

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 12 October 2011**

**Public Authority: Cotgrave Town Council**  
**Address: Leisure and Enterprise Centre**  
**Woodview**  
**Cotgrave**  
**Nottingham**  
**NG12 3PJ**

### **Summary**

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The complainant requested information about responses to a planning consultation on a proposed development. Some information was disclosed at the time, and additional information was disclosed during the course of the Commissioner's investigation. The Commissioner finds that the public authority's searches for the requested information made at the time of the request were inadequate. Further searches have been undertaken, at his request, during the investigation and he concludes that, on the balance of probabilities, no further information was held at the date of the request. He finds breaches of regulation 5 and regulation 11 of the Environmental Information Regulations 2004 (the EIR).

### **The Commissioner's Role**

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

## Background

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3. The area adjacent to Cotgrave contains a disused colliery, for which redevelopment is proposed. The redevelopment, referred to as the 'proposed pit site development', has created a degree of local controversy and dispute.

## The Request

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4. On 16 July 2010 the complainant wrote to Cotgrave Town Council (the council) requesting the following:

*"[...] that you make public the points and comments submitted to you by councillors and residents regarding the proposed pit site development."*

5. On 28 July 2010 the council replied, disclosing a document titled 'Colliery site development/planning application – notes from public consultation held on Tuesday 18<sup>th</sup> May 2010.' This document, produced in a form similar to a set of minutes, summarised a number of questions from residents to council members (and a representative of the developers) and their responses, aired at a public meeting held to facilitate public consultation on the matter.

6. The complainant replied on 26 August, expressing her disappointment with the response provided. She indicated that she had expected to receive 'facts and figures' and commented that, *"if you are going ahead with your proposals for building these homes in Cotgrave, you MUST by now have properly compiled and documented evidence from a properly conducted consultation process, if you are to present all the views collected to the Council in September"*. She submitted a further request, for:

*"[...] the results of your Public Consultation (as you intend to submit to Rushcliffe Borough Council in September)"*

7. The council replied on the same day, indicating that its status in respect of the development was as a statutory consultee only. It explained that it had no intentions of building anything, and that only the principal authorities have the power to approve planning applications. It commented that the planning authority in the matter is Rushcliffe Borough Council (RBC), which has also published the opinions which it took from various quarters. It stated that it had provided the requested information. The complainant was informed that if she wished to appeal against the response, she should contact a named individual, the

chairman of the council. She was also informed of her right to bring a complaint to the Information Commissioner if she remained dissatisfied.

8. The complainant replied, also on 26 August 2010. She clarified that her understanding was that the town council had played a key role in the decision-making process thus far, and explained her expectation that it would have access to more complete information than had been disclosed to her. She stated that *"Clearly, you don't actually HAVE any information that might be of help to me [...]"*. She indicated her belief that the council was supporting the development, regardless of the strength of opposition from local residents and her associated expectation that the council would hold more information which it intended to submit to RBC, partly based on her view that the information disclosed was a *"pathetically small contribution for a town to make to a major Borough consultation [...]"*.
9. The complainant subsequently, on 17 October 2010, contacted the chairman of the council to request an internal review. She stated her dissatisfaction with the response provided, which she regarded as insufficient. She indicated that she had also received information from RBC, which appeared to have originated with Cotgrave Town Council but which had not been disclosed to her in response to her request.
10. The chairman of the council responded on 26 October 2010, declining to make any comment on her letter. The Commissioner understands this to mean that the council does not intend to conduct an internal review of its response, and he has accordingly accepted the complaint in the absence of an internal review.

## The Investigation

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### Scope of the case

11. On 27 October 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - She indicated that the information disclosed on 28 July 2010 could not be regarded as a document detailing the results of a public consultation which had been held in March.
  - She categorised the council's attitude as 'hostile and unhelpful' and expressed her belief that the council held more information than it had disclosed to her, partly based on the disclosures received from RBC but also because of her scepticism that a proper consultation process

would have produced so little information. She voiced her suspicion that the council had been indicating that it had 'no objections' to planning proposals when the facts suggested that there was considerable local objection.

12. After some initial correspondence, the Commissioner wrote to the complainant on 28 April 2011 to set-out the scope of his investigation, which has been to investigate whether the council holds any more information on the subject of "*the points and comments submitted to the council by councillors and residents regarding the proposed pit site development*"; and "*the results of its Public Consultation (as it intended to submit to Rushcliffe Borough Council in September)*".
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## **Chronology**

14. The Commissioner wrote to both parties during the conduct of his investigation, from early April to late June 2011. That correspondence will not be summarised further, but its content is examined, where necessary, in the analysis section below.

## **Analysis**

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### **Substantive Procedural Matters**

15. The information requested is information on the outcome of a public consultation into a proposed planning development. It is therefore information on a "*measure and activity, affecting or likely to affect 'the state of the elements of the environment, such as [...] water, soil, land, landscape'*". Consequently, it is environmental information, as defined at regulation 2(1)(a) and 2(1)(c) of the EIR. The appropriate disclosure regime is therefore the Environmental Information Regulations 2004, not the Freedom of Information Act 2000 and the Commissioner's analysis, below, will refer to the applicable sections of the EIR, as necessary.

## Regulation 5

16. The council has not refused to disclose information to the complainant, but has given its view that she has received all the information it holds which is described by the request. The Commissioner notes that no response to the complainant's second request has been issued, however the council did state that it had provided the information she had requested, in a response to the complainant's 26 August 2010 email containing the second request. The Commissioner therefore understands from this that the council's position was that all the information it holds in respect of the public consultation exercise undertaken about the proposed pit development had been disclosed to the complainant and that nothing further was held.
17. The Commissioner's enquiries established that, aside from the consultation meeting on 18 May 2010, resulting in the minute-like notes which had been disclosed to the complainant, the council had held a consultation and exhibition event at the Cotgrave Miners Welfare centre on 11 March 2010, co-hosted by RBC, East Midlands Development Agency, the Homes and Communities Agency and other public sector partners. Over 160 people attended the event. The council has provided the Commissioner with a copy of an email from RBC, received by it on 4 May 2010, which explains that:

*"The exhibition was welcomed with a mixed response; comments were raised reflecting concerns about the impact development could have on the local infrastructure and environment."*

The email goes on to summarise a number of comments and concerns received at the event.
18. This is understood to relate to the complainant's reference, at paragraph 11 above, to a consultation in March, but which is not referred to directly in either of her requests.
19. The Commissioner asked the council for details of any searches it had made for information, with specific reference to enquiries to councillors for any records they had of comments made to them by residents about the proposed pit development. The council's response confirmed that it had conducted searches of the council's minutes books, but led him to conclude that it had not conducted any searches of correspondence received by it, or of councillors' records, but had simply disclosed the document described at paragraph 5, above.
20. The Commissioner indicated his view that it was possible that councillors had taken notes of verbal comments made to them, for example, at the 11 March exhibition, or had received emails or letters from residents expressing comments about the proposed pit development. These, if

held, would be held on behalf of the council by those councillors, and would fall to be disclosed on request. He asked the council to check with its councillors. He also asked the council to check its own correspondence records, for any correspondence from residents or councillors which matched the description in the request.

21. The council circulated the Commissioner's enquiry to the 16 councillors who had been in post at the material time, and received seven responses confirming that no notes had been taken, or records kept, of any comments from residents. A further response from one councillor took issue with the enquiry and failed to address the matter. Subsequently, after further enquiries by the Commissioner, the council confirmed that it had now received response from all 16 councillors, and that no information was held by any of them.
22. The Commissioner notes that the council did not take sufficient steps to ascertain what information was held in its records, or on its behalf by its councillors, at the time of the complainant's 16 July 2010 request. Due to the passage of time, and the piecemeal response to the council's belated enquiries during his investigation, the Commissioner is unable to conclude definitively that no information was held, at the time of the request, by councillors, either in the form of informal notes of verbal comments made to them, or emails or letters received. However, the required standard of proof in such cases is 'the balance of probabilities' – in other words, is it more likely than not that information was held?
23. Searches now conducted, during the Commissioner's investigation, appear to have been appropriately directed and sufficiently thorough. As a result of the council's search of its own records, a small amount of additional material has been disclosed to the complainant. There appears to be no evidence that information has been deleted or destroyed, and the body of evidence from councillors suggests strongly that, while several councillors were approached in person, comments made to them were verbal and were not recorded by them at the time.
24. The complainant's argument, at paragraph 9 above, that information received from RBC appears to have originated with Cotgrave Town Council relates to submissions made by the council indicating that it does not object to the proposed development. These documents were created by the council and therefore fall outside the scope of *'points and comments submitted to you by councillors and residents'* from the complainant's first request. This is not, therefore, persuasive evidence that any other information is held by Cotgrave Town Council, relevant to the request, but which has not been disclosed.
25. The Commissioner learnt, from the response of one councillor to these enquiries, that two petitions, signed by *"well in excess of 1,200 people"*

were submitted about the matter. He has asked the council to clarify the relevance of these petitions, in the context of the requests. The council undertook to do so, and has clarified that the petitions were submitted to RBC, not to Cotgrave Town Council. The Commissioner is therefore satisfied that the council does not hold this information.

26. The council has also provided the Commissioner with copies of the minutes of a council meeting of 19 May 2010, the day following the public consultation meeting, at which its response to RBC was resolved. This was sent to RBC on 20 May 2010, accompanying a notice stating that Cotgrave Town Council did not object to the proposed pit development. The council has confirmed that it has not disclosed these documents to the complainant, but that they were posted onto its website. However the complainant has confirmed that she has received them in response to a related request to RBC.
27. The Commissioner has considered these documents. The first is a public record of a council meeting, and while it is therefore understood to be publicly-available, the council did not make the complainant aware of the record, nor its relevance to its submissions to RBC. It is clear to the Commissioner that the council has made no effort to address the complainant's second request, relying instead on its response to the first request. The council admits that it interpreted the second request to be, in effect, a repetition of the complainant's first request.

### **Regulation 5, conclusions**

28. With regard to the complainant's first request, of 16 July 2010, for

*"the points and comments submitted to you by councillors and residents regarding the proposed pit site development"*

the Commissioner has examined the council's responses. He concludes that, on the balance of probabilities, the council did not hold any more information of the description in the request beyond that which has already been disclosed to the complainant.

29. The Commissioner is reasonably satisfied that adequate searches of the councillors' own records have now been undertaken, and that, to the required standard of proof, no information relevant to the requests has been retained.
30. The Commissioner is also reasonably satisfied that adequate searches of the council's own records have now been undertaken and that a small amount of additional information was located and disclosed to the complainant. This information was not disclosed within 20 working days of the request, in breach of regulation 5(2) of the EIR.

31. He notes that there is clear evidence that a number of people made comments at a consultation exhibition held on 11 March 2010, acknowledged by the email from RBC referred to at paragraph 17, above. These comments would be likely to fall within the scope of the request if they were made to Cotgrave Town Council's councillors and staff, and not to any RBC or other authority's staff.
32. As the planning authority responsible for the proposed pit development, the Commissioner recognises that RBC was the public authority which was required to take the outcome of such a consultation into account, not Cotgrave Town Council. He notes the council's explanation that it was RBC which ran the public consultation process, and he has received a document produced by RBC which outlines steps taken by it during this public consultation process. The Commissioner is satisfied that, on the balance of probabilities, any submissions sent by residents after the public consultation would have been likely to have been sent directly to RBC, not to Cotgrave Town Council.
33. He also notes the apparent degree of local interest in the proposed pit development, and the associated likelihood that some of the council's residents would have made their views known. Given the wording employed in the request, the Commissioner is concerned to note that no effort appears to have been made to find out whether any councillors had notes or records of any such comments from their constituents, at the time of the request, and that no direct search of incoming correspondence and communications to the council by residents appears to have been undertaken at the time.
34. The Commissioner acknowledges the possibility that any Cotgrave Town Council councillors or staff present at the 11 March exhibition simply passed on any comments to RBC staff, as the planning authority, at the time and did not retain any records. Similarly, that councillors in receipt of comments subsequent to 11 March may have done the same, or may not have kept records of any such comments but simply used them to inform their own voting on the matter. The Commissioner is satisfied that his enquiries have established that, on the balance of probabilities no such information is held by the council or its councillors, other than that which has now been disclosed to the complainant.
35. With regard to the complainant's second request, for

*"the results of your Public Consultation (as you intend to submit to Rushcliffe Borough Council in September)"*

the Commissioner finds that the information described at paragraph 24, above, would fall within the scope of the request and that Cotgrave



Town Council has not disclosed this to the complainant. This is a breach of regulation 5.

## **Procedural Requirements**

### **Regulation 11**

36. The Commissioner notes that the complainant did not submit a request for an internal review of the council's 28 July 2010 response until 17 October 2010, but it is reasonably clear she was dissatisfied with this response at 26 August 2010. The period from 26 August 2010 to 17 October 2010 is 36 working days, and therefore inside the 40 working days required at regulation 11(2). Consequently the council was obliged to consider these representations, under the provisions at regulation 11(3), but declined to do so, in a letter dated 26 October 2010. This is a breach of regulation 11.

## **The Decision**

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37. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

- The council failed to conduct adequate searches of its records for information matching the description in the requests and therefore failed to disclose information it held, in breach of regulation 5(1).
- The council disclosed some information during the course of the Commissioner's investigation, considerably later than the 20 working days permitted, in breach of regulation 5(2).
- The council failed to consider the complainant's representations made to it in respect of her view that the response failed to comply with the regulations, in breach of section 11(1).

## **Steps Required**

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38. The Commissioner does not require any steps to be taken.

## Right of Appeal

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

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

40. 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.
41. 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 12<sup>th</sup> day of October 2011**

**Signed .....**

**Lisa Adshead  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### **Regulation 5 - Duty to make available environmental information on request**

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#### **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 11 - Representation and reconsideration**

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#### **Regulation 11(1)**

Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

#### **Regulation 11(2)**

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

#### **Regulation 11(3)**

The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

**Regulation 11(4)**

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.