

Environmental Information Regulations 2004

Decision Notice

Date: 9 November 2009

Public Authority: Northamptonshire County Council
Address: John Dryden House
8-10 The Lakes
Northampton
Northamptonshire
NN4 7DD

Summary

The complainant requested information about who was liable to cover the full cost of the legal challenge to an application to register the playing fields of a former school as a town or village green. He asked five questions about this matter. He wanted a breakdown of the liability, the share of which the public authority was liable, who took the decision, the limits of the costs and a copy of the authorisation sent to the lawyers involved. The public authority provided an answer to the request. It also clarified its position at its internal review. The complainant explained that he remained dissatisfied with two aspects. The Commissioner has considered those two aspects and has determined that the Information was Environmental Information and should have been considered from the outset under the Environmental Information Regulations. He has determined that the exception in 12(4)(a) applies to these two aspects because the requested information is not held by it for the purposes of the Regulations. However he has noted a number of breaches in this case. He has determined that Regulations 9(1), 11(4), and 14(1) were all contravened in this instance. He requires no further remedial steps to be taken in this case.

The Commissioner's Role

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

Background

2. After a Schools Review in Northampton it was determined that a school site was surplus to requirements and was to be sold. A building company contracted to purchase the site for redevelopment. A group of residents made an application for the playing fields of this closed school to be registered as a town or village green (the TVG application). This application was unsuccessful.
3. Part of the contract with the building company provided that it had liability to meet the costs of opposing the town or village green registration application. However, the contract with the building company was terminated prior to the TVG application action being heard. The complainant wanted to understand who would now meet these costs.

The Request

4. On 7 November 2008 the complainant requested the following information in accordance with section 1(1) of the Freedom of Information Act ('the Act'). The public authority and the complainant dealt with the whole request under this legislation and for clarity, the Commissioner will therefore retain the references to the Act in the early sections of this notice. In the Commissioner's view, however, the majority of the request actually constituted a request for environmental information and thus should have been dealt with under the Environmental Information Regulations 2004 (EIR). He will explain why he believes that most of the information was actually environmental information and the consequences of this finding in his 'analysis' section below. The request was worded:

'Under that terminated contract, [building company] were liable to meet the costs of opposing the application to register the playing field at the former [School name redacted] as a town or village green. I am therefore seeking to understand who is now meeting the full cost of the legal challenge to this application (which is of the order of tens of thousands of pounds).'

Under the Freedom of Information Act I request information regarding

(1) A breakdown of who is now liable for these costs

If NCC is at all liable, I would like to know

(2) What share is NCC [Northamptonshire County Council] liable for.

(3) Who has taken the decision that NCC will be liable for that share of the costs.

(4) What is the limit of these costs.

(5) *A copy of the authorisation sent to the opposer's legal representations.*

...

[6] *I would therefore also request that you advise me who is acting as Head of Legal Services, and ask that you provide them with a copy of this correspondence.'*

5. On 5 December 2008 the public authority wrote to the complainant and said that it required more time to provide a response under the Act. The complainant responded on the same day informing the public authority that he was unhappy about the delay and that the public authority should deal with it as a stage one complaint.
6. On 15 December 2008 the public authority provided an apology for the delay and a response as follows:

(1) *NCC is liable.*

(2) *100%.*

(3) *'Decision outcomes with [building company] by NCC (Project Board). In the absence of arrangement with another third party, all costs are to be borne by NCC.'*

(4) *There is no limit.*

For point (5) it asked for the complainant to clarify this request in line with section 1(3) of the Act:

'Please clarify what document is referred to. Is this a document sent by NCC to its own legal advisers or a document sent on behalf of NCC to [building company]'s legal advisers.'

[6] *It provided no answer to part [6].*

7. On 16 December 2008 the complainant informed the public authority that the response had not fully satisfied his request for information. He said that the response failed to satisfy his request for the following reasons:
 1. He said that the response for part (3) had failed to answer his question as:

'The original school sites contract laid out that [building company redacted] would meet the legal costs of opposing any village green applications, and [building company redacted] would be able to claim back 50% of those costs from NCC. Therefore there was never any direct contract between NCC and (in the case of [School redacted] at least) [law firm redacted] to cover these activities. In any event, when the deal fell through this all

became null and void. Somebody in NCC has taken a decision to oppose its application, and to authorise 'unlimited' costs. I want to know the name of that person (or persons if taken by committee) and when that decision was taken.'

2. He explained that he found the answer to part (4) difficult to believe:

'As even the Chief Executive does not hold this delegated authority. Furthermore if true it would violate NCC's constitution (under Article 4). I cannot find reference to this spend in the policy and budget framework, and I ask that you provide a full explanation of your answer.'
3. He explained that for part (5) he wanted the public authority to explain why it took so long to ask for clarification and he stated that:

'To clarify, there was never any contract between NCC and [law Firm name] (as stated above). As [law firm redacted] represented NCC as the sole opposer of the application there must now be a contract in place and it is this document that I am seeking.'
4. He also commented that part [6] of the request had not been answered at all.
8. On 19 December 2008 the complainant emailed the public authority and explained his concern that he was yet to receive an acknowledgement or response to his request for an internal review.
9. On 5 January 2009 the complainant emailed the public authority twice. He explained that he was not happy that he had not received a response and that he wanted to raise the issue to Stage 3 of the Council's complaints procedure. On 6 January 2009 having not received a response, he said he would refer this issue to the Commissioner and the Local Government Ombudsman if he did not receive a response within 24 hours. On 6 January 2009 the public authority acknowledged receiving the complaints and explained it required time to investigate them.
10. On 8 January 2009 the public authority provided a response to these complaints. It stated that it had been unclear previously and that its corporate complaints procedure was not the correct forum for FOIA complaints. It explained that it was presently preparing a response to the request for internal review dated 16 December 2009.
11. On 12 January 2009 the complainant responded to the email dated 8 January 2009. He said that he believed it was completely unjustifiable that the misunderstanding was created.
12. On 5 February 2009 the public authority communicated 'a report on the review' to the complainant. It explained the terms of the review and the background of the requests and the Act. It acknowledged that it had failed to meet the requirements of section 10(1) of the Act. It apologised for this. It also discussed the responses

given to the given to the five numbered requests and the request that was not recognised (numbered [6] by the Commissioner):

- (1) It explained that it viewed this response as clear, albeit that the complainant sought additional clarification.
- (2) As above.
- (3) It explained that section 16(1) did provide an obligation to provide advice and assistance so far as it is reasonable to do so. It explained that the Project Board discussed this matter and that it was the Board's decision as a Board. It explained that it found this part of the response satisfactory but that the new request [the Commissioner assumes this refers to the request for the details of *when* the decision was taken] within the internal review request should now be processed. It asked for its FOIA team to contact the complainant to deal with this issue.
- (4) It said that it considered that the response was clear but that it would go on to consider the complainant's challenge to the accuracy.
- (5) It explained that it believed that it was entitled to ask for clarification for this part of the request. It explained that it agreed that it was a breach of the Commissioner's section 45 Code of Conduct to not ask for the clarification earlier.
- [6] It stated that the failure to recognise this as an information request was a breach of the Act and the Code of Conduct. The person who prepared the report was Mr Paul McArthur who identified himself as the Acting Head of Legal Services, thereby answering the request implicitly.

13. After the Commissioner's intervention, the public authority provided the complainant with a further substantive review of its handling of the request on 17 June 2009. It apologised for its delays and tried to explain them. It identified the outstanding issues as parts (3) to (5) of the original request dated 7 November 2008:

- For part (3) the Council stated that section 12 of the Act applied, as it would exceed the limit of £450, as set out in the Appropriate Limit and Fees regulations of the Freedom of Information Act, to respond to this element of the request. It also stated however that :

'Without prejudice to the above, I can confirm from the reasonable searches conducted so far I understand the decision to oppose the TVG application for [School redacted] was taken in or about June 2007. This decision was taken in the normal course of business of the Council as landowner.

- For part (4) it provided the following explanation of its previous response

It is understood this phrase ['There is no limit'] referred to the ongoing nature of the matter and that no decision on the upper limit of costs was taken. The costs implications in this matter were, and are, being kept under constant review as to their reasonableness.'

- For part (5) it said:

' [Law firm redacted] were originally retained by the Council to provide legal services in connection with the Schools Review PFI Project in 2005. [law firm redacted] were specifically instructed to advise on the objection to the TVG [the Town or Village Green] application on [School redacted] in June 2007. The documents evidencing the contract between [law firm redacted] and NCC are legally privileged and exempt under S.42 Freedom of Information Act 2000.

It is considered that the public interest favours the application of the exemption as the terms of the contract between [law firm redacted] and NCC is not in itself a public issue and there is also public interest in maintaining professional legal privilege to enable full disclosure to take place when obtaining legal advice.

It is also considered the information within the documents are exempt from disclosure under S.43 Freedom of Information Act 2000 as it relates to information on price structure and costs which were negotiated specifically for legal advice and assistance on the Schools PFI Project. The disclosure of this information could prejudice both the Council's and [law firm redacted]'s commercial interests in their ability to negotiate future costs with other parties or as between themselves.

The public interest favours the application of this exemption as this ensures proper competition and ensures the Council are able to obtain independent quotes.

Some of the information within the documents is also exempt under S.40 Freedom of Information Act 2000 as it is information defined as personal data within the Data Protection Act 1998.

For the reasons detailed above, I am not able to provide you with the copy documentation. I can additionally confirm, given the size of the Schools Review Project, it was determined external solicitors would be required for the majority of the legal work and [law firm redacted] were instructed to act as external solicitors for the Council from 30 November 2005. The terms and conditions of the retainer (or contract) for [law firm redacted] are detailed in a letter from [law firm redacted] dated 7 December 2005 as required under the Solicitors Practice Rules 1990. Confirmation of specific instructions regarding the TVG application is detailed in a letter dated 15 June 2007.'

The Investigation

Chronology

14. Between the 12 February 2009 and 16 June 2009 the Commissioner exchanged numerous letters with the public authority and the complainant in an effort to get the public authority to take the follow up action it had promised in its internal review letter of 5 February 2009. As explained above the results of a further substantive review of its handling of the request were communicated to the complainant, by the public authority on 17 June 2009.
15. On 17 June 2009 the Commissioner wrote to the complainant to ask for the complainant's view on the contents of this further review.
16. On 29 June 2009 the complainant provided a response. He explained his view was the following:
 - For part (3) he explained that he did not believe that section 12(1) applied as the sum of money was a large amount and should have been properly accounted for.
 - For part (4) he explained that he did not feel the information was accurate. He explained that there must be a limit of liability in the contract and someone must have signed it. This is because he believed that it was impossible that the lawyers could act without an agreed contract.
 - For part (5) he explained that he had asked for a copy of the signed authorisation. He did not want financial information or legal privileged information as this was not requested.
 - He explained his view that this case showed that the Council's poor understanding and application of the Act.
17. On 1 July 2009 the Commissioner acknowledged receiving this email. On 2 July 2009 the Commissioner wrote to the complainant to confirm the initial scope of his investigation as the first three bullet points in the paragraph above.
18. On 15 July 2009 the complainant explained that he was happy that the scope could be as the Commissioner suggested. He also emphasised however, that he had general concerns about the public authority's compliance with the Act and he wanted the Commissioner to take action with regard to these issues.
19. On 16 July 2009 the Commissioner explained that he had referred the general concerns to his Good Practice and Enforcement Team and that his investigation, focussed on the three bullet points above, would continue. He explained he had reverted back to the public authority about these three points.
20. Also on 16 July 2009 the Commissioner wrote detailed enquiries to the public authority. He asked for it to justify its application of section 12(1), section 42 and

section 43(2). He also provided guidance on the application of the exemptions, asked for copies of the information that was being withheld and asked the public authority to explain its position in relation to part (5) of the request. He received a response on 6 August 2009.

21. Between 11 August 2009 and 7 September 2009 the Commissioner made further attempts at informal resolution of the case. He negotiated with the public authority regarding the provision of information which, whilst falling outside the original scope of the request, might assist the complainant in his understanding of the underlying issues. The result of this was that further information that was outside the scope of the request was provided to the complainant on 7 September 2009.
22. On 9 September 2009 the Commissioner wrote to the complainant. He explained that he believed at this stage that there remained no outstanding information in relation to the complainant's request, and that a Decision Notice would therefore contain no remedial steps. He asked whether the complainant still wished a Decision Notice to be served.
23. On 1 October 2009 the complainant replied to this email. He thanked the Commissioner for ensuring that he received further information but said that he wanted a Decision Notice to be issued. He stated that he still believed that part (4) of the request had not been answered to his satisfaction and he still had not received the signed authorisation for part (5). He also said that he believed a formal decision notice would help the public authority to accurately monitor and hopefully improve its performance.
24. On 16 October 2009 the Commissioner informed the complainant that a Decision Notice would be drafted. He explained that he would consider the following three things:
 1. To determine whether the public authority holds further recorded information about the limits of the costs about defending the town/village green application at the former [School redacted] (part 4 of the request).
 2. To determine whether the public authority holds further recorded information about the authorisation to assume the costs (part 5 of the request).
 3. To note all the procedural defects in the delays that had been experienced in relation to the request of 7 November 2008.

Scope of the case

25. On 19 January 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. At this point the complainant specifically asked the Commissioner to consider the following points:
 - He was dissatisfied with the response he had received from the public authority.

- He was dissatisfied that the public authority was not answering all his requests for information within twenty working days.

26. On 15 July 2009 the complainant confirmed that he was happy that the scope of this investigation would be limited to:

- The answer part (3) of the request.
- The correct answer to part (4) of the request.
- The authorisation that was relevant to part (5) of the request.

He also stated that he remained unhappy with the public authority's "ongoing poor attitude and performance", of which their handling of this particular request was just one example, and that he would like the Commissioner to address this more general issue. On 16 July 2009 and 9 September 2009 the Commissioner confirmed that the complainant's more general concerns would be referred to the Commissioner's Good Practice and Enforcement team whose role was to focus on more general working practices, rather than individual complaints.

27. On 16 October, following the complainants confirmation that he was still not satisfied with the public authority's response to part 4 and part 5 of the request the Commissioner confirmed that his Decision Notice would consider these two outstanding issues. In this letter the Commissioner also stated that the Decision Notice would note all procedural defects that had been experienced in relation to the request of 7 November 2008.

28. Whilst the Commissioner notes that his letter of 16 October 2009 stated that all defects related to the request of 7 November 2008 would be noted in the Decision Notice, he also notes that the complainant had previously agreed that only the parts of the request where information remained outstanding would be investigated. As only these aspects of the request have been fully investigated the Commissioner has restricted his findings to only cover parts 4 and 5 of the request. As stated above, the more general issues have been referred to the Commissioner's Good Practice and Enforcement team. The Commissioner acknowledges that his letter of 16 October 2009 was misleading in this respect

Analysis

Substantive Procedural Matters

Is the information environmental?

29. The Commissioner has firstly considered whether the request made by the complainant was a request for environmental information as defined by the EIR.
30. The Commissioner considers that parts 1 to 5 of the request would fall within the definition given at regulation 2(1)(c) of the EIR : ' Information on ...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 designed to protect those elements.'

31. The Commissioner considers that the registration of a piece of land as a village/town green would be a measure likely to affect the state of the elements of the environment. This is because the granting or denial of such a registration would determine the future use to which the land could be put, which would be likely to affect that state of the land and landscape as referred to in regulation 2(1)(a). He further considers that part 1 to 5 of the request would all qualify as information on this measure.
32. The Commissioner accepts that request 6, for the name of the person acting as Head of Legal Services, was a more general question that was not specifically related to the registration application. He therefore considers that this information was not environmental information and thus the choice of the Freedom of Information Act as the relevant legislation for this part of the request was correct. However, as this is not information that the complainant has identified as still outstanding, the Commissioner has not considered the public authority's handling of this aspect of the request any further in this notice.

Is further relevant recorded information held in relation to parts 4 and 5 of the request?

33. In this case the public authority confirmed its view that it did not hold the specific information that the complainant sought and that it was unable to provide it. As the Commissioner has determined that parts 4 and 5 of the request were for Environmental information, he has considered the public authority's position under the EIR.

Exception

Regulation 12(4)(a)

34. The EIR are worded so that information not being held does not mean that the only thing the public authority is required to do is to say that it is not held. Instead the public authority is required to apply the exception found in Regulation 12(4)(a), which allows a request to be refused where the information is not held.
35. The Commissioner appreciates that the wording of Regulation 12(1)(b) specifies that 12(4)(a) is a qualified exception. It would therefore imply that a public interest test would need to be conducted when information is not held. The Commissioner believes that a public interest test in the event where the information is not held would serve no useful purpose. This is because even if the public interest test favoured disclosure the public authority would still not hold the information to enable it to be released. He therefore does not consider a public interest test when he adjudicates the application of Regulation 12(4)(a) and he has not done so in this case.
36. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the time of the request

for information. This is the only information that a public authority is obliged to provide.

37. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.
38. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It will also require considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

Part 4 of the request

39. The complainant maintained that the public authority must have imposed some limits on the legal fees it was prepared to endure to ensure that the land did not become designated a town or village green. He pointed out that otherwise it was possible that its exposure to these fees would be unlimited. He explained that unlimited exposure would not correspond with the public authority's constitution and therefore he did not believe the answer he had received to this question.
40. The public authority explained that it whilst it was keeping the amount of money paid under review as to the reasonableness of the fees; it had no set limits on the amount of money it was to pay. It explained that the Project Board of the Council as landowner had made the decision to oppose the designation of the land and had instructed [the firm redacted] to do the necessary work. It explained that its position should be understood in context. It said that it was not possible to reliably estimate the costs at the commencement of the matter. The solicitors employed had a professional duty to ensure that the public authority was regularly provided with updated costs reports, risk benefit analyses and estimates of future costs to ensure that value and budget considerations were made. Not having a set limit at the outset ensured a level of flexibility and was realistic in the circumstances.
41. It provided the complainant with a redacted copy of the letter from the firm that explained its costs and the letter from it explaining that it wished for it to act. It provided the Commissioner with a full copy of the same correspondence. The correspondence did not specify any limit on costs that the public authority would be prepared to meet in relation to the TVG application work. Instead the firm were instructed to do what was required. This instruction came within the wider project where there are fifteen such schools and the firm were dealing with the majority of the legal work for the wider project.

42. The Commissioner is satisfied that on the balance of probabilities the Council holds no information about the limits on the legal fees. This is because he believes that the public authority did not set any limits on this specific issue as they viewed it as part of the wider project.
43. He therefore finds that the exception found in Regulation 12(4)(a) applies to part 4 of the request in this case.

Part 5 of the request

44. The Commissioner notes that in its correspondence of 17 June 2009 the public authority stated that it was withholding this information under a number of FOI exemptions, implying that it did in fact hold this information. In the course of the Commissioner's investigation it became clear that the information to which the exemption was being applied was not actually the information covered by part 5 of the request, and that the public authority's position in relation to part 5 of the request was that this information was not held. The Commissioner has therefore considered the application of the exception at 12(4)(a) of the EIR to this information.
45. The complainant believes that it would have been reasonable for there to have been an authorisation for assuming these legal costs after the contract with the company was terminated. This was because the costs are a large sum of money and the Council were now required to pay them. He explained that it would be assumed to be necessary as it would need to come out of the Council's budget and this was an unexpected expense. He did however state that he suspected the decision may not have happened and this is why it did not exist.
46. The public authority explained that the decision to defend the action had been taken by the Project Board and that it was assumed to be part of the overall project and that it was dealt with by its usual solicitors. It explained that it did not hold a specific authorisation as it did not see the defending of the application itself as a separate piece of work distinct from the overall project. It explained that it defended the application in its normal course of business as a land owner. The consequences of the land being declared a village or town green would prevent it being developed at all and this would obviously prejudice its rights.
47. The Commissioner is satisfied that on the balance of probabilities the Council holds no recorded information concerning an authorisation to assume the legal fees for the work required to oppose the application to make the land a village green. He can make no comment about the reasonableness of this position.
48. He therefore finds that the exception found in Regulation 12(4)(a) applies to part 5 of the request.

Procedural Requirements

49. The Commissioner has chosen to consider the procedural breaches by order of the Regulation that imposes them. He has considered the evidence in the request and analysis sections above.

Regulation 5(1)

50. Regulation 5(1) requires that a public authority that holds environmental information shall make it available on request.
51. In this case as the Commissioner has found that the public authority does not hold the information requested in part 4 and part 5 of the request, he finds that the public authority had no duty under Regulation 5(1) and thus did not breach this section.

Regulation 9 – Advice and assistance

52. The Commissioner has considered the advice and assistance provided in this case and whether it corresponds with its obligation in regulation 9. The full text of Regulation 9 is provided in the legal annex to this notice.
53. The Commissioner has analysed each paragraph of the Regulation 16 Code of Practice and its application to the facts of this case. The Code should be read always taking into account that its purpose is to ensure 'reasonable advice and assistance' is provided.
54. Paragraph 14 states that staff in public authorities in contact with the public should bear in mind that not everyone will be aware of the EIR or the FOIA and they should draw the legislation to the attention of potential applicants who appear to be unaware of them. The Commissioner believes it would have been reasonable for the public authority to have identified that the majority of this request fell under the EIR rather than FOIA, and to have drawn the complainant's attention to the existence and provisions of the EIR. He therefore considers that the public authority has breached regulation 9(1) in this respect. He does not require any remedial steps in relation to this breach as the detail provided within this notice serves the purpose that would be met by the ordering of such a step.
55. Paragraph 16 requires that the public authority requests clarification where it is unclear what the request is asking for. The public authority did request clarification in this case. The Commissioner is satisfied that this request for clarification was reasonable in the circumstances and was not a breach of Regulation 9(1).
56. Regulation 9(2) provides that when a request is formulated in too general a manner, a public authority shall ask the applicant for any further details it requires within 20 working days after the receipt of the original request. In this case, as acknowledged by the public authority, it did not ask for clarification of part 5 of the request of 7 November 2008 until 15 December 2008. As this period exceeds 20 working days the Commissioner finds the public authority in breach of Regulation 9(2).

Regulation 11

57. Regulation 11 formalises the internal review process under the EIR. Regulation 11(1) provides that an applicant may make representations to a public authority if it appears to the applicant that the public authority has failed to comply with the Regulations.
58. Regulation 11(3) provides that:
- 'The public authority shall on receipt of the representation 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.'*
59. Regulation 11(4) requires that in such a situation a response to the applicant's representations should be provided no later than forty working days from the date that the request for such an internal review was received.
60. In relation to part 4 of the request, the complainant first made representations against the public authority's response on 16 December 2008.
61. On 5 February 2009, the authority communicated the findings of its review of the initial handling of the complainant's request. In relation to part 4 of the request its finding was that it considered its original response to be clear, but that it would go on to consider the applicant's challenge to its accuracy.
62. On 17 June 2009, over 120 working days from the date on which the complainant first expressed dissatisfaction with the handling of his request, the authority completed its consideration of the applicant's challenge about the accuracy of its initial response. Whilst providing some further explanation, the public authority maintained its original position that it held no information about the upper limit of costs, as no such limit existed. The Commissioner finds a breach of Regulation 11(4) in relation to part 4 of the request as the public authority took more than 40 working days to consider the representation made by the applicant and advise him of its decision in this respect.
63. In relation to part 5 of the request, the public authority received the necessary clarification of the request on 16 December 2008. The Commissioner's view is that where clarification of a request is required and is then received the clarification constitutes a new request for information. The public authority's report of 5 February 2009, whilst reviewing the clarification process, failed to actually address this new request at all. The applicant did not specifically make representations to the public authority about its failure to answer the new request of 16 December 2008, as by the time he received the report of 5 February he had already placed his complaint in the hands of the Commissioner. The new request of 16 December 2008 was not actually addressed by the public authority until 17 June 2009. In this circumstance, the Commissioner is unable to find the public authority in breach of Regulation 11(4) but he has considered the public authority's failure to respond to this request until 17 June 2009 under his consideration of the public authority's compliance with Regulation 14.

Regulation 14

64. Regulation 14 explains what is required when a request for environmental information is refused by a public authority. It states that where a public authority refuses to provide information it should state the exception that it is relying on and the matters that were considered in its analysis of the public interest within twenty working days.
65. In this case the public authority did not believe it was providing a refusal notice under the EIR. It did not therefore rely on any EIR exceptions. However, in its correspondence with the Commissioner, it did maintain a position that no information to meet parts 4 and 5 of the request was held. The Commissioner considers that the public authority was, in effect, relying upon the exception found at Regulation 12(4)(a) of the EIR for information, which applies when information is not held by a public authority when a request is received.
66. In relation to both part 4 and part 5 of the request the Commissioner finds that the public authority breached regulation 14(1) as it failed to comply with the following requirements of Regulation 14.
- 14(2) – the requirement to provide a refusal notice under the EIR within 20 working days after the date of receipt of the request.
 - 14(3)(a) – the requirement to specify that it was relying upon the exception at Regulation 12(4)(a) of the EIR
 - 14(5)(a) – the requirement to inform the applicant that he may make representations to the public authority under Regulation 11 of the EIR.

The Decision

67. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Regulations:
- It was entitled to rely on the exception found in Regulation 12(4)(a) for the two outstanding items of the request. It therefore had no duty to provide information under regulation 5(1) and thus did not breach this regulation.
68. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:
- It contravened Regulation 9(1) in relation to both part 4 and part 5 of the request, in failing to offer reasonable advice and assistance in this case.
 - It contravened Regulation 11(4) in relation to part 4 of the request in failing to provide an internal review within forty working days.

- It contravened both Regulation 14(1) in relation to both part 4 and part 5 of the request, as it failed to meet the requirements of regulation 14(2), 14(3)(a) and 14(5)(a) .

Steps Required

69. The Commissioner requires no steps to be taken.

Other matters

70. For the reasons given under the heading 'scope of the case' above, the Commissioner has only made detailed findings in relation to part 4 and part 5 of the request. He would comment that this omission should not be taken to mean that he has found the public authority's handling of the other parts of the request to be satisfactory.

Right of Appeal

71. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 9th day of November 2009

Signed

**Lisa Adshead
Senior Policy Manager**

**Information Commissioner's Office
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Legal Annex

* Environmental Information Regulations 2001

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

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- (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) and (b) 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 elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 3 – Application

Regulation 3(1) Subject to paragraphs (3) and (4), these Regulations apply to public authorities.

Regulation 3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority’s possession and has been produced or received by the public authority; or
- (b) is held by another person on behalf of the public authority.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public

authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 9 - Advice and assistance

Regulation 9(1) provides that –

'A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.'

Regulation 9(2) provides that –

'Where a public authority decides that an applicant has formulated a request in too general a manner, it shall -

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.'

Regulation 9(3) provides that –

'Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.'

Regulation 9(4) provides that –

'Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.'

Regulation 9(5) provides that –

'The provisions referred to in paragraph (4) are -

(a) regulation 5(2);

(b) regulation 6(2)(a); and

(c) regulation 14(2).'

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), 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.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority 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.

Regulation 11(3) 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.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(4)(a) provides that –

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

- (a) it does not hold that information when an applicant's request is received...'*

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

*** Freedom of Information Act 2000**

Section 1 - General Right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.