

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

**Decision notice**

**Date:** 18 July 2013

**Public Authority:** Herefordshire Council  
**Address:** Brockington  
35 Hafod Road  
Hereford  
HR1 1SH

**Decision (including any steps ordered)**

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1. The complainant has requested information on who authorised a named council official to take of photographs of her property.
2. The Commissioner's decision is that Herefordshire Council was correct to refuse the request under regulation 12(4)(a) on the basis that it did not hold the information.
3. The Commissioner does not require the public authority to taken any action.

**Request and response**

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4. On or around the 17 October 2012, the complainant wrote to Herefordshire Council and requested information in the following terms:  
"Who gave authorisation for (council officer's name redacted) to take intrusive surveillance/ who told (the same council officer's name redacted) to take photographs of (address redacted) in the last four months.
5. Herefordshire Council responded on 19 October 2012. It refused the request under regulation 12(5)(b) which provides that information is exempt if disclosing it would have an adverse affect on the course of justice, the ability to obtain a fair trial or the ability of the public

authority to conduct a criminal or disciplinary inquiry. Apparently, this was on the basis that the use of the term "intrusive surveillance" had suggested to the Council that she was alleging some form of covert surveillance had been undertaken. It therefore explained that if there was any kind of covert surveillance taking place, releasing information on that operation would undermine its effectiveness.

6. Following an internal review the Council wrote to the complainant on 13 December 2012. It upheld its original decision to apply regulation 12(5)(b).

### **Scope of the case**

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7. The complainant contacted the Commissioner 22 February 2013 to complain about the way her request for information had been handled. It was clarified with her that the focus of her complaint was whether the Council was entitled to withhold the information under regulation 12(5)(b).
8. The Commissioner wrote to the Council asking it to explain its use of regulation 12(5)(b). This led to the Council reviewing its position. On 10 May 2013 the Council wrote to the complainant and withdrew its application of regulation 12(5)(b). This was on the basis that it now recognised that her use of the term "intrusive surveillance" was not a reference to covert surveillance.
9. Having withdrawn its use of regulation 12(5)(b) the Council explained that there was no recorded information that revealed who authorised the named official to take photographs of her property. It therefore relied on regulation 12(4)(a) to refuse the request. Regulation 12(4)(a) provides that a public authority is not obliged to provide information that it does not hold.
10. The Council informed the complainant of its change in position by letter dated 10 May 2013. The complainant advised the Commissioner that she still wished to pursue her complaint against the Council.
11. In light of the above the Commissioner considers that the issue which needs resolving is whether Herefordshire Council holds a record of who authorised the taking of photographs of the complainant's property, or who instructed the named official to take those photographs.

## Reasons for decision

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### Regulation 12(4)(a)

12. Regulation 12(4)(a) EIR states that a public authority can refuse to disclose information if it does not hold the information at the time the request is received.
13. The Council has explained that a planning application had been submitted for a temporary dwelling to be built on the complainant's land. A decision to grant that application was made in May 2011. Permission for such temporary buildings is granted for three years.
14. After the three years is up fresh applications are often made to keep the temporary building on the land for a further three years or even to erect a permanent building. During the life of the temporary planning permission the planning file remains open in that any issues that might prove relevant to applications to renew the permission or to seek permanent permission are noted on the file.
15. The council official named in the request works in the Land Agents section of the Council. The officer's role, as verified by examining the job description, includes providing professional advice on agricultural matters to other directorates within the Council. This includes providing advice when planning applications are received that affect agricultural land, which was the case in respect of the complainant's planning application.
16. As a consequence of being associated with the consideration of this planning application the named officer received a complaint that ragwort was growing on the land in question. The Council has confirmed that the complaint was made directly to the council officer. It is understood that this complaint was made around August 2011, after the decision was taken to grant temporary planning permission. However because the planning file was still active it was considered appropriate to consider the matters raised by the complaint. Although the presence of ragwort on the land would not have a great bearing on a decision whether to grant further temporary permissions, or permanent permission, the officer considered it was appropriate to look into the matter in order to gain a full picture of any issues concerning the land in question. The officer visited the site and took 4 photographs from the public highway.
17. It is understood that the photographs would have been taken shortly after the complaint was received, i.e. around August 2011. This may not tally with the complainant's understanding of when the photographs were taken. However the Council has explained that the photographs

first came to the attention of the complainant as the result of earlier information requests for information held about her and her land. In light of this the Commissioner is satisfied that the photographs taken around August 2011 are the same ones are referred to in the Complainant's request.

18. The Council has explained that the named officer was regularly consulted on planning matters of this type and routinely dealt with complaints relating to temporary planning permissions on agricultural land. An individual in that role would be expected to act on their own initiative in such matters and that is what happened on this occasion. It follows that having received the complaint directly and being at liberty to act on their own initiative, the question of needing authorisation to act as they did would not arise. Since no one told the officer to take the photographs, and no authorisation was necessary, it follows that the information requested does not exist.
19. In light of this the Commissioner finds that Herefordshire Council does not hold the requested information and is entitled to refuse the request under the exception provided by regulation 12(4)(a).

### **Public interest test**

20. Technically regulation 12(4)(a) is subject to a public interest test as set out under regulation 12(1)(b). Regulation 12(1)(b) states that information can only be withheld if the public interest in maintaining an exception outweighs the public interest in disclosure. However where the information is not held the Commissioner does not consider that any meaningful public interest test can be carried out. Therefore he finds that exception provided by regulation 12(4)(a) can be used to refuse the request.

### **Other matters**

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21. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern.
22. The Council's original response to request was influenced by what it considered to be the emotive language it contained, i.e. the term "intrusive surveillance". The Commissioner advises the public authority to ignore use of such language in order to interpret requests objectively.

## Right of appeal

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23. 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)

24. 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.
25. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**