

**Freedom of Information Act 2000 (Section 50)
and
The Environmental Information Regulations 2004.**

Decision Notice

Date: 18 July 2011

Public Authority: Gateshead Council
Address: Civic Centre
Regent Street
Gateshead
NE8 1HH

Summary

The complainant submitted a request to Gateshead Council ('the Council') for information from environmental records held on a property in Gateshead. The Council stated that it would make some of this information available free of charge, but would charge a fee to allow inspection of other parts of the information. Later in the investigation, the Council informed the Commissioner that it relied on regulation 6(1)(a), although it would allow inspection if a fee was paid. The Commissioner finds that the Council has breached regulation 8(2)(b). He requires the Council to make the requested information available for the complainant to inspect free of charge. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

The Commissioner's Role

1. The Environmental Information Regulations (The Regulations) 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 Regulations 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 Regulations.

Background

2. Section 3 of the Local Land Charges Act 1975 compels all local authorities to generate, maintain and update a Local Land Charges Register and to provide local searches. In order to obtain information from a local search, an application for an Official Search must be submitted to the relevant Local Authority on form LLC1. This is usually accompanied by form CON29R.
3. The CON29R form is comprised of two parts. Part 1 contains a list of standard enquiries about a property. Optional enquiries are contained in Part 2.
4. When a property or piece of land is purchased or leased, a request for a search is sent to the relevant local authority.
5. The complainant represents a company which provides information about property and land issues.

The Request

6. On 4 October 2010 the complainant requested to inspect the Local Land Charges Register and records containing the information necessary to complete a CON29R form.

The complainant requested this information in relation to a specific known property.

7. On 19 October 2010, the Council responded to the complainant and informed him that it would make environmental information available for inspection, and how he could make an appointment to do this. The Council however stated that a charge would be levied to allow the complainant to inspect information that was not environmental in nature, or was not held on a statutory register. The Council directed the complainant to its [website](#) for details of the charges levied.
8. On 21 October 2010 the complainant requested an internal review of this decision.
9. On 7 December 2010 the Council responded to the complainant and stated that it would impose a market based charge to allow information on non-statutory registers to be inspected. The Council explained that this was because the information was provided on a commercial basis

and the EU directive allowed it to impose such a charge in these circumstances.

The Investigation

Scope of the case

10. On 20 December 2010, the complainant contacted the Commissioner to complain about the Council's compliance with the provisions of the EIR.
11. The Council has confirmed that it will make the following information available for inspection free of charge:

The Local Land Charges Register, and information relevant to CON29R queries 1.1(a)-(e), 1.2, 2(a), 3.3(b), 3.4(a), 3.4(e)-(f), 3.10(a), 3.12(a)-b(ii), 3.13.

This information has therefore been excluded from the scope of the decision notice. The decision will consider the Council's response to the request for the outstanding information, specifically information relevant to CON29R queries:

1.1(f)-(h), 2(b)-(d), 3.1, 3.2, 3.3(a), 3.4(b)-(d), 3.5, 3.6(a)-(l), 3.7(a)-(f), 3.8, 3.9(a)-(n), 3.10(b), 3.11, 3.12(c).¹

Chronology

12. On 29 January 2011 the Commissioner wrote to the Council and explained that a complaint had been received. On 31 January 2011, the Commissioner again wrote to the Council and drew its attention to the decision notice [FER0236058](#), and the subsequent Information Tribunal decision, [East Riding of Yorkshire Council v Information Commissioner](#) (EA/2009/0069), which had dealt with a similar request for access to building control information. The Commissioner outlined his position on access to property search information under the EIR as set out in previous decision notices. The Commissioner invited the Council to provide a submission in support of its position.

¹ Annex A details the nature of the information relevant to these CON29R enquiries.

13. On 8 February 2011, the Council responded to the Commissioner. This email explained that all of the requested information was available for inspection, but the Council intended to levy a charge for allowing inspection of information that was not available on public registers.
14. On 11 February 2011, the Commissioner wrote to the Council to explain his intention to issue a decision notice and invite any further arguments that the Council wished to be considered.
15. On 21 February 2011, the Council responded to the Commissioner's email and provided a submission that it wished the Commissioner to consider. The Council also confirmed that it now relied on regulation 6(1)(a) as it did not believe it was reasonable to make some information available via inspection.

Analysis

Substantive Procedural Matters

Regulation 2

16. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR. In the Council's initial response to the complainant, it stated that a charge would be levied for allowing inspection of information that it did not consider was environmental in nature. However, the Council did not specify whether it believed any of the information requested by the complainant was not environmental.
17. During the course of the investigation, the Council argued that information relevant to certain CON29R queries does not constitute environmental information. The Council refers to the case of [Glawischnig v Bundesminister \[2003\] All ER \(D\) 147](#) (Case C-316/01). This was a judgment made by the Advocate General in the Court of European Justice in a case brought against the Austrian government. The judgment concluded that administrative documents relating to the labelling of GM foods were not covered by Directive [90/313](#). The Commissioner notes that this Directive has since been repealed by Directive [2003/4/EC](#). The EIR are derived from this later Directive. The ECJ judgment considered the 1990 Directive as the 2003 Directive had not come into force at the time of the ruling. However, the judgment notes that the definition of environmental information under the more recent directive is "wider and more detailed" (para 5).

18. However, the Council's intention in citing this case seems to be to argue that not all information with a tendentious link to one of the environmental factors should fall under the EIR. Specifically, in its email of 21 February 2011, the Council argues that

"...information relating to the issue or otherwise of contravention notices / enforcement notices or prosecutions is not a measure relating to the land nor is the certificate of lawfulness of existing use of land...it is difficult to see how a penalty imposed on an individual owner or occupier could be found to affect the land".

It appears that the Council therefore maintains that information relevant to CON29R queries 1.1(d), 3.8, and parts of 3.9 are not environmental in nature.

19. Regulation 2(1)(c) of the EIR provides that any information on "measures (including administrative measure), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements", will constitute environmental information. The Commissioner considers that the phrase "any information...on" should be interpreted widely and in line with the purpose expressed in the first recital of the Directive 2003/4/EC.
20. The information relevant to each CON29R query is listed in Annex A. These queries concern measures that would affect the elements of the environment. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. For example, the existence of otherwise of Certificate of Lawfulness of Existing Use of Land (CLEUD) would have an effect on whether the land continues to be used for one purpose, or whether activities that might affect it must cease.² The Commissioner also notes that the Tribunal in [Easter v Information Commissioner and the New Forest NPA](#) (EA/2009/0092) concluded that information held on a planning enforcement matter constituted environmental information. The Commissioner therefore considers the information requested by the complainant to be environmental information.

² In any case, the Commissioner notes that the Council is prepared to make information relevant to CON29R query 1.1(d), which covers CLEUDs available for inspection free of charge, and it has consequently been excluded from the scope of this notice.

Regulation 6

21. Regulation 6(1) provides an applicant with the right to request that information be made available in a particular form or format. It is the Commissioner's view that "although regulation 6(1) may appear to be primarily concerned with the particular physical form or format in which the information is provided, it should be interpreted broadly and does provide a right to request the inspection of environmental information".
22. A public authority should comply with this preference unless one of two exceptions applies. These exceptions are at regulation 6(1)(a), which provides an exception from complying with a preference for a particular format where it is reasonable to make the information available in another format, and 6(1)(b), which applies when the information is already publicly available in another format.
23. The Council does not accept the Commissioner's interpretation. It argues that

"...if the intention of the EU parliament and Council was to create a general right to inspect then that would be expected to be explicitly spelled out in the Directive which it is not. In particular if there was a duty specifically to allow inspection ... then this would have been spelled out in the Aarhus Convention, the 2003 Directive and the EIRs...The obligatory part of Article 3(5)(c) of the Directive only requires member states to ensure that the practical arrangements are defined for ensuring that the right of access...can be effectively exercised. The Directive left it up to member states to decide how to define the appropriate practical arrangements, and this falls far short of requiring inspection"

24. However, the Commissioner has previously set out his interpretation of regulation 6(1) in decision notice [FER0236058](#). The Commissioner considers that although regulation 6(1) may appear to be primarily concerned with the particular physical form or format in which the information is provided, it should be interpreted broadly and does provide a right to request the inspection of environmental information. The Commissioner reiterates that based on passages in interpretative aids such as the Directive and the Implementation Guide, he considers that 'inspection' constitutes a 'form or format' under regulation 6(1). In particular, the Commissioner refers to Recital 15 of the Directive, which refers to arrangements to "guarantee that the information is effectively and easily accessible", and The Implementation Guide to the Aarhus

Convention, which specifically states that a public authority “must allow” an applicant to examine original documentation subject to the two caveats which are replicated in 6(1)(a) and (b). Consequently, the Commissioner concludes that the complainant is entitled to request to inspect the requested information.

Regulation 6(1)(a)

25. Despite the fact that the Council does not accept that regulation 6(1) includes the right to request to inspect information, it has also chosen to rely on regulation 6(1)(a) to argue that it is reasonable to make the requested information available in a format other than inspection. As the Commissioner does not accept the Council's contention that regulation 6(1) excludes the right to request inspection, he has considered the Council's arguments for its reliance on regulation 6(1)(a).
26. The Council argues that it will refuse to permit inspection of information because to do so would “breach other regulations DPA and FOI. Further it would in order to comply with our obligations regarding the dissemination of information such as those under DPA would cause excessive disruption to the day to day activities of staff”.
27. It is not immediately clear to the Commissioner, and the Council offers no further explanation of how allowing inspection of environmental information could create a breach of the Freedom of Information Act, and so he has not considered this point further.
28. In relation to the Data Protection Act, the Council argues that relevant information is held in files that also contain information that if disclosed, would breach the DPA.
29. The Council also argues that it is reasonable for it to provide the requested information in a format other than inspection because many documents are stored away from public view for security reasons, because some documents are old and not suitable for inspection. The Council also argues that permitting inspection would cause excessive disruption because the information is held in several different departments.
30. The Commissioner is not convinced by the Council's arguments in support of regulation 6(1)(a). In particular, he notes that in its response to the complainant, and at an earlier stage in the Commissioner's investigation, the Council was happy to allow the complainant to inspect the requested information as long as a fee was

paid. The [Council's website](#) states that "component data" relevant to CON29R queries can be viewed for a fee that covers the cost of access. The website also explains where in the Council's offices data can be viewed, and how applicants can make an appointment to do this. Although the Council states in its final submission to the Commissioner that it relies on regulation 6(1)(a), it also writes that "permitting inspection would cause excessive disruption to the day to day activities of the local authority... and it is for this reason that the local authority requires a fee to be paid for permitting that access".

31. The Commissioner is therefore of the opinion that the Council could reasonably comply with the complainant's request to receive information in a particular form, specifically inspection. Consequently, the Commissioner considers that the exception to complying with this preference under regulation 6(1)(a) has been applied incorrectly. The Commissioner also notes that although the Council states that it relies on regulation 6(1)(a), it will allow inspection where a fee is paid. For this reason, the Commissioner considers that the Council has actually complied with regulation 6(1) and regulation 6(1)(a) was applied inappropriately.
32. The Council also argues that some of the information required to answer CON29R queries is "derived from a particular officer's personal knowledge and experience and is not held in a particular file capable of inspection". The Commissioner would point out here that the EIR only affords a right of access to recorded information. Regulation 2(1) provides that for the purposes of the EIR, environmental information constitutes "any information in written, visual, aural, electronic or any other material form". Consequently the personal knowledge of officers that is not recorded would not in any case fall into the scope of the EIR.
33. Since neither of the exceptions to the Council's obligation to provide information in the form and format requested can be satisfied, the Commissioner concludes that the complainant should be permitted to inspect the requested information.

Regulation 8

34. Although during the investigation the Council informed the Commissioner that it would not make the requested information available, it also stated that if a fee was paid the information could be inspected. The Council has set charges for allowing access to

information relevant to each query. These charges range from £0.26 (levied for query 3.1) to £7.80 (levied for queries 3.7 (a)-(d) and (f)).³

35. Regulation 8(2)(b) provides that:

“a public authority shall not make any charge for allowing an applicant to examine the information requested at the place which the public authority makes available for examination”

36. The Council explains that it believes it is entitled to levy a market based charge for allowing inspection of information that is provided on a commercial basis, that is non-statutory, and where the charge is necessary to ensure the information continues to be collected. In its internal review outcome, the Council explains that the EU directive allows it to do this.

37. The Commissioner assumes here that the Council relies upon Recital 18 of directive 2003/4/EC which states that:

“...as a general rule, charges may not exceed actual costs of producing the material in question... In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market based charge is considered to be reasonable...”

38. However, the Commissioner considers that this is only relevant where a public authority is permitted to levy a charge for environmental information under regulation 8(1). Regulation 8(3) provides that these charges should be ‘reasonable’. Recital 18 explains circumstances in a ‘reasonable charge’ levied under regulation 8(3) might exceed the actual costs of disbursements incurred in providing the information.

39. However, where information is inspected, regulation 8(2)(b) makes an absolute prohibition from *any* charges being levied. Consequently the Commissioner does not accept that the Council is entitled to levy a market based charge for allowing the applicant to inspect the requested information.

40. The Council also contends that if it needs to prepare the information for inspection, for example by redacting personal data, it is entitled to make a charge for this. Specifically it argues:

³ Full details of these charges are available on the Councils [website](#)

“The narrow restriction which prohibits a charge only in respect of accessing public registers or lists of environmental information, leaves untouched the residual right to charge for all aspects of supplying the information apart from inspection. So for example if the only way inspection could be permitted would be for local authority staff to refine the raw data to redact out information which is prohibited for disclosure by other legislation such as DPA then we can charge the full costs of staff time for making it available or supplying it, though not a specific charge for examining it”

41. However, as set out in decision notice [FER0302281](#), the Commissioner does not accept that a public authority can levy any such charge for preparing information for inspection. This is because the complainant's request is for the information required to answer CON29R queries about a specific property. Therefore, by locating and isolating the specific information that the complainant wishes to inspect, the Council is merely complying with the complainant's request. In any case, the Commissioner notes that the cost of redaction cannot be included in any charge made under the Fees Regulations.
42. By attempting to impose a charge to allow the applicant to inspect the requested information, the Council has breached regulation 8(2)(b).

The Decision

43. The Commissioner's decision is that Gateshead Council has breached regulation 8(2)(b) of the EIR by attempting to impose a charge for the inspection of environmental information.

Steps Required

44. The Commissioner requires the Council to make the requested information available for the complainant to inspect free of charge.
45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

46. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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 18th day of July 2011

Signed

**Gerrard Tracey
Principal Policy Advisor**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

Regulation 8 - Charging

Regulation 8(1)

Subject to paragraphs (2) to (8), where the public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

Regulation 8(2)

A public authority shall not make any charge for allowing an applicant –

- (a) to access any public registers or lists of environmental information held by the public authority; or

(b) to examine the information requested at the place which the public authority makes available for the examination.

Regulation 8(3)

A charge under paragraph (1) shall not exceed an amount on which the public authority is satisfied is a reasonable amount.

Annex A - CON29R Enquiries

1.1 Which of the following relating to the property have been granted, issued or refused or (where applicable) are the subject of pending applications:

- a) a planning permission
- b) a listed building consent
- c) a conservation area consent
- d) a certificate of lawfulness for existing use or development
- e) a certificate of lawfulness for proposed use or development
- f) building regulations approval
- g) a building regulations completion certificate
- h) any building regulations certificate or notice issued in respect of work carried out under a competent person self-certification scheme

1.2 What designations of land use for the property or the area, and what specific proposals for the property are contained in any existing or proposed development plan?

2. Which of the roads, footways and footpaths named in the application for this search are:

- a) highways maintainable at public expense
- b) subject to adoption and supported by a bond or bond waiver
- c) to be made up by a local authority who will reclaim the cost from the frontagers
- d) to be adopted by a local authority without reclaiming the cost from the frontagers

3.1 Is the property included in land required for public purposes?

3.2 Is the property to be acquired for road works?

3.3 Do either of the following exist in relation to the property:

- a) An agreement to drain buildings in combination into an existing sewer by means of a private sewer, or
- b) An agreement or consent for (i) a building or (ii) extension to a building on the property to be built over or in the vicinity of a drain, sewer or disposal main?

3.4 Is the property (or will it be) within 200 metres of any of the following:

- a) the centre line of a new trunk road or special road specified in any order draft order or scheme
- b) the centre line of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway
- c) the outer limits of construction works for a proposed alteration or improvement to an existing road involving (i) construction of a roundabout (other than a mini roundabout) or (ii) widening by construction of one or more additional traffic lanes
- d) the outer limits of (i) construction of a new road to be built by a local authority, (ii) an approved alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway or (iii) construction of a roundabout (other than a mini roundabout) or widening by construction of one or more additional traffic lanes
- e) the centre line of the proposed route of a new road under proposals published for public consultation
- f) the outer limits of (i) construction of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway or (ii) construction of a roundabout (other than a mini roundabout) or (iii) widening by construction of one or more additional traffic lanes under proposals published for public consultation.

3.5 Is the property (or will it be) within 200 metres of the centre line of a proposed railway, tramway, light railway or monorail?

3.6 Has a local authority approved but not yet implemented any of the following for the roads, footways and footpaths which abut the boundaries of the property:

- a) permanent stopping up or diversion
- b) waiting or loading restrictions
- c) one way driving
- d) prohibition of driving
- e) pedestrianisation
- f) vehicle width or weight restrictions
- g) traffic calming works including road humps
- h) residents parking contracts
- i) minor road widening or improvement
- j) pedestrian crossings
- k) cycle tracks
- l) bridge building

3.7 Do any statutory notices which relate to the following matters subsist in relation to the property other than those revealed in a response to any other enquiry in this Schedule:

- a) building works
- b) environment
- c) health and safety
- d) housing
- e) highways
- f) public health

3.8 Has a local authority authorised in relation to the property any proceedings for the contravention of any provision contained in Building Regulations?

3.9 Do any of the following subsist in relation to the property or has a local authority decided to issue, serve, make or commence any of the following:

- a) an enforcement notice
- b) a stop notice
- c) a listed building enforcement notice
- d) a breach of condition notice
- e) a planning contravention notice
- f) another notice relating to breach of planning control
- g) a listed buildings repair notice
- h) in the case of listed building deliberately allowed to fall into disrepair, a compulsory purchase order with a direction for minimum compensation
- i) a building preservation notice
- j) a direction restricting permitted development
- k) an order revoking or modifying planning permission
- l) an order requiring discontinuance of use or alteration or removal of building or works
- m) a tree preservation order
- n) proceeding to enforce a planning agreement or planning contribution

3.10 Do the following apply in relation to the property:

- a) the making of the area a Conservation Area before 31 August 1974
- b) an unimplemented resolution to designate the area a Conservation Area

3.11 Has any enforceable order or decision been made to compulsorily purchase or acquire the property

3.12 Do any of the following apply (including any relating to land adjacent to or adjoining the property which has been identified as contaminated land because it is such a condition that harm or pollution of controlled waters might be caused on the property):

- a) a contaminated land notice
- b) in relation to a register maintained under section 78R of the Environmental Protection Act 1990:
 - (i) a decision to make an entry
 - (ii) an entry
- c) consultation with the owner or occupier of the property conducted under section 78G of the Environmental Protection Act 1990 before the service of a remediation notice?

3.13 Do records indicate that the property is a 'Radon Affected Area' as identified by the Health Protection Agency?