

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

Decision notice

Date: 22 July 2015

Public Authority: Cheshire West and Chester Council
Address: HQ Building
Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainants requested planning information from Cheshire West and Chester Council ("the council"). The council said that the information was not held in relation to two of the requests and that one of the requests was not a valid request for information under the legislation. The Commissioner finds that the council breached regulation 14(2) of the Environmental Information Regulations 2004 ("the EIR") for failing to state that information was not held within 20 working days. He considered that the remaining request was valid and he has found that the council breached regulation 5(2) for failing to respond to it within 20 working days.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Respond to request 2 under the EIR "*Kindly ensure that all correspondence sent or received from those detailed below including attachments sent or received is posted onto the CWAC website [names]*". The council should make the information available to the complainants or rely on a valid exception under the EIR. If the information was not held, the council should rely on the exception under regulation 12(4)(a). If the council is not clear about the scope of the request, it should contact the complainants to clarify the request in line with its obligation to provide reasonable advice and assistance under regulation 9(1).

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.

Request and response

4. On 4 March 2015, one of the complainants requested information from the council in the following terms:

"FOI/EIR REQUEST 1

We formally request under the FOI Act to be sent in chronological order all correspondence between:

[Name] or [name] or any other member of the Ecology or Planning Teams with any member of the CWAC Legal Team or Legal Advisors discussing or referencing the matter of the EU Directive or EPS or GCN or NE Licensing directly or indirectly arising out of 14/3107/FUL.

FOI EIR REQUEST 2

Kindly ensure that all correspondence sent or received from those detailed below including attachments sent or received is posted onto the CWAC website

[names]

FOI/EIR REQUEST 3

[Name] you advised us that [name] had advised you that there existed a restrictive covenant that limited the development of the barns to no more than 3 dwellings. We would be grateful if you could send us a copy of the email in which that was stated by [name] or his agent or write to us advising what you were told verbally that made you believe this to be the case".

5. When the council did not respond, the complainants complained to the Commissioner. The Commissioner wrote to the council on 5 May 2015 asking it to respond.
6. The council sent a response to one of the complainants on 19 May 2015. It said that it was considering the requests under the Freedom of Information Act 2000 ("the FOIA") and it confirmed that it did hold recorded information. The council said that it considered an exemption

may apply and it needed more time to consider the application of the public interest test. It estimated that it would have reached a decision by 17 June 2015.

7. The Commissioner wrote to the council again on 11 June 2015 to outline its responsibilities.
8. The council sent a reply to one of the complainants on 2 July 2015 under the terms of the EIR. In response to requests 1 and 3, the council said that this information was not held. The council said that request 2 was not actually a request for information to be provided. It was a request for information to be placed onto the council's planning portal website. It said it would pass this on to the relevant department for consideration.

Scope of the case

9. The complainants contacted the Commissioner on 23 April 2015 to complain that the council had not responded to their requests. Following the response, the complainants contacted the Commissioner again on 3 July 2015. They continued to complain about the delay.
10. They also complained that the council had not responded to request 2, which they considered was a valid request for the information to be provided in an electronic form on the council's planning portal website.
11. The Commissioner notes that some of the information requested in request 2 would constitute the personal data of the complainant who made the request, since she has asked for copies of her own correspondence. Personal data is defined by the Data Protection Act 1998 ("the DPA") as any information relating to a living and identifiable individual. A requester's own personal data cannot be considered under the terms of the EIR in accordance with regulation 5(3). There are separate rights of access provided for access to personal data under section 7 of the DPA. The council should consider that matter separately as soon as possible. It forms no part of this decision notice.

Reasons for decision

Environmental Information Regulations 2004

12. The council initially indicated that it was going to consider the requests under the FOIA. Subsequently, the council decided to consider the requests under the EIR instead because the information was considered

to meet the definition of "environmental information" provided by the legislation.

Regulation 5(1), 5(2), 6(1)

13. Public authorities have a general duty under regulation 5(1) to make environmental information available upon request. In this case, the complainant asked the council to make correspondence available on its website. The council said that a request to put correspondence on its website was not a valid request under the EIR although it added that it would forward the request on to its planning team for consideration.
14. The Commissioner disagrees with the council's position. He considers that this was a valid request under the EIR in that it was a request to make environmental information available. The failure to provide a response under the EIR was a breach of regulation 5(2) because the council should have responded to the request within 20 working days.
15. That said, there is no obligation upon the council to publish the information on its website upon request. Regulation 6 of the EIR concerns circumstances where information is requested in a particular form or format. The Commissioner's position is that "form and format" does not extend to a request for public authorities to publish information on their website. That is a matter for an individual public authority. The Commissioner notes that the council has indicated that it will consider this but it is important to be clear that it is not a step that the Commissioner considers he can order the council to take under the EIR. For ease of reference, the Commissioner's guidance on "form and format" is here:

<https://ico.org.uk/media/for-organisations/documents/1639/form-and-format-of-information-eir-guidance.pdf>
16. In view of the above, the Commissioner asked the complainants whether they would be interested in receiving the information even if it was not made available on the website. The complainants indicated that they would still like to receive it in any format and that the request at the time to put it on the website was an effort to achieve additional transparency. For the reasons above, the Commissioner cannot order the council to publish the information on its website but he can require the council to respond and make the environmental information in another appropriate way under the terms of the EIR. That step has been included in this notice.

Regulation 9(1)

17. Under regulation 9(1) of the EIR, public authorities must provide reasonable advice and assistance to requesters. In correspondence to

the Commissioner, the council suggested that it was not clear about the precise scope of request 2. It said that the request had just referred to correspondence and there was no specific timeframe. The Commissioner has directed the council in the steps to this notice to contact the complainants directly to clarify the scope of the request if it is unsure about the scope of the information being sought, although this may now be clearer as a result of a further request for information submitted by the complainants which is not the subject of this complaint.

Regulation 14(2)

18. The EIR does not permit an extension to consider the public interest test as the FOIA does. The only circumstances under which a public authority can have more time (40 working days) is if the complexity and volume of the information make it impractical for the public authority to comply, or decide to refuse to do so, within 20 working days. The circumstances where this provision applies will be limited. In this case, the council provided no information to the Commissioner to justify its decision to take longer to respond.
19. When the council responded to requests 1 and 3, it said that the information was not held. Under the EIR, the exception under regulation 12(4)(a) applies when information is not held. The failure to rely on this exception within 20 working days was a breach of regulation 14(2) of the EIR.

Right of appeal

20. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

21. 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.
22. 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
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