

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 7 February 2013

**Public Authority:** West Sussex County Council

**Address:** County Hall  
West Street  
Chichester  
West Sussex  
PO19 1RQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested various pieces of CON29 information in respect of every proposed or approved development within West Sussex. West Sussex County Council ("the council") declined to provide this information en masse, but explained that it would provide this information at a charge of £15 for each individual address which the complaint required. The Commissioner's decision is that the council has breached regulation 8(3) by seeking to levy an unreasonable charge for the provision of environmental information. He also considers that the council has failed to comply with regulation 11(3).
2. The Commissioner requires no steps to be taken.

#### **Request and response**

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3. On 19 December 2011, the complainant wrote to the council and requested information in the following terms:

*"I would like to receive a complete list of answers to the following questions proposed or approved within West Sussex found on Form CON29R:*

1. Question 3.2 – Land to be acquired for road works
2. Question 3.4 – Road Schemes
3. Question 3.5 – Railways

*4. Questions 3.6 (a) – (l) on the Con29. The list should indicate the name of the scheme, details of what is approved or proposed and details of the roads that will be affected along with the date the scheme is approved.*

*5. Question 3.7 – All Outstanding Notices*

*6. Question 3.11 – All Compulsory Purchases proposed/approved.*

*I am happy to be emailed a list if this is easier for you, or to be sent a hard copy of the list. Please note we will also require regular updates to the list dependent upon how often you update the list. Please indicate in your reply how often such lists are updated.*

*If easier for you, I am happy to view this data in the form of a map if appropriate, on a case by case basis as and when they arrive.”*

4. The council responded on 20 January 2012 advising the complainant that it needed to extend its time to respond to 40 days under regulation 7(1). On 1 March 2012, the council provided a substantive response to the complainant, indicating that it could provide the information sought but only in respect of specific addresses at a cost of £15 per address. On the same day, the complainant sought a review of this response along with a breakdown of the £15 fee.
5. The council wrote to the complainant on 20 March 2012; providing a breakdown of the fee but advising the complainant that in order to have the council's decision reviewed he would need to go through the council's formal online complaint's procedure. On 22 March 2012, following the council's instructions, the complainant then submitted a request for a review online. The council responded on 25 April 2012 arguing the £15 fee to be "reasonable" within the meaning of regulation 8(3).

## **Scope of the case**

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6. The complainant contacted the Commissioner on 25 April 2012 to complain about the way his request for information has been handled. On 14 September 2012, the Commissioner wrote to the complainant advising him that he proposed to focus his investigation "on whether the charges imposed by the council can be considered reasonable under regulation 8(3) of the EIRs". The complainant endorsed this scope and accordingly this notice will focus on regulation 8(3). However, the Commissioner also proposes to address the council's compliance with regulation 11 of the EIR.

7. For the sake of clarity, the council's argument that the information could only be provided if requested in relation to specific addresses was not part of the complaint made to the Commissioner or his investigation. Consequently, the council's position on this point will not be considered in this notice.
8. The Commissioner also notes that the final two paragraphs of the complainant's request relate to information which the council may, or may not, hold in the future rather than information which the council would hold at the time of the request. The obligation placed on public authorities by regulation 5(1) is to provide information which it actually holds; not to provide information which it may hold at a later date. Accordingly, the Commissioner is of the view that these requests seek information which the council would not be obliged to provide under the EIR. The requests contained in these final two paragraphs therefore fall outside the Commissioner's jurisdiction and have not been considered here in this notice.
9. In light of the above, the Commissioner's investigation has been confined to items 1 – 6 of the complainant's request.

## **Reasons for decision**

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### **Regulation 2**

10. The Commissioner began by considering whether the request made by the complainant is a request for environmental information as defined by regulation 2(1) of the EIR.
11. The Commissioner considers that the information which is necessary to address the CON29 questions referred to in the complainant's request falls within regulation 2(1)(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". The Commissioner considers all of the information requested to be measures likely to affect one or some of the elements referred to in regulation 2(1)(a).

### **Regulation 8(3)**

12. Public authorities often levy a charge for providing information of the type sought in this case under the [Local Authorities \(England\) \(Charge for Property Searches\) Regulations 2008](#) ("the CPSR"). The Commissioner's position is that regulation 5(6) specifically disapplies the charging provisions under the CPSR. In [Kirklees v Information](#)

[Commissioner](#), the Tribunal accepted that regulation 5(6) has this effect. Therefore, where information is environmental in nature, public authorities should only levy charges in accordance with the EIR. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law.

13. Having established that the information requested is environmental information within the meaning of regulation 2(1), the only charging regime which the council must comply with is that contained in the EIR. Regulation 8 provides a general right for public authorities to charge for the provision of environmental information.
14. Under regulation 8(1) a public authority may only charge for 'making environmental information available', the Commissioner considers this to apply only to the process of supplying information to an applicant once the requested information has been located, retrieved and put into a disclosable form.
15. Regulation 8(3) of the EIR states: "A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount."
16. The Commissioner's interpretation of a "reasonable amount" is that it extends to no more than the cost of actual disbursements necessitated by complying with the request, such as postage and photocopying charges.
17. The council disagrees with this position. Instead, it argues that the provision in regulation 8(3) for a public authority to charge a "reasonable amount" allows it to make charges on a cost recovery basis.
18. The Commissioner considers it unlikely that the regulations intended for a public authority to be able to charge for the same work necessary to respond to a request in some instances, but not others. With this in mind, the Commissioner considers that it would be illogical, and contrary to the general scheme of regulation 8, for a public authority to be prohibited from charging for locating and retrieving information in some scenarios but allowed to do so in others. Whether the information is being provided on paper or to be inspected, the degree of work for the public authority involved in locating and retrieving the relevant information will be comparable. As regulation 8(2)(b) clearly prohibits work being charged for time locating and retrieving information where that information is to be inspected by the applicant, it must follow that this activity cannot be charged for where the copies of the information are provided to the applicant. The Commissioner therefore disagrees with the council's position.

19. The council has also argued that the request is "*not for the supply of environmental information as held by the council*". Instead, it considers the request to be for the provision of a service which "*incurs costs additional to those related to the creation, retention and retrieval of the data*".
20. The Commissioner cannot find any support within the regulations for this view. The Commissioner considers that compiling a response to a request will always involve the use of staff time and judgment in order to locate information relevant to a request. There is nothing in the EIR to suggest that a public authority can charge for responding to a request for environmental information simply on the grounds that it will take some staff time to locate the information sought.
21. The Commissioner's view is supported by the panel in [Kirklees v Information Commissioner](#) which noted:

*"82. In respect of any request for information, whether under the FOIA or the EIR, it is inherent that a public authority will have to undertake some sort of evaluative exercise to establish what information it holds that falls within the request. Every public authority has to do this in respect of every request; some will require more evaluative work than others but that cannot take it outside the definition of a request. There is a measure of protection in each set of legislation against unreasonable administrative or cost burdens in complying with statutory requests, but that is achieved by express provisions that limit or alleviate the authority's obligation to comply (section 14 FOIA; regulation 12(4) EIR), not by limiting or redefining what counts as a request."*

22. Finally, the council has argued that "*case law confirms that what is reasonable is subjective*" and that the test of "reasonableness" in regulation 8(3) should therefore be: "*did [the] authority have an honest belief that the £15 was reasonable and was that a belief which the authority could reasonably hold after properly directing itself to relevant law and facts?*"
23. The Commissioner notes that the council has not referred either him or the complainant to any specific cases to support this view. As this is the only basis which the council has put forward in support of the test advocated above, the Commissioner does not feel able to accept this argument to any degree.
24. In summary, none of the arguments presented to him by the council have persuaded him that his well established interpretation that regulation 8(3) essentially extends only to postage and photocopying

costs is incorrect. Consequently, the Commissioner finds that the council has breached regulation 8(3) by attempting to levy an unreasonable charge.

### **Regulation 11**

25. Regulation 11(1) provides: "... an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request".
  26. Regulation 11(2) states that these representations must be made "no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement".
  27. Regulation 11(3) states:

"The public authority shall on receipt of the representations and free of charge –

    - (a) consider them and any supporting evidence produced by the applicant; and
    - (b) decide if it has complied with the requirement."
  28. As outlined in paragraph 5, within 40 days of believing the council had failed to comply with its obligations under the EIR the complainant, on 1 March 2012, made representations to the council asking it to review its decision to levy a £15 fee per address. Instead of accepting these representations as a request for a review, the council advised the complainant that in order to receive a review of the council's response he would have to go through its formal online complaints procedure. The complainant did this on 22 March 2012 and received a response from the council on 25 April 2012.
  29. The Commissioner considers that the council should have accepted the complainant's email of 1 March 2012 as a request for its response to be reviewed. Complainants are not obliged to go through any formal online complaints procedure if they have made "representations" to the council in line within regulations 11(1) and 11(2). The requirement in the EIR is that an individual simply "make representations" to a public authority which the complainant did unambiguously by requesting the council "*forward [the] complaint to the appropriate person for review*".
- By failing to consider these representations of 1 March 2012 and decide if it has complied with the EIR, the Commissioner considers that the council has breached regulation 11(3).

## Right of appeal

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30. 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)

31. 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.
32. 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 .....**

**Gerrard Tracey  
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