

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

**Decision notice**

**Date:** 14 August 2013

**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 the possible development of a particular site. Monmouthshire County Council ('the Council') refused to comply with the request on the basis that it was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Commissioner's decision is that the request is not manifestly unreasonable and the exception is not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - issue a fresh response under the EIR without relying on regulation 12(4)(b).
3. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

**Background**

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4. The request in this case relates to a strategic site for housing development (Deri Farm) referred to in the Council's draft Local Development Plan ('LDP').

## **Request and response**

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5. On 17 August 2012, the complainant wrote to the Council and requested information in the following terms:  
  
"I am requiring information falling within the provision of the Freedom of Information Act, in respect of the period from 1<sup>st</sup> January 2011 to the date of this email. I am requesting sight of all correspondence including that held electronically which refer to the possible development of Deri Farm. I am also requesting for the same period all reports, minutes/notes of meetings in which any reference is made to the development of Deri Farm. It should be noted that this request includes all agents and consultants for the Council".
6. The Council provided a substantive response on 4 October 2012 stating that it was refusing the request under regulation 12(4)(b) of the EIR as it would take a considerable amount of time to comply with it. However the Council agreed to provide as much information relevant to the request as it was able to, on a voluntary basis over an extended period of time.
7. On 9 October 2012 the complainant requested an internal review of the Council's handling of the request.
8. The Council provided the outcome of its internal review on 22 November 2012 and upheld its decision that regulation 12(4)(b) had been appropriately applied to the request. The Council also explained that, whilst it was refusing the request under the provisions of the EIR, it was still endeavouring to provide information relevant to the request over an extended period of time.
9. On 26 November 2012 the Council provided some information relevant to the request to the complainant, outside of the provisions of the EIR.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 3 March 2013 to complain about the way her request for information had been handled.
11. The complainant referred to the timing of the part disclosure of the information requested, which took place on the day that the Council met to endorse the LDP (22 November 2012).
12. The information which the Council disclosed was provided on a voluntary basis, outside the provisions of the EIR, and the Council maintains that

regulation 12(4)(b) applied to the request. As a result, the Commissioner advised the complainant that whilst he would be able to investigate whether the Council correctly applied regulation 12(4)(b), he would be unable to investigate any concerns in respect of the information provided by the Council outside the provisions of the EIR.

13. The Commissioner considers the scope of this complaint to be whether the Council correctly applied regulation 12(4)(b).

## **Reasons for decision**

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### **Regulation 12(4)(b) – manifestly unreasonable**

14. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
15. The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances:
  - where it is vexatious, or
  - where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources.
16. However, that is not to say that the exception is limited to these two sets of circumstances. It is clearly not possible to identify all situations in which a request will be manifestly unreasonable and there may well be other situations where regulation 12(4)(b) can apply. However, in reality, the Commissioner would consider the circumstances listed in the bullet points above to cover the vast majority of manifestly unreasonable requests.
17. In this case, the Council considers that the request is manifestly unreasonable due to the time and cost of complying with it. It has argued that complying with the request would create an unreasonable diversion of its resources in terms of time.
18. The EIR differ from the FOIA in that no specific limit is set on the amount of work required by an authority to respond to a request as provided by section 12 of the FOIA. Regulation 7(1) provides an additional 20 days for an authority to respond to a request where it reasonably believes that the information is particularly complex or is voluminous and it is therefore impractical for it to respond within 20 working days.

19. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
20. To assess the Council's application of regulation 12(4)(b), the Commissioner asked for clarification in the following areas: the location of the information and the extent of the information that the Council considers would be covered by the request; the role and size of the business area(s) that would need to be employed in recovering and extracting information; the activities that the Council would need to undertake to comply with the request and an estimate of the time needed to provide the information; and confirmation of whether the decision to apply the exception was underpinned by a sampling exercise.
21. By way of background information as to the volume of information held relevant to the request, the Council advised that the information/documents held relevant to the request form part of its LDP Process<sup>1</sup>. The Council explained that this:

" is a statutory process and is very stringent, thorough and formal, intended to define the Council's planning policy and strategy for a five year period. It lays out what the Council's research has suggested is required to meet the County's identified needs for housing, industrial and other sites. This involves the identification and investigation of a number of proposed sites for possible development during the period. The Plan lists five major strategic sites, of which Deri Farm is one, plus 23 other housing allocations, 13 business and mixed use sites, 4 sites for tourist accommodation and 6 sites for possible waste management facilities. The process must therefore thoroughly examine every aspect of each proposed site, particularly the strategic housing sites, to ensure that it is suitable for appropriate development and remains attractive to a developer. This is a complex and difficult process, leading to much correspondence. The Plan is subject to an in-depth hearing which is scheduled to take four weeks".

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1. <sup>1</sup>  
[http://www.planningpolicy.monmouthshire.gov.uk/info/1/local\\_development\\_plan/1/local\\_development\\_plan](http://www.planningpolicy.monmouthshire.gov.uk/info/1/local_development_plan/1/local_development_plan).

22. The Council advised that information relevant to the request is held across several locations – some within the email account of the LDP Manager and some at other locations across the Council's network. To complicate matters, the Council stated that e-mails over three weeks old are automatically transferred to an archive vault in order to save server space, and each email has to be opened individually from the vault in order to be inspected. It advised that each vault is attached to an email account, so the process can only be carried out by the person whose email account contains the document(s). In addition, the Council pointed out that the documents relate to similar subjects and tend to take the form of e-mail chains, many of which use similar subject headers. This makes identification of relevant information more difficult.
23. In terms of the estimate of the time it would take to comply with the request in its entirety, the Council explained that the following processes and activities would be necessary:

**"E-mail search**

Small amount of time to identify possible correspondence

**Manual trawl of likely area of network**

1 hour

**Restoring documents from vault, reading to check whether relevant to request and whether any exemptions may be appropriate** (document sizes vary, but estimate 15 minutes per document on average).

94 relevant documents were identified, but no records exist of how many documents were reviewed but considered not to be relevant. 94 x 15 minutes = 23.5 hours plus unknown time for non-relevant documents

**Transfer of identified network documents to an area accessible to FoI Officer**

Small amount of time

**FoI Officer review of possibly exempt material to establish whether exemptions apply**

Estimate 2 hours

**Total required time** = 26.5 hours identifiable plus an unknown amount which would have to be spent reviewing documents which proved not to be relevant".

24. In relation to diverting staff from their core duties to deal with the request, the Council advised that all of the processes listed above, with

the exception of the FOIA officer review of possible exempt information, would need to be undertaken by the LDP Manager. At the time of the request the team set up to deal with the LDP (four staff), were under significant pressure to deliver to a tight external schedule for a particular stage of the LDP. The LDP Manager was unable to delegate the work to other staff because he was the only one with access to the e-mail archive vault in which most of the documents were stored as the majority of information is held in his email account.

25. The Council advised that all information relevant to the request is held by the LDP department, whose four staff are directly involved with processing information relating to the selection and assessment of sites for development as part of the LDP. The LDP team were, at the time of the request, facing a significant deadline in the LDP process, which would have been severely threatened by diverting staff from their normal duties. The deadline in question was the preparation of a report to Council to agree the submission of the LDP to the Welsh Government. The Council was initially aiming for a deadline of June 2012 but in light of the volume and complexity of consultation responses, it was postponed initially to September 2012 and eventually it was decided that the report would be presented to Council at its meeting on 22 November 2012.

26. To comply with the request, the Council advised that the "Manager would have needed to leave work required for an approaching deadline for over three days". The Council confirmed that it had considered the option of having the items in the vault reopened en masse by its IT provider. However, this would have required a preliminary exercise to identify relevant documents and would still have required the LDP Manager to become very involved in identifying potentially exempt items, and would not have materially changed the position in terms of the time to comply with the request and the diversion of resources.

27. The Council advised the Commissioner that:

"A significant amount of work was undertaken to assess the information we held, and it became clear that much further work would be required to comply with the request. The amount of work involved with the request, plus the workload of the [LDP] team, led to us failing to decide on a response to [the complainant] in time to meet the deadline. A late decision was then taken to refuse the request under regulation 12(4)(b), due to the amount of work involved and the effect on the LDP deadlines. However, we always accepted that the information requested was largely beneficial to release, and we undertook to release as much information as we could on a voluntary basis, allowing us to provide it on a timescale which was less damaging to the team's primary commitment".

28. The Council acknowledged that, under the EIR, there is no appropriate limit, as provided under section 12 of the FOIA. However, it pointed out that, had the request been considered under the FOIA, the time to comply would have been 24.5 hours (as the two hours to consider exempt information could not be taken into account under the activities allowed under section 12 of the FOIA). This figure exceeds the appropriate limit of 18 hours under section 12 of the FOIA. The Council pointed out that the burden on its resources is not that on the Council itself but on a very small team, and in particular one individual, whose primary role is to steer an important document through a very involved statutory procedure with set timescales.
29. In reaching a view on whether the cost, or the amount of staff time involved in responding to a request is sufficient to render a request manifestly unreasonable, the Commissioner considers that the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') provide a useful starting point in establishing what would or would not amount to an unreasonable burden or cost to a public authority. However, the Fees Regulations are not determinative in any way.
30. In this case, the Commissioner accepts the Council's estimate for complying with the request totals 26.5 hours. The Commissioner notes that this is in excess of the appropriate limit of 18 hours as provided under the Fees Regulations, even when the estimate is reduced to 24.5 hours in relation to activities that the Council would be unable to take into account under the Fees Regulations. It should be noted, however, that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed in a preliminary decision of the Information Tribunal in the case of Department for Business Enterprise and Regulatory reform (DBERR) vs the Information Commissioner and Platform (EA/2008/0097), where the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

31. In assessing whether the cost or burden of dealing with a request is “too great”, the Commissioner is of the view that public authorities should consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. This will mean taking into account all the circumstances of the case including:
- the nature of the request and any wider value in the requested information being made publicly available;
  - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
  - the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
  - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
32. The request in this case was submitted on 17 August 2012, around three months before the Council formally endorsed the LDP at its meeting on 22 November 2012 for submission to the Welsh Government. The complainant argued that it was of vital importance that the information requested which informed the decision making process in relation to selection of the development site in question was provided before the LDP was endorsed.
33. The Commissioner notes that the subject matter of this request ie the potential development at Deri Farm has been a matter of significant concern to local residents, including the setting up of a protest group – Mardy Against Deri Development. The Commissioner understands that the group submitted detailed representations against the development throughout the LDP consultation process.
34. The Commissioner considers that, in this case, there is a significant wider value in the requested information being made publicly available as any development of over 200 new homes on the site is likely to have a considerable impact on the area and local residents. Given the fact that the draft LDP had not been agreed by the Council at the time of the request there is an argument that disclosure of the requested information would have assisted the public in understanding the Council’s decision to select the site in question and increase public participation in the LDP process.
35. The Commissioner acknowledges the Council’s arguments that the activities required in order to comply with the request would have placed



a burden on a small team (the LDP team), and the manager of the team in particular. He notes that the thrust of the Council's representations in respect of diversion of resources focus on the timing of the request in relation to specific deadlines associated with the LDP process. As noted earlier in this notice, the Council did voluntarily release a large amount of information in response to this request, albeit outside the provisions of the EIR. The Council confirmed that this was done as "we always accepted that the information requested was largely beneficial to release, and we undertook to release as much information as we could on a voluntary basis, allowing us to provide it on a timescale which was less damaging to the team's primary commitment".

## **Conclusion**

36. The Commissioner's decision is that the available evidence does not demonstrate that the request is manifestly unreasonable and he therefore finds that regulation 12(4)(b) is not engaged in this case. In reaching a view, the Commissioner has taken into account the wider value in the information being made publicly available in terms of transparency and accountability, the fact that a public authority may be required to accept a greater burden in providing environmental information than other information and the presumption in favour of disclosure as provided in regulation 12(2).
37. As the Commissioner's decision is that the exception is not engaged, he has not gone on to consider the public interest test inherent in this exception.

## Right of appeal

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38. 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)

39. 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.
40. 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**  
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**SK9 5AF**