

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

### **Decision notice**

**Date:** 3 June 2024

**Public Authority:** Warwick District Council

**Address:** [information@warwick.gov.uk](mailto:information@warwick.gov.uk)

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

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1. The complainant requested various information regarding businesses storing commercial waste on the public highway over the last seven years. Warwick District Council ('the Council') provided some information. However, the complainant was not satisfied that the Council had provided all relevant information it holds in respect of section 47 notices.
2. The Commissioner's decision is that the Council has failed to demonstrate that all relevant information held has been identified and considered for disclosure. The Commissioner is not therefore satisfied that it has complied with the requirement under regulation 5(1) of the EIR to make it available on request (subject to the relevant conditions). The Council has therefore breached regulation 5(1) of the EIR.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to that part of the request regarding the number of section 47 letters issued, which complies with regulation 5(1) of the EIR, ensuring that all information held by the Council which falls within its scope has been identified and considered for disclosure.
4. The public authority must take these steps within 30 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

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5. On 4 October 2023, the complainant wrote to the Council and requested the following information:

“Could we have a copy of your records regarding businesses that have been storing commercial waste including wheelie bins bagged rubbish pallets et cetera on the public highway against legislation for the last seven years please?

Including how many section 47s have been issued and how many warning letters have been issued and who these have been issued to.

In particular the town centre of Royal Leamington Spa.”

6. The Council responded on 25 October 2023. It attached a spreadsheet showing how many section 47 letters were sent in the last seven years, stated that it does not send warning letters to businesses pre section 47 letters and informed the complainant that it does not keep a dotted map of commercial bins being permanently stored on streets by businesses.
7. The complainant asked the Council to confirm that the information sent in respect of section 47 notices was accurate and that it includes all section 47 notices that were issued in Leamington Spa during this period.
8. Following an internal review the Council wrote to the complainant on 20 November 2023. It confirmed that the information provided in the spreadsheet was accurate and that there would be no difference had the town centre of Leamington Spa been defined or for Royal Leamington Spa.
9. Although the complainant had not raised this in their correspondence, the Council confirmed that it was withholding the complainant’s request for a copy of the Council’s records regarding businesses storing commercial waste on the public highway on the basis of regulation 12(5)(b) (course of justice). In respect of ‘who’ the section 47 notices had been issued to, the Council informed the complainant that this would involve the disclosure of personal data and was being withheld under section 40 of the FOIA and regulation 5(3) of the EIR.

## Scope of the case

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10. The complainant contacted the Commissioner on 29 November 2023 to complain about the way their request for information had been handled. In particular, they were concerned that the Council had not provided all information it holds in respect of section 47 notices.
11. The Commissioner understands that a section 47 notice is a legal notice issued under the Environmental Protection Act 1990. They are issued to businesses/traders who fail to comply with their duty of care. The notice has instructions on how to store, dispose and present waste for collection.
12. The complainant subsequently confirmed that they do not want the Commissioner to investigate the Council's reliance on regulation 12(5)(b) in respect of the first part of their request, or its reliance on section 40(2) of the FOIA and regulation 5(3) of the EIR in respect of personal data.
13. The scope of the Commissioner's investigation is limited therefore to consider whether the Council has complied with its obligations under regulation 5(1) of the EIR.

## Reasons for decision

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### Would the requested information be environmental?

14. Regulation 2(1) of the EIR defines environmental information as being information on:
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
  - (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)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
15. The Commissioner considers that as the request relates to commercial waste and its associated legislation/measures, that it is likely to relate to (a)(b) and (c) of the above definition. For procedural reasons, he has therefore assessed this case under the EIR.

## **Reasons for decision**

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### **Regulation 5(1) – duty to make available environmental information on request**

- 16. Under regulation 5(1) of the EIR, a public authority must make environmental information available on request if it holds the information and it is not subject to an exception.
- 17. In scenarios where there is some dispute between whether the public authority holds additional relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
- 18. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any additional information which falls within the scope of the request (or was held at the time of the request).
- 19. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.

20. The Commissioner notes, that in its response to the request, the Council attached a spreadsheet showing how many section 47 letters were sent in the last seven years. However, the complainant queried with the Council whether the spreadsheet contained a complete list of all section 47 letters issued.
21. The Council explained in its internal review that the spreadsheet was compiled by interrogating another internal spreadsheet tracking various environmental matters, including fly tipping. The Council informed the complainant that it had checked the spreadsheet again, and was satisfied that it was an accurate record of the information held in respect of section 47 notices.
22. The complainant does not accept that the Council has provided all relevant information it holds and has referred to, and provided copies of, two section 47 notices issued in respect of an FOIA request by an acquaintance in 2020. Neither of these notices are included in the spreadsheet provided.
23. The Commissioner queried this with the Council and asked it to specifically address the complainant's concerns.
24. Although the Council did not explicitly address his query regarding this, it informed the Commissioner that:

"During the period of the request there was significant change within the team responsible for the information. It is not impossible that information was not recorded correctly in this time and that since then information has been incorrectly deleted when their accounts were deleted with the Council. However, there is no way of proving certainty on this point one way or the other."
25. The Council further informed the Commissioner that all information should be recorded within an annual spreadsheet, and attached an example dated for the financial year from April 2023 to March 2024. The Council added that the spreadsheet cross references its civica system where data is entered afterwards, and informed the Commissioner that there is no way to search on the specific section 47 facility. It added that the response was therefore based on the information contained within this.
26. The Council did not offer an explanation of the civica system itself or explain why it is not possible to conduct a search on a specific section 47 facility. The Commissioner also notes that it did not specify whether the response was based on the information within the civica system or the annual spreadsheet.

27. The spreadsheet provided to the Commissioner consists of three separate sheets labelled as follows:
  - Letters sent
  - CPN (blank)
  - FPN's (seven entries)
28. Whilst the Council offered no explanation regarding the three different sheets, the Commissioner understands that FPN is an acronym of Fixed Penalty Notice.
29. Having reviewed the spreadsheet sent by the Council, the Commissioner expected to be able to cross reference the 'Letters sent' content with the 'FPN's'. However, he found that the entries on the FPN sheet are not on the 'Letters sent' sheet and conversely in respect of the 'Letters sent' sheet.
30. Additionally, he found that although the 'Letters sent' sheet indicated that there had been a total of 21 section 47 letters sent in the whole period from April 2023 to March 2024, there were only two on the FPN sheet. He therefore checked to see if he narrowed his search of the 'Letters sent' sheet to the period covered by the FPN sheet (5 December 2023 – 19 March 2024), and found that there were eight section 47 Letters sent during this time. Regardless of the various ways the Commissioner tried to cross reference the two different sheets, he was unable to do so.
31. Having considered the arguments and evidence from the complainant, and the explanation and information from the Council, the Commissioner is not satisfied that the Council has conducted a reasonable and proportionate search of its records in respect of section 47 notices/letters.
32. It is not clear how the Council was able to produce two specific section 47 letters in 2020, yet it is apparently unable to locate them now. Neither has the Council provided sufficient details of its record keeping in respect of section 47 letters/notices. The inconsistencies between the 'Letters sent' and 'FPN' sheets on the spreadsheet provided to the Commissioner indicate that there may be additional section 47 letters issued which were not included in the spreadsheet sent to the complainant with the Council's original response. As such, the Commissioner can only conclude that the Council has not complied with its obligations under regulation 5(1) of the EIR to provide all relevant information it holds (and subject to the relevant conditions).

## **Other matters**

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### **Engagement with the Commissioner**

33. The Commissioner wrote to the Council on 28 February 2024 asking for its full and final submissions within 10 working days (13 March 2024) from the date of the letter. However, despite various reminders, the Commissioner is disappointed that he had to exercise his powers under section 51 of the FOIA to issue a formal Information Notice to the Council on 2 April 2024 before he received its response.
34. The Commissioner expects the Council to engage with the Commissioner more readily in the future.

## **Right of appeal**

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35. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Catherine Dickenson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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