

## Environmental Information Regulations 2004

### Decision Notice

Date: 7 January 2010

**Public Authority:** Fareham Borough Council  
**Address:** Civic Offices  
Civic Way  
Fareham  
PO16 7AZ

### Summary

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The complainant made a number of requests to Fareham Borough Council ('the Council') between January 2005 and November 2008. The Council refused to respond to the complainant's latest request citing section 14 of the Freedom of Information Act 2000. The Commissioner investigated and determined that the request should have been considered under the Environmental Information Regulations 2004 (EIR) and the Council subsequently applied regulation 12(4)(b). The Commissioner concluded that regulation 12(4)(b) was not engaged. The Commissioner requires the Council to confirm or deny whether the information is held and if held, either disclose this information to the complainant or issue the complainant with a valid refusal notice under regulation 14 of the EIR.

### The Commissioner's Role

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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 Environmental Information Regulations 2004.

### Background

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2. The request for information concerns the planning history of a site known as the 'Crofton House Site'.

3. The Crofton House Site has a long and complicated planning history that predates April 1974 – the date on which Fareham Borough Council became the local planning authority.
4. There have been 3 public enquiries relating to planning matters regarding the site:
  - July 1986 – appeals concerning the refusal of an Established Use Certificate (EUC) application and an enforcement notice
  - November/December 1990 – appeal against a further EUC application and 5 enforcement notices
  - June 1994 – relating to a further enforcement notice.

## The Request

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5. On 12 January 2008 the complainant made a request to the Council to inspect  
“..all files FBC [Fareham Borough Council] keeps on ‘Crofton House’ including all the photographs and negatives.”
6. The Council made arrangements for the complainant to inspect the files on 18 March 2008 and 19 March 2008.
7. Following the inspection of the files, the complainant contacted the Council on 5 April 2008 to advise that he believed some of the information and photographs had been removed from the file. The complainant requested sight of the information he considered to be missing from the file.
8. On 23 June 2008 and 22 July 2008 the complainant sent further requests to the Council for the information which he considered to be missing from the file. The complainant identified the following information as missing:
  - Documents stored on microfilm, that the complainant considered were in the file in 2005
  - Correspondence between two individuals dated 23 April 1985, 9 January 1986 and 16 January 1986
9. The Council responded to these requests on 1 September 2008. It explained to the complainant that some of the microfilm had been destroyed since 2005 as the index to the records had been destroyed making the film unusable. The Council also stated that no information or photographs had been removed from the files. On 2 September 2008 the Council provided the complainant with the correspondence dated 23 April 1985 and 16 January 1986 and stated that the correspondence dated 9 January 1986 could not be found.
10. On 8 October 2008 the complainant’s Solicitors wrote on his behalf to the Council to ask for the following information:

“...we request copies of the following documents concerning the Site:

1. All handwritten notes produced by planning officers;
2. Letter from [a named person] of Fareham Borough Council, believed to have been signed by [a named individual] to [a named individual] of Hampshire County Council dated 9 January 1986;
3. All correspondence between Fareham Borough Council and Hampshire County Council concerning the Site;
4. When our client [name of complainant] last inspected your files, which was on the 18/19 March 2008 he noted that a number of documents were missing from the files since his last inspection of the files, which took place on 8 April 2005. These documents included microfilm and photographs. In this regard it may be easier for you to allow [the complainant] to re-inspect your files to identify missing documents. Alternatively, please provide us with copies of the items which have been removed. Written evidence has been provided previously from council officials that you hold photographs of the Site.”

11. The Council responded on 20 October 2008, the Council advised that it considered that the request was similar in nature to numerous other requests submitted to the Council which it had answered in full. The Council therefore deemed the request to be vexatious and cited section 14 of the Act.
12. The Complainant requested an internal review of the Council's application of section 14 of the Act on 25 November 2008.
13. The Council responded to the request for internal review on 2 December 2008, upholding its decision to apply section 14 of the Act to the request.

## The Investigation

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### Scope of the case

14. On 23 April 2009 the complainant asked the Commissioner to investigate this matter. In particular, he asked the Commissioner to consider whether the Council's application of section 14 of the Act to his Solicitor's request of 8 October 2008 was reasonable.

### Chronology

15. On 22 April 2009 the Commissioner wrote to the Council requesting further information on its application of section 14 of the Act. The Commissioner also advised the Council that he considered that the

information might be environmental information and asked it for its view.

16. The Council responded on 21 May 2009. The Council agreed with the Commissioner's view that the requested information was environmental and that the relevant access regime was therefore the EIR. The Council stated its view that the request was manifestly unreasonable and that regulation 12(4)(b) was therefore applicable. The Council provided representations in support of its application of regulation 12(4)(b).

## Analysis

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### The Relevant Access Regime

17. The Council considered the complainant's request under the terms of the Act. However, having considered the information requested the Commissioner took the view that the information requested constitutes environmental information as defined by the EIR.
18. The Commissioner considers that on the whole, planning applications and the planning approval process, constitute administrative measures likely to affect the elements and factors listed in regulation 2(1)(a) and (b). For example the Commissioner considers that planning regulations affect the land use and landscape.
19. The Commissioner is therefore satisfied that the information requested falls within the broad definition set out in regulation 2(1)(c) of the EIR.

### Regulation 12(4) (b) – Manifestly unreasonable

20. Regulation 12(4) (b) states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. There is no definition of the term "manifestly unreasonable" but the Commissioner's view is that the word "manifestly" implies that a request should be obviously or clearly unreasonable. There should be no doubt as to whether the request was unreasonable.
21. The Commissioner recognises the similarities between section 14 of the Act and regulation 12(4)(b) of the EIR. In particular the Commissioner considers that a request that could be considered vexatious or repeated under section 14 of the Act is likely to be manifestly unreasonable for the purposes of the EIR. However, whilst section 14 of the Act provides that a public authority can simply refuse to comply with a request it considers to be vexatious or repeated, the same can not be said for regulation 12(4)(b). Regulation 12(4)(b) is an exception under the EIR and is therefore subject to the public interest

test at regulation 12(1)(b). The Commissioner is also mindful of the presumption in favour of disclosure which is conferred by regulation 12(2).

22. The Commissioner's approach when considering vexatious and repeated requests is to consider the following questions:
- Could the request fairly be seen as obsessive or manifestly unreasonable?
  - Is the request harassing the authority or causing distress to staff?
  - Would complying with the request impose a significant burden?
  - Is the request designed to cause disruption or annoyance?
  - Does the request lack any serious purpose or value?

### **Council's position**

23. The Council explained to the Commissioner that it had given the complainant access to the Crofton House Site records on numerous occasions. The Council explained that the records are made up of a number of boxes which contain an array of information (documents, microfilm and photographs) relating to the site over the last 25 years. In addition, the Council stated that Committee papers going back to the 1960's have also been made available to the complainant over the last 4 years.
24. The Council explained that it had received numerous requests from the complainant and had provided advice and assistance to him in trying to locate the information he requested. The Council collated the requests made by the complainant in relation to the site and provided details to the Commissioner.
25. The Council stated that the complainant had been given ample opportunity during his inspection of the site records and committee minutes to locate the information himself. The Council advised the Commissioner that it had not added or removed information during or since the complainant's visits to inspect the files.
26. The Council advised that it would be a distraction to spend further time locating the information that the complainant could not locate himself.
27. The Council also argued that the request for information was designed to cause disruption and annoyance.

### **Complainant's position**

28. The complainant explained to the Commissioner that he has, on several occasions, requested the notes and notebooks of a particular

former employee. Further the complainant advised that he had obtained evidence that the Council held the information, although he did not provide this to the Commissioner.

29. As the Council had not informed him in previous requests whether it held the information he was requesting, the complainant considered that information had been removed from the files that he had inspected, and thus continued to request the information.

## **Commissioner's position**

### **Context and history**

30. The Council have stated that the history in this case has an important bearing on its decision. It explained that it had received at least 26 requests from the complainant in relation to the Crofton House site between January 2005 and November 2008.
31. The Commissioner's Awareness Guidance<sup>1</sup> on the subject of vexatious and repeated requests states that:
- "A request may not be vexatious in isolation but when considered in context (for example it is the latest in a long series of overlapping requests or other correspondence) it may form a wider pattern of behaviour that makes it vexatious".
32. This was the view of the Information Tribunal in *Betts v Information Commissioner (EA/2007/0108)*. In this case the Tribunal considered not just the request but the background and history to the request as part of a long drawn out dispute between the parties. The request was considered vexatious when viewed in context as it was a continuation of a pattern of behaviour.
33. However, the Commissioner's Awareness Guidance also states that: "The context of a request may occasionally indicate that it should not be considered vexatious. For example, your previous dealings with a requester may show that they have a good reason for making persistent requests...For example; a series of successive linked requests may be necessary where disclosures are unclear or raise further questions that the requester could not have foreseen. Similarly, in the context of a dispute, a request may be a reasonable way to obtain new information not otherwise available to the individual".
34. The complainant has submitted that if information had been supplied when requested, a great deal of unnecessary correspondence would have been avoided and the matters have only arisen due to the

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_22\\_vexatious\\_and\\_repeated\\_requests\\_final.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_22_vexatious_and_repeated_requests_final.pdf)

Council's failure to respond appropriately to his requests for information.

35. The Commissioner has been provided with details of the requests made to the Council and its responses. He notes a number of procedural inadequacies in the handling of the requests, including the failure to offer an internal review and failing to state whether the information requested is actually held by the Council (further detail concerning the Council's handling of the complainant's requests can be found in annex 1). The Commissioner's view is that the failure to state whether the requested information was held led the complainant to submit further requests seeking clarity.
36. The Commissioner is of the opinion that an important point to note is that it is the request rather than the requestor which must be manifestly unreasonable. A useful test is whether the information would be supplied if it were requested by another person, unknown to the Council. If this would be the case, the information should normally be provided as the Council cannot as a general rule discriminate between different requestors.
37. Whilst it may be reasonable for the Council to conclude that a particular request represents a continuation of behaviour which it has judged to be vexatious, it is the Commissioner's view in this case that the previous behaviour can not justify judging the request as unreasonable. This is because of the Council's inadequate handling of the complainant's previous requests.
38. In order to arrive at a balanced opinion, consideration has also been given to the five points set out at paragraph 22.

### **Can the request fairly be seen as obsessive?**

39. In his Awareness Guidance on the subject of vexatious and repeated requests the Commissioner recognises that obsessive requests are usually a very strong indication of vexatiousness. The Guidance states that:

"Relevant factors could include the volume and frequency of correspondence, requests for information the requestor has already seen, or a clear intention to use the request to reopen issues that have already been debated and considered".

40. The Commissioner is of the opinion that there is not a strong argument relating to the volume and frequency of correspondence in this case as although the Council stated that the complainant has made at least 26 requests, when the evidence has been examined by the Commissioner it appears that a number of these requests should have been considered to be requests for an internal review, and therefore a number of 'requests' can be disregarded.



41. Whilst the Commissioner accepts that the volume and frequency of requests is demonstrative to some extent of obsessive behaviour, he considers there is a thin line between obsession and persistence and each case should be determined on its own facts.
42. In this case, the Commissioner does not consider that the nature of the request falls within this definition of obsession. The matters the complainant is concerned about remain unresolved, as he is unclear as to whether the information he requested is held by the Council. Therefore, there is a possibility that more information could be made available to assist his understanding of the issue.
43. For the reasons outlined above, the Commissioner is unable to conclude that the request is obsessive.

**Is the request harassing the public authority or causing distress to staff?**

44. The Council has not submitted any arguments in relation to this point.
45. The Commissioner has not therefore considered this factor.

**Would complying with the request impose a significant burden in terms of expense and distraction?**

46. The Commissioner's Awareness Guidance on the subject of vexatious and repeated requests states that:

"The wider context of a request is likely to be relevant here. You may be able to conclude that responding to a relatively simple request would still impose a significant burden because any response would be very likely to lead to a significant number of further requests and complaints. However, you would need to be able to support this argument with evidence from extensive previous experience with the individual concerned. "
47. The Council has confirmed that it has searched for the information requested and the results of the searches have been communicated to the complainant. It therefore argued that a further request for the same information is a distraction to the Council. The Council believes the latest request to be repeated as it has previously answered similar requests by the complainant.
48. However, for the reasoning outlined in paragraphs 30 to 38 above, the Commissioner has determined in this case that the previous behaviour can not justify judging the request as unreasonable. As a result of this conclusion, and in the absence of any further representations from the Council in relation to this point, the Commissioner has concluded that complying with the request would not impose a significant burden.



**Is the request designed to cause disruption or annoyance?**

49. The Council has suggested that by repeating the request it is designed to cause disruption and annoyance to the Council.
50. The Commissioner has seen no evidence to suggest that the complainant's intention is to cause disruption or annoyance. It appears to the Commissioner that the request is designed to clarify the issues that have been raised as a result of the Council's inadequate handling of his previous requests.
51. On this basis, the Commissioner is unable to conclude that this element of vexatiousness is present.

**Does the request lack any serious purpose or value?**

52. The Council has asserted that responding to the request will not provide any further information that would add value to the complainant's understanding of matters relating to the Crofton House site.
53. The Commissioner does not agree that there is nothing to be gained from responding to the request, particularly given that the Council has not confirmed or denied whether the information requested is held.
54. The Commissioner believes that the available evidence does not demonstrate that the request is manifestly unreasonable and he therefore finds that regulation 12(4)(b) is not engaged in this case. As the exception is not engaged, the Commissioner has not gone on to consider the public interest test inherent in this exception.

**Procedural Requirements**

**Regulation 14**

55. The Commissioner finds that the Council ought to have considered the request under the EIR rather than the Act. In failing to deal with the request under the correct access regime, the Commissioner finds that the Council was in breach of Regulation 14(3) of the EIR.

**Regulation 14(3)(b)**

56. Whilst the Commissioner has determined that the exception available at regulation 12(4)(b) is not engaged, he notes that the Council did not provide any public interest arguments in relation to its application of regulation 12(4)(b). In failing to consider the public interest test when applying regulation 12(4)(b) the Commissioner finds that the Council breached regulation 14(3)(b).

## The Decision

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57. The Commissioner's decision is that the public authority did not deal with the following aspects of the request for information in accordance with the EIR:
- It incorrectly applied the exception at regulation 12(4)(b) to the request.
  - In providing a refusal notice that referred to exemptions under the Act rather than exceptions under the EIR, the Council breached regulation 14(3).
  - In failing to consider the public interest test the Council breached regulation 14(3)(b)

## Steps Required

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58. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The Council should reconsider the request of 8 October 2008 and provide the information requested or issue a valid refusal notice that complies with regulation 14 of the EIR. Unless the exception from the duty to confirm or deny under 12(5)(a) is claimed, then any refusal notice should explicitly state whether or not the information is held.
59. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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60. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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61. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 7<sup>th</sup> day of January 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

**Section 14(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

**Section 14(2)** provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

### Environmental Information Regulations 2004

**Regulation 2(1)** ...“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 –

- (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;

**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 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 the 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)** 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;
- (b) the request for information is manifestly unreasonable;

**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.

## Annex 1

All of the following requests were submitted by the same complainant and relate to substantially the same information as requested on 8 October 2008 (the request with which this Notice is concerned).

### **Request dated 10 February 2005**

Request for documents from the Crofton House file

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

### **Request dated 28 February 2005**

Request for documents from the Crofton House file

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

### **Request dated 26 April 2005**

Request for documents from the Crofton House file

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

### **Requests dated 26 April 2005 and 1 May 2005**

Request for documents from the Crofton House file

- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

### **Request dated 2 November 2005**

Request for documents from the Crofton House file

- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

### **Request dated 8 November 2005**

Request for documents from the Crofton House file

- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

### **Request dated 13 February 2006**

Request to view the Crofton House file

- Council provided an opportunity to inspect files

### **Requests dated 17 October 2006 and 5 November 2006**

Request to inspect Planning Committee Minutes from 1974-1990

- Council stated information was confidential but did not provide details of the exception it was relying on in accordance with regulation 14(3)(a) and (b)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

**Request dated 29 October 2007**

Request for information the complainant considered to be missing from the Crofton House site.

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

**Request dated 4 November 2007 (received 20 February 2008)**

Request for documents from the Crofton House file

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

**Request dated 12 January 2008**

Request for information the complainant considered to be missing from the Crofton House site including request to view file.

- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

**Request dated 2 February 2008**

Request for information on delegated responsibility in relation to Crofton House. Correspondence also contained request for internal review.

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

**Requests dated 4 February 2008, 13 February 2008 and 12 March 2008**

Request for photographs and information from the Crofton House file the complainant considered was missing. Further request also made to view the file.

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)
- Council also potentially breached 14(2) in failing to refuse to provide a full refusal within 20 working days

**Request dated 5 April 2008**

Request to view the complete file including photographs and information missing from the Crofton House



- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)

**Request dated 23 June 2008**

Request to inspect files to view information considered to be missing from the file.

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)
- Council also potentially breached 14(2) in failing to refuse to provide the a full refusal within 20 working days

**Request dated 22 July 2008**

Request for documents from the Crofton House file

- Council did not confirm or deny whether the information was held in accordance with regulation 12(4)(a)
- Council did not provide the complainant with details of its internal review procedure in accordance with regulation 14(5)(a)(b)