

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 6 December 2011

Public Authority: Warrington Borough Council
Address: Town Hall
Warrington
WA1 1UH

Decision (including any steps ordered)

1. The complainant requested information from Warrington Borough Council's (the council's) environmental records about a property in Warrington.
2. The Commissioner's decision is that the council has breached regulation 5(1) as it failed to make information available on request and regulation 5(2) as it failed to make it available within the statutory time for compliance. Additionally, the council breached regulation 8(3) by attempting to impose a charge that the Commissioner does not consider to be a "reasonable amount" for the provision of environmental information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the requested information that is not available free on inspection, namely the CON29 highways information - 2(a)-(d), 3.2, 3.4(a)-(f), 3.5, 3.6 and 3.7(e). This information should be provided at Markinson¹ rates.

¹ [Markinson v IC](#)

- The Commissioner requires the council to make the remaining requested information available for the complainant to inspect free of charge.
4. The council 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.

Request and response

5. On 1 February 2011, the complainant wrote to the council and requested information in respect of a specific named property:

***“Environmental Information Regulations 2004 (The EIR)
Property Address; [named property]***

Pursuant to Regulation 5 (1) of the EIR. please treat this letter as a formal request for environmental information.

Pursuant to Regulation 5 (1) the Council is obliged to make the information available on request

Furthermore, we wish to examine the information requested free of charge at the place which the Council makes available for that examination.

The Information which we wish to examine is all the information which the Council holds which will enable us to complete and/or answer the questions in the Form CON29R (Enquiries of the Local Authority 2007) in respect of the property mentioned above in particular 2 (b) 3.4 (all sub sections) 3.6 (all sub sections) 3.7 (all subsections) 3.8 3.11

Accordingly, would you please advise: -

- 1. The place at which the Council will make all the information available for examination*
- 2. The timescale within which such information will be made available for examination. Regulation 5 (2) requires information to be made available as soon as possible and, in any event, no later than twenty working days after the date of this request. Given that the Council, is able to produce the information for its own replies to Forms CON29 and LLC1 in a timescale which is far*

less than twenty days, the same timescale is expected in respect of this request"

6. The council responded (undated) informing the complainant that, as the requested information was not on a register and did not appear on a website, it could apply a charge for its provision.
7. On 25 February 2011 the complainant asked for an internal review.
8. Following an internal review, the council wrote to the complainant on 26 April 2011. It stated that regulation 8(1) allowed the council to charge for the provision of information and acknowledged that 8(3) specified that those charges must be "reasonable".

Background

9. 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.
10. 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.

Scope of the case

11. The complainant contacted the Commissioner on 12 May 2011 to complain about the way her request for information had been handled.
12. The Commissioner considers that, although the council sought to reopen the debate about what information the complainant requested, it seems clear that she requested all CON29R information (although with a particular emphasis on highways information). The complainant subsequently confirmed this.
13. However, the council confirmed in its letter of 4 October 2011 that all other CON29R information is made available for inspection free of charge. Therefore the Commissioner has not considered this further and has only focused on information relevant to CON29R queries on highways – specifically queries 2(a)-(d), 3.2, 3.4(a)-(f), 3.5, 3.6 and 3.7(e) (see Annex A at the conclusion of this notice).
14. The Commissioner wrote to the council on 5 September 2011 explaining his position with regard to property search cases.

15. On 4 October 2011, the council wrote back to outline its view. Firstly, it accepted that the EIR were likely to apply. It went on to quote *East Riding of Yorkshire Council v IC (EA/2009/0069)*² which it claimed supported the general principle that, where a rule is in place which is reasonable, the local authority ought to be able to rely on that rule to restrict access to the information and charge for its production. In this case, the council's highway and traffic information is kept in individual development scheme files, and not within ledgers or computer databases. It included other documents such as complaints from the general public, the disclosure of which would be likely to break the DPA. For this reason the information was not available for inspection but could be collected or sent by post, after the fee had been paid. The council went on to argue that it considered a "reasonable charge" not to be restricted to photocopying and to include the cost of officer time in answering the set form queries. In addition, although it allowed inspection free of charge, postal searches of the land charges register and/or a CON29 search had specified charges. The council argued that its officers are not simply making raw data available but examining and sorting information in order to answer the relevant questions.
16. On 10 October 2011, the Commissioner wrote to the council to elicit a further response regarding the files within which the highways information was held. He also expressed his view that the council was not entitled to charge for the cost of staff time in compiling information.
17. On 24 October 2011, the council explained that the highways information is contained alongside personal data and other confidential information but is, however, on separate pieces of paper within the files concerned. All of the information is held together within the same files, and in order to be inspected, the non-sensitive data needs to be separated from the sensitive data. The information within the files concerns a great many properties and therefore the information has to be sifted in order that the relevant information can be found. The council further took the view that the highways information did not fall within regulation 8(2) and therefore its charges could not be limited by it. It believed that a reasonable charge could be made for its officers answering the questions asked as they were determining what was

² Found at:
http://www.informationtribunal.gov.uk/DBFiles/Decision/i380/Decision_EA.2009.0069_15.03.10_No_Sig.pdf

relevant and what was not relevant for which they could be held to account.

Reasons for decision

Regulation 2

18. Firstly, the Commissioner has considered whether the information requested by the complainant is environmental information, as defined by the EIR. Regulation 2(1)(c) provides that environmental information will include any information on "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". The complainant has requested information partly about the status of highways and future works that might affect them. The Commissioner would consider that this information would constitute a 'measure' that could affect the elements of the environment set out in regulation 2(1)(a). The council has not disputed that the requested information is environmental.

Regulation 5

19. 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.
20. In its submission to the Commissioner the council explained that it makes the information available in accordance with regulation 5(1), but also intended to levy a charge under regulation 8(3). However it states that this charge will be made in accordance with the 'Local authorities guidance on charging for property searches'.
21. The complainant's original request for information was made on 1 February 2011. The council has not yet disclosed the requested information, although it has agreed to do so if the complainant pays a fee. This matter is addressed in paragraphs 27-35 below. As a consequence, the Commissioner finds that the council has breached regulation 5(1) by failing to make the requested information available and regulation 5(2) by failing to make the information available within the statutory time for compliance.

Regulation 6

22. "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"

23. Firstly, in the internal review the council appears to have read regulation 6(1) in accordance with regulation 8(2)(a) and concluded that information only needs to be made available for inspection where it is on a public register. Regulation 6(1) is not informed by regulation 8(2)(a). In any event, this interpretation is to ignore regulation 8(2)(b).
24. The Commissioner has considered whether the council is entitled to refuse to provide the information in the format requested by the complainant. It is clear from the correspondence that the council considered that it is reasonable to provide the information in another format and so relies on regulation 6(1)(a).
25. The council argued that:
 - The highways information is not contained within "*ledgers or computer databases*", but in "*individual development scheme files*" along with all other information relevant to that particular scheme.
 - The other information includes various documents that may be exempt from disclosure such as tendering documents, financial information, consultation objections, correspondence from members of the public.
26. The Commissioner's view is that "inspection" can only be achieved where the information is inspected in the exact form that it is originally held in. Therefore, the Commissioner accepts that, in the circumstances of this case, it is reasonable for the council to provide the information in a format other than inspection. The Commissioner accepts that the complainant would be unable to inspect the files that the information is usually kept in, as this would potentially breach the DPA.

Regulation 8

27. Regulation 8 sets out the charges a public authority is entitled to make for providing environmental information. Regulation 8(3) provides that a public authority may charge for environmental information available on request, as long as it does not exceed an amount which the public authority is satisfied is "reasonable".
28. The council's argument is that it should be able to charge for providing the requested information as its officers need to use their professional judgement in order to collate it.
29. The council makes the point that "*...the information within the files concerns a great many properties and therefore the information will have to be sifted in order that the relevant information can be found*". The Commissioner does not accept that any charge can be levied for the location and extraction of information.
30. The council also suggests that it is being asked to extract information and answer questions in respect of the CON29R form and, consequently, should be able to impose costs. The Commissioner does not accept that the request is asking them to do that. The requestor is asking them to provide relevant information, not to answer the CON29R queries.
31. The council argues that it is undertaking a professional judgment by deciding what information is or is not relevant and should be able to impose a charge for this. Firstly, the Commissioner does not accept that anything in the EIR supports this view. Secondly, most requests for information will require a degree of judgment as to what is relevant.
32. The council explained in its 4 October 2011 letter that it had calculated the costs of dealing with a request by averaging out officer time annually. The costs of officer time cannot be included in charges, and this is supported by paragraph 16 of EA/2005/0014.³
33. The Commissioner does not accept that any charge can be levied for these activities. The Information Tribunal in [Markinson v IC](#) found that the costs of maintaining, identifying or extracting requested information should not be taken into account when calculating a "reasonable" charge. The Tribunal found that whilst a public authority

³ Found at <http://www.informationtribunal.gov.uk/DBFiles/Decision/i161/Markinson.pdf>

is entitled to levy a reasonable charge for providing information under regulation 8(3), it can only take into account relevant considerations, such as the cost of paper for photocopying, or of postage. It cannot take into account factors such as the cost of staff time in maintaining, identifying, locating or retrieving from storage the information in question.

34. The Tribunal also found that:

“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 33)

35. The Commissioner considers that the council has attempted to levy charges for activities that cannot be factored into the calculation of a “reasonable amount”. He therefore finds that the council has breached regulation 8(3).

Right of appeal

36. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

Andrew White
Group Manager
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:

the centre line of a new trunk road or special road specified in any order draft order or scheme

- a) 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
- b) the outer limits of construction works for a proposed alteration or improvement to an existing road involving (i) construction of a roundabout (other than a mini roundabout) or (ii) widening by construction of one or more additional traffic lanes
- c) 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
- d) the centre line of the proposed route of a new road under proposals published for public consultation
- e) 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?