

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

**Date:** 30 August 2012

**Public Authority:** Monmouthshire County Council  
**Address:** County Hall  
Cwmbran  
NP44 2XH

**Decision (including any steps ordered)**

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1. The complainant requested information about conifer trees sited on a particular piece of land. Monmouthshire County Council ('the Council') stated that it did not hold the information requested. The Commissioner's decision is that the Council did not hold the information requested. The Commissioner does not require the Council to take any steps.

**Request and response**

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2. On 7 November 2011, the complainant contacted the Council in relation to conifer trees located on a piece of land in front of a particular property and requested information in the following terms:
  1. *"Who planted the conifer trees on the Highway turning point?"*
  2. *When were they planted?"*
  3. *Who planted them?"*
  4. *Why were they planted?"*
  5. *Why have they still not been removed?"*
3. The Council responded on 6 December 2011 stating that it did not hold the information requested.
4. On 13 January 2012, the complainant requested an internal review of the Council's handling of the request.

5. The Council provided the outcome of its internal review on 13 June 2012. It stated that it considered the request to be for environmental information, and as such the correct access regime would be the EIR. However, the Council maintained its position that the requested information was not held.

## **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant did not make any reference to any specific areas of concern he had regarding the way that the Council handled his request.
7. The Commissioner wrote to the complainant on 20 June 2012 to confirm that the scope of his investigation would be to establish whether the Council held any information relevant to his request, and if so, whether any information held should be disclosed.

## **Reasons for decision**

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### **Background**

8. The Commissioner understands that the request in this case relates to a dispute about ownership of the piece of land on which the conifer trees are situated, which has been on-going for approximately 20 years, and was the subject of a court case in 1994. The complainant is acting on behalf of a resident who lives near the land in question and maintains that the piece of land forms part of the public highway, and as such it falls under the Council's responsibility. The Council maintain that the mapping referred to in the Court Judgment is insufficiently accurate to identify ownership of the land in question.
9. There has been significant correspondence over a period of several years between the resident living near the land (and third parties acting on her behalf including the complainant) regarding the matter of land ownership and the conifer trees planted on it.
10. The Commissioner has no role in the dispute regarding ownership of the land in question. His remit in this case is to establish whether the Council has complied with the FOIA and the EIR in its handling of this request.

### **Correct Access regime**

11. The Council originally considered the request under the FOIA and stated that it did not hold the requested information. At the time of its internal

review, the Council stated that it considered the request to be for environmental information and, as such, the correct access regime was the EIR. However, the Council maintained its position that it did not hold the requested information.

12. The Commissioner agrees that the correct access regime is the EIR as the information requested, if held, would fall under the definition of regulation 2(1)(a) as it is information on the state of the elements of the environment (land, landscape). It could also be argued that any information, if held, relating to plans or measures to remove the conifer trees (part 5 of the request), would fall under the definition of regulation 2(1)(c) as it would be information on a measure, which is likely to effect the elements of the environment, namely land and landscape.

### **Regulation 12(4)(a) – information not held**

13. Regulation 12(4)(a) of EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
14. In cases such as this where there is some dispute as to whether a public authority holds information falling within the scope of the request the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held.<sup>1</sup> In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
15. Therefore, the Commissioner will consider both:
  - the scope, quality, thoroughness and results of the searches and
  - other explanations offered as to why the information is not held.
16. The Council advised that it has never had any reason to hold any information about the planting of the trees in question. It does not hold any records to suggest that information relevant to the request has ever been destroyed. The Council confirmed that there is no business need for it to hold any information about the planting of the trees in question.

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<sup>1</sup> See *Bromley v Information Commissioner* [EA/2006/0072].

No planning permission would have been required for the trees to be planted and as such no planning records exist. Further, the Council confirmed that it is not required to maintain the trees in question through any commitment, statutory or otherwise, for example as part of any highways maintenance programme.

17. In view of the background to this request, the Council advised that the only files which would have any realistic prospect of containing any relevant information about the trees in question would be ones relating to the land ownership dispute. These files are held within its Legal and Highways departments and the records consist of both paper and electronic files.
18. The Council confirmed that all manual records relating to the land ownership dispute were searched in order to identify any relevant information. In relation to electronic records, whilst they are stored within a searchable structure network, the Council's view is that it would have been difficult to identify all relevant search terms which would reliably identify any relevant information. As such, in relation to electronic records held, the Council considered the relevant folders and the documents within each folder. Any document which was considered to have any chance of containing any relevant information was opened and checked. The Council considered this to be a reasonable and proportionate search, given the background and the fact that there was no reason why the Council would hold the information requested.
19. The Commissioner notes that in correspondence the complainant has sent to him relating to other matters, the complainant stated that the trees in question were planted by the former occupants of a property near to the land, and who were involved in the land ownership dispute. The Commissioner considers this adds weight to the Council's position that it does not hold the requested information, as the Council does not appear to have any role in the planting of the trees in question.
20. After considering all the information before him, the Commissioner is satisfied that, on the balance of probabilities, the Council does not any information relevant to the request.
21. Regulation 12(1)(b) of the EIR requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. However, it is not possible for the Commissioner to carry this out given his finding that the Council does not hold the information to which the public interest could apply.

### **Procedural requirements**

22. The Commissioner accepts that the Council originally handled the request under the FOIA and there are no explicit timescales for completion of internal reviews under the FOIA. Under the FOIA, the

Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that it took over 100 working days for an internal review to be completed in this case.

23. Under regulation 11 of the EIR a public authority has 40 working days to conduct an internal review following receipt of a complaint. The complainant requested an internal review on 13 January 2012 and the Council did not provide the outcome of its review until 13 June 2012. The Council therefore breached regulation 11 of the EIR in its handling of the request.

## Right of appeal

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24. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

25. 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.
26. 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** .....

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