staff, increased salary payments, the conversion of existing buildings, and the cost of consumables.

52. However, the Commissioner does note that the requested information is held on 'live' computer systems. This means that the information is held in a dynamic form and can be altered by a user, rather than being

a static record. The council also points out that these systems hold the personal information of other individuals, and that disclosure of this would be likely to breach the terms of the Data Protection Act. For example, information held by the Planning and Development Service is located on the Uniform system. The council cannot lock this system so that it would be unable to be altered, even inadvertently, by somebody accessing the system. Information which constitutes the personal data of other individuals is also accessible on these systems. The council also points out that not all of the buildings housing the systems where information is held are publicly accessible or have facilities to accommodate the general public. The Commissioner does not consider that it is reasonable that the council should have to invest in facilities and new computer systems expressly for the purpose of complying with this request.[3] The Commissioner accepts that in the particular circumstances of this case, it would therefore be impractical for the council to allow the applicant to inspect the requested information in the format that it is currently held in.

53. The Commissioner therefore accepts that the council is entitled to rely on regulation 6(1)(a) to provide information in a format other than inspection, although he emphasises that this decision has not been made on the basis of the aggregated impact of dealing with requests to inspect information. The Commissioner's view on whether public authorities can impose charges for allowing applicants to inspect environmental information is set out below.

Regulation 8

54. Regulation 8 provides a general right for public authorities to charge for making information available.

Regulation 8(3)

55. The right under regulation 8 to impose a charge for making information available is subject to a number of conditions. The relevant condition in this case is at regulation 8(3), which provides that any charge levied for the provision of environmental information must be "reasonable".

Is the council entitled to calculate its charges in accordance with the CPSR?

56. The Commissioner notes that the council currently imposes a charge for providing the requested information. The council here relies upon the charging provisions set out in the Local Authorities (England)

[3] The Commissioner does however note that work is ongoing to implement systems that will eventually make more of this information accessible via public access portals.

(Charges for Property Searches) Regulations 2008 ('the CPSR'). Regulations 5, 6 and 7 of the CPSR set out the charges that may be levied for providing access to property search information.

57. The Commissioner's position is that regulation 5(6) specifically disapplies the charging provisions under the LLCA and the CPSR. This regulation provides that "any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply". The Upper Tier Tribunal in Kirklees v Information Commissioner accepted this argument, and also pointed out that: regulation 4(2) of the CPSR itself "makes express provision to ensure that the CPSR do not trespass on other enactments which require information relevant to property searches to be provided free of charge" (para 98)

58. 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, regardless of the charging provisions of the CPSR, the information should be considered for disclosure under the EIR.

59. 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. The Upper Tier Tribunal in Kirklees Council v Information Commissioner and PALI Ltd (*GI/258/2011)* concurred with this view and also commented that

> "There is in our judgment no inconsistency between these provisions and the CPSR. Indeed Regulation 4(2) of the CPSR makes express provision to ensure that the CPSR do not trespass on other enactments which require information relevant to property searches to be provided free of charge." (para 98)

60. The council does not accept that regulation 5(6) of the EIR necessarily disapplies the charging provisions of the CPSR. In its response to the complainant of 14 July 2010 the Council refers to the Court of Appeal judgment in The Office of Communications v The Information Commissioner . The council points out that this case made clear that regulation 5(6) only applies to the

> "disclosure of information, not to subsequent reuse of the information disclosed, and there is nothing else in the EIR that

> disapplies enactments or rules of law relating to such subsequent use".

61. The council here suggests that it is entitled to make a charge for permitting the re-use of information disclosed and explains that its current fees combine a charge for disclosure under regulation 8(1) with a charge for permitting this re-use. The Commissioner concurs with the council that the EIR only deals with the disclosure of information. It is therefore outside of his remit to comment on or regulate how an applicant is entitled to re-use information once it has been disclosed

'Reasonable' charges under regulation 8(3)

62. The Commissioner's position is that a "reasonable charge" under regulation 8(3) can only cover the costs of disbursements incurred in providing the information, such as postage and photocopying. He does not accept that factors such as the cost of staff time spent on complying with a request can be taken into account. If a public authority believes that it would take an excessive amount of time to comply with a request, it has the option of citing the exception at regulation 12(4)(b). The Commissioner's position is supported by the Information Tribunal decision in Markinson v Information Commissioner.

63. The council however argues that a public authority should in fact be able to include the costs of staff time when levying a fee for information. It cites the decision of the ECJ in European Communities v Federal Republic of Germany (1999) [Case C-217/97], which commented on article 5 of the Directive that underpins the EIR. It stated that

> "any interpretation of what constitutes a 'reasonable cost'… which may have the result that persons are dissuaded from seeking to obtain information…must be rejected" (para 47)

The council argues that currently, it provides property search information to "thousands of applicants" annually, and has no evidence that they are deterred from seeking information by the charges levied.

64. The Commissioner considers that whilst this comment on the Directive is useful, it is not the only factor that should be considered when determining whether a charge is 'reasonable' for the purposes of the EIR. The Commissioner would further observe that obtaining information of the type sought by the complainant is often a necessary part of purchasing or leasing land, and so applicants have no choice but to obtain this information irrespective of the charges levied.

65. The council also points to paragraph 48 of the same judgment, which emphasised that the directive does not permit authorities to pass on the entire amount of costs incurred in providing information to applicants. The council emphasises that it does not do this, as charges only take into account officer time (including pay, national insurance contributions and pension costs), and do not include "other overheads such as accommodation, ICT equipment costs etc". The Commissioner however would comment that the fact that the council has disregarded some irrelevant costs when calculating its charges, does not mean that it is therefore entitled to include other irrelevant costs.

66. The Commissioner's view, however, as supported by the decision in Markinson, remains that the costs of staff time cannot be taken into account when dealing with a request. The Tribunal commented that:

> "the Council had taken into account "the officer time in locating and retrieval of the documentation", a factor which we believe the Council, and the Commissioner, should have regarded as irrelevant. Regulation 8(2)(b) provides that the information in question should be made available for inspection free of charge and we believe that, if the costs of locating and retrieving a piece of information should be disregarded for that purpose, it is not open to a public authority to regard it as reasonable to include them in calculating the cost of copying the same material" (para 16)

67. The council also argues that the correct basis for calculating the correct fee to be charged for providing this information is by dividing the total costs of operating the property search service by the average number of requests received. The Commissioner does not accept that the council is entitled to calculate charges on this basis. He believes that a public authority should only be entitled to charge for the actual disbursements incurred by dealing with a particular request.

68. The Commissioner finds that the council has breached regulation 8(3) by attempting to levy an unreasonable charge for making the requested information available. The Commissioner therefore finds that the council is entitled only to levy a charge to cover the costs of disbursements incurred in complying with the request. In accordance with regulation 8(8)(a), it may only levy these charges if they have been published and made available to applicants.

Regulation 12

69. The council also claims that the requested information is exempt from disclosure under the exception at regulation 12(5)(c). The Commissioner notes that for an exception under regulation 12(5) to be applicable a public authority must establish that disclosure would have an "adverse effect". He considers that the threshold to justify non-disclosure because of adverse effect is a high one. It is necessary to show that disclosure "would" have an adverse effect. The Commissioner has interpreted this to mean that a public authority must show that it would be more probable that not that prejudice would occur. The Commissioner also notes that all exceptions under the EIR are subject to a public interest test. The Commissioner will therefore first consider whether the exception is engaged, and then go on to consider the public interest test if appropriate.

70. Regulation 12(2) provides that a public authority must apply a presumption of disclosure when considering a request. This means that in the event that the weight of public interest in favouring of maintaining the exception is balanced with the public interest in disclosure, the information should be disclosed.

Regulation 12(5)(c) – intellectual property

71. The council has advised the Commissioner that it considers that the withheld information falls under the exception under 12(5)(c) of the EIR. This regulation states that,

> "a public authority may refuse to disclose information to the extent that its disclosure would adversely affect… intellectual property rights"

72. The Commissioner must first decide if the exception is engaged. The council has provided arguments in support of its contention that it owns the copyright in the databases holding the requested information. Consequently, it believes that the requested information constitutes its intellectual property. The Commissioner has considered these arguments below.

73. The Commissioner first notes that although the council claims that the requested information is exempt from disclosure under regulation 12(5)(c), it has in fact agreed to provide the information for a fee. Generally, the Commissioner would consider that the fact that information would be provided for a charge would be likely to invalidate a public authority's reliance on an exception. However, the Commissioner understands that given the particular nature of this

exception, the council considers that the fee charged would compensate it for the adverse effect on its intellectual property rights, and that the complainant would be purchasing the right to use the council's intellectual property. This is implicit in the council's initial response to the complainant, the council comments that the charge is "in effect a combined charge for both disclosure and subsequent use of the information…" The Commissioner has therefore gone on to consider the council's arguments for why the exception should apply.

74. In its initial response to the complainant, the council argues that "…disclosure would adversely affect the council's intellectual property rights, by virtue of the information being reproduced as part of a private conveyancing transaction". The Commissioner would however emphasise that the EIR is applicant and motive-blind. In this case, the Commissioner notes that the complainant represents a company that provides property search products to clients for a fee. In part these products are based on information obtained from local authorities. In Kirklees v Information Commissioner, which involved a similar company, the Upper Tribunal commented that:

> "…we think it is fair to say there was some element of shadow-boxing on both sides in the way the request was formulated and responded to … the Council were of course aware of the activities and campaigns of PSC's in this field and … had viewed this request as in effect one to be given a set of the answers to the Con29R enquiries …The time of the Council's officers would thus be taken up in going through and assessing the detailed pieces of information and exercising judgment as to which was actually relevant as on a full official search, doing much if not all of PALI's work for nothing at the expense of the taxpayers…It is a fair inference that this last assumption, or something close to it, accounted for the rather brusque and unhelpful response PALI's request was given but if so it was both a legal and a tactical mistake for the Council to have taken such matters into account" (paras 54-55)

75. Whilst the council may infer a potential motive behind a request from the request itself, or perhaps from the identity of the requestor, the Commissioner would once again emphasise that these factors cannot be taken into account when considering whether information should be disclosed.

76. Similarly, the Commissioner again emphasises that any matters relating to potential re-use of information do not fall within his remit. As set out in the Commissioner's guidance on property searches, a public authority may be able to levy a separate charge for the re-use of

information in accordance with the Re-use of Public Sector Information Regulations 2005. However, there is no provision in the EIR that allows a charge of this nature to be levied. The regulation of disclosure and re-use are separate matters.[4] However, the Commissioner does appreciate that the nature of the exception cited means that the fact information could be reused is relevant. This was also recognised by the Court of Appeal in OFCOM v Information Commissioner [2009] EWCA Civ 90, which commented that

> "…it is obvious that breaches of intellectual property rights can and must be taken into account both in determining the application of the exception and in assessing…the public interest in maintaining the exception. It is plain, too, that regard can and must be had not just to the immediate effect of disclosure but also to its wider consequences, including subsequent use of the information disclosed".

77. The Commissioner accepts that a substantial part of any harm caused to intellectual property rights will be caused by re-use of information. However, his view is that he will only consider the impact of intellectual property being released to the public at large, rather than any specific potential reuse suspected by the public authority.

Is the exception engaged?

78. In Football Dataco v Britten Pools Ltd [2010] EWHC 841, the court found that databases of fixture lists for football leagues did not attract a sui generis "database right" under the Copyright and Rights in Database Regulations 1997. This is because the database right exists only to protect collections of information taken from other sources, rather than content actually created by the compiler. The council accepts that this is the case and does not claim a sui generis database right.

79. However, the council argues that the requested information attracts copyright under the Copyright Designs and Patents Act 1988 ('the CDPA'), as it believes that the information constitutes a "literary work". Section 1(1)(a) of the CDPA provides that copyright will apply to "original literary…works". A literary work is defined at section 3 of the CDPA as "…any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes…(d) a database".

[4] The Office of Public Sector Information (OPSI) is responsible for the administration of the Re-use of Public Sector Information Regulations.

80. The CDPA elaborates further on what constitutes a database for the purposes of the legislation. Section 3A(1) defines a database as a "collection of independent works, data or other materials" which "are arranged in a systematic or methodical way and…are individually accessible by electronic or other means". For the purposes of the CDPA, a database is considered 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" (section 3A(2)).

81. The Commissioner firstly observes that the complainant has not requested access to these databases, but simply information relevant to CON29R queries for a particular property. The Commissioner also notes that as he has already concluded that it would be reasonable for the council to provide information in a format other than inspection, the applicant would not in fact view the entire databases, but simply extracts from them.

82. However, the council also claims that it is the copyright owner of any "print-out or extract from these databases, and that each of these qualify for protection in their own right as a 'literary work' under section 3(1) of the 1988 Act".

83. The council's environmental health team are responsible for information relevant to CON29R queries 3.7(b),(d) and (f). The Commissioner has not however received arguments explaining why the council believes it holds copyright over this information or the systems that hold it. He has therefore excluded information relevant to these queries from the scope of the analysis of whether the exception at regulation 12(5)(c) applies, and finds that the council should disclose this information to the complainant.

Is the requested information subject to copyright?

84. The Commissioner accepts that if the council does own the copyright in the databases, then this would constitute an intellectual property right and unauthorised re-use of that information could adversely affect that right.

85. In order to determine whether the exception is engaged, the Commissioner therefore considers that he is next required to determine whether the systems holding the requested information are "databases" as defined by the CDPA, whether these databases are original, and whether the council consequently holds copyright in the databases. If these factors are satisfied, he will go on to consider whether the requested information would similarly attract copyright as an 'extract' from the databases.

Are the council's systems "databases"?

86. The requested information is held in five separate databases. These are the Street Register database, and a GIS database used by Highways and Transportation Services. This department is responsible for information relevant to CON29R queries 2(b)-(d), 3.1, 3.2, 3.4(b)-(d), 3.5, 3.6(a), 3.6(b)-(l) and 3.7(e).

87. There is a GIS database, and a system of paper based records, used by the Parks and Countryside department. This department is responsible for information relevant to CON29R query 3.6.

88. The council's Planning and Development service uses a system called the CAPS Uniform database. This department is responsible for information relevant to CON29R queries 1.1(f)-(h), 3.7(a), 3.7(c), 3.9(c)-(n), 3.10(a), 3.10(b), 3.12(c).

89. The Commissioner has viewed extracts from each of these systems that the council has helpfully provided. He has considered whether these systems constitute "databases" as defined by the CDPA. The Commissioner considers that the systems meet the description of "collections of independent works or other data…" and are "individually accessible". The submissions provided by the council showing how each of these systems work clearly demonstrate that the requested information is arranged in a systemic and methodical way. For example, in the GIS, information is arranged so that relevant results are returned in relation to both drop-down menu queries, and by a defined geographic area. The Commissioner therefore accepts that the computer systems used by the council constitute databases for the purposes of the CDPA.

90. However, in respect of the paper-based records used by the council's Parks and Countryside department, the Commissioner is not satisfied that these constitute a database. This is because the council has not explained how the records are individually searchable. In addition, the Commissioner understands that the content of these files is, although generated by the council's employees, determined only by statutory requirement. The Commissioner would not therefore accept in any case that the records had the requisite quality of originality required to attract copyright.

Are the databases "original"?

91. The council points out that in Football Dataco v Britten Pools, the court accepted that the process of "selecting and arranging" can include decisions about the content of a database – i.e. what should be

included and what is irrelevant. The council accepts that its computer databases are "to a certain extent dictated by the particular software we use". However, it claims that it has exercised creativity by determining how the information is arranged and presented. For example, the Street Register database is held in a file created in the Windows Access programme. Clearly the council was not responsible for the design of this software. However, it states that the information that it has included within the system are its own selections, and that the way it has chosen to utilise the software to arrange the information is to its own design.

92. The Commissioner notes that much of the content of these databases is dictated by the legal requirements to collect certain information. There are some exceptions to this. For example, the council is required to hold a list of streets maintained at public expense in its street register. However, it also holds "additional information to improve the efficiency of responding to adoption questions and to carry out other functions". For example, the council provided the Commissioner with a screenshot of information about a street maintained at public expense. The system also included fields showing the fact that the road had been bisected by another, the length of the road, the status of the roads intersecting it, and footpaths adjacent to the road. In the CAPS database used by the Planning and Development service, the council states that that although the content is dictated by statutory requirements, there are

> "also 'free form' fields of information which members of staff may input depending on the circumstances of a particular case. This could consist of information which is taken into account by the planning officer in making the planning decision, or which assists the Council to monitor development and the implementation of Council policies, for example in relation to sustainable energy which the Council can then feedback to central government."

93. The Commissioner accepts that council does exercise some judgment about the content of the databases. However, he does not accept that this is sufficient to give the databases the requisite quality of "originality" which would qualify it as a literary work. This is because the bulk of the information that it held in these databases is placed there because of statutory requirements to hold the information. Although some additional supplementary information is held, the Commissioner does not accept that this makes the content of the databases unique to this public authority.

94. In terms of the arrangement of the contents, the Commissioner notes that although the council's databases are underpinned by generic

software, the council has utilised this to arrange the contents of the databases to its own specification. For example, the council has designed its own "adoptions extent layer" which lies within the GIS system. This shows, as a guide, the extent of a maintained highway when the street is located on the spatial map. The council has also designed the "table layout" for schemes that are reported as relevant to that street. In the CAPS system, the council states that although most of the arrangement is defined by the software used, the system

> "… also contains user defined fields, where we can hold additional information outside of the standard fields in Uniform, and that information is determined by the officers inputting it. In addition, even in the standard fields, most of the information which is inputted is selected from a range of options determined by the Council"

95. The Commissioner acknowledges that the council has demonstrated that it determines some of the arrangement of the contents of the database. However, given that the databases are based on commercially available software, the Commissioner does not accept that the council's input creates the requisite quality of originality needed to qualify the database as a literary work. Whilst the council has labelled various fields to suit its own purposes, and created searching tools to locate information, this has been done within the confines of a generically available system. The Commissioner does not therefore accept that the council owns copyright in these databases.

96. The Commissioner also notes that in any case, the complainant has requested information relevant to CON29R queries. The Commissioner does not accept that these would constitute "extracts" from a database that would be shaped by the particular selection and arrangement of information within it. The council concedes, for example, that information relevant to highways CON29R queries is usually based on delegated decisions taken by council officers, which are "also available online via the council's website [although]…they can't be searched for easily and are quite difficult to find". The Commissioner therefore considers that the requested information is not only available as an extract from this database but is, however inaccessible, already in the public domain and not subject to copyright protection as an extract from a "literary work".

97. The Commissioner therefore concludes that the requested information is not a "literary work" and is not subject to copyright. He consequently finds that the council's intellectual property rights would not be adversely affected by its disclosure, and that the council was not

entitled to rely on regulation 12(5)(c) to withhold the requested information from disclosure.

Conclusion

98. The Commissioner therefore finds that:

- The council was not entitled to rely on the exception at regulation 12(5)(c) to withhold the requested information
- The council has complied with regulation 6(1) as it is entitled to rely on regulation 6(1)(a) to provide information in a format other than inspection
- The council has breached regulation 8(3) by attempting to levy an unreasonable charge for providing information
- The council has breached regulations 5(1) and 5(2) by failing to make information available in accordance with the EIR within the statutory time for compliance.

Right of Appeal

99. 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.

Signed ……

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

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

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

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

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

3.7 Do any statutory notices which relate to the following matters subsist in relation to the property other than those revealed in a response to any other enquiry in this Schedule:

a) building works
b) environment
c) health and safety
d) housing
e) highways
f) public health

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

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

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

3.10 Do the following apply in relation to the property:

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

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

3.12 Do any of the following apply (including any relating to land adjacent to or adjoining the property which has been identified as contaminated land because it is such a condition that harm or pollution of controlled waters might be caused on the property):

a) a contaminated land notice
b) in relation to a register maintained under section 78R of the Environmental Protection Act 1990:
    (i) a decision to make an entry
    (ii) an entry
c) consultation with the owner or occupier or the property conducted under section 78G of the Environmental Protection Act 1990 before the service of a remediation notice?

3.13 Do records indicate that the property is a 'Radon Affected Area' as identified by the Health Protection Agency?