

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

**Decision Notice**

**Date: 14 March 2011**

**Public Authority:** English Heritage  
**Address:** The Historic Buildings and Monuments  
Commission for England  
Kemble Drive  
Swindon  
SW2 2GZ

**Summary**

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The complainant requested information from English Heritage about what consultation had taken place regarding proposed developments in Norwich Cathedral Precinct. English Heritage refused on the grounds that there was nothing further held beyond what had already been provided to the complainant.

The Information Commissioner decided that the Environmental Information Regulations 2004 (the "EIRs") applied. He decided that English Heritage had not recognised that the EIRs applied but that any further information requested was not held. The Commissioner is satisfied on a balance of probabilities that English Heritage holds no further information with regard to this request other than what it had already provided to the complainant in response to previous requests.

**The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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

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3. The complainant first wrote to the Commissioner on 27 May 2010 enclosing correspondence between herself and English Heritage dating back some years. Over the course of the following few months the Commissioner attempted to clarify the original request for information with the complainant. In an effort to resolve the issue he obtained the document that English Heritage believed was the original request for information. The complainant was unable to confirm that this was the case. Having attempted to ascertain what the original request consisted of by email and telephone the Commissioner wrote to the complainant on 7 October 2010 asking for clarification, otherwise the complaint would be closed. Despite these efforts the Commissioner remained unclear as to the request which formed the basis of the complaint. Consequently the case was closed.
4. However, the complainant did not accept the case closure and continued to correspond with the Commissioner. On 19 November 2010 the Commissioner was finally able to clarify the original request for information with the complainant and was satisfied that he could now begin an investigation of the complaint.

## The Request

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5. On 9 May 2009 the complainant made the following request for information:  
  
*"Now please avail to me (via Freedom of Information) all the copy by which the East Director states "there was consultation".*
6. On 17 June 2009 English Heritage wrote to the complainant regarding what "consultation" had taken place over Norwich Cathedral Close. The complainant was provided with a letter from one of English Heritage's staff which explained its position as a consultee in relation to the Cathedral Close.
7. On 24 June 2009 the complainant responded suggesting that English Heritage look at her request under the Environmental Information Regulations 2004. She asked for access to all other communications between English Heritage and Norwich Cathedral regarding all Planning and Development matters for the entirety of that area as she

suggested that some areas had not been included. The Commissioner does not consider this to be a new request but rather a reiteration of the 9 May 2009 request.

8. English Heritage responded to this on 29 July 2009 confirming that it did not hold information falling within the ambit of her request. The regularity of the complainant's correspondence was also highlighted. Since January 2005 the complainant had sent over fifty letters and emails some of which were requests for information. English Heritage stated that a number of members of staff had been involved in these communications and that a great deal of staff time had been occupied in responding to these communications which placed a burden on staff time and resources in view of the size of the regional office. As a result English Heritage suggested that it was considering the application of section 14 of the FOIA to any further requests.
9. The complainant requested an internal review on 22 August 2009 and the following day outlined what she believed to be the "relevant copy".
10. On 8 October 2009 English Heritage, having apologised for the delay, sent the complainant documents that it suggested she had probably already been sent in response to an earlier request. It stated that these documents were part of the planning record for 56A, B and C The Close and were available from Norwich City Council.

## The Investigation

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### Scope of the case

11. The scope of this case is confined to whether English Heritage held more information in relation to the "consultation" that had taken place over Norwich Cathedral Close at the point the complainant's request was made than had already been provided to the complainant in response to previous requests. In establishing the scope the Commissioner made a series of clarifications outlined below.
12. The Commissioner tried to clarify this request further on 17 November 2010:  
  
*"By consultation I understand you are referring to the consultation on development proposals for 56A, B and C The Close as outlined by English Heritage in its internal review response to you of 8 October 2009. You emphasised that the scope of your request would cover any information involving consultation that would affect the above properties."*

13. On 24 January 2011 the Commissioner made his final clarification and confirmed with the complainant that the request of 9 May 2009,

*"...was referring to the consultation on development proposals for the majority of the cathedral precinct area and not just the specific buildings 56A, B and C The Close (as stated in your telephone messages to me over the weekend of 20/21 November and my follow up email of 22 November confirming this to be the case)."*

The complainant did not dispute this further clarification of the scope of her request i.e. that she was referring to the majority of the cathedral precinct area as defined above. He has therefore proceeded with the investigation of her complaint on this basis.

14. After the Commissioner wrote to English Heritage on 22 November 2010 he received the correspondence that had passed between it and the complainant subsequent to the request being made.
15. On 27 May 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. After clarification had been obtained in November 2010 the complainant asked the Commissioner to look at whether English Heritage held any further requested information as she was incredulous that nothing falling within her request seemed to have been held by English Heritage's Planning and Development Department. The Commissioner has therefore confined his investigation to this issue.
16. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## **Chronology**

17. On 22 November 2010 the Commissioner wrote to English Heritage explaining his decision to reopen the complaint after having gained clarification from the complainant. He underlined the fact that he could only determine "on the balance of probabilities" whether further information was held at the date the request for information was made. Additionally the Commissioner requested that English Heritage identify and send the relevant documentation associated with this request. In order to assist with his determination the Commissioner asked specific questions regarding how English Heritage had determined that no further information was held.
18. English Heritage wrote back to the Commissioner on 13 January 2011. In this letter English Heritage explained the following:
- That when it had received the 9 May 2009 request it had not viewed it as a new request but rather as a reiteration of an ongoing

complaint that the complainant had not received what she had expected.

- English Heritage maintained that it had already provided everything it held in relation to Norwich Cathedral Precinct as part of previous requests.
- Since 2005 many attempts had been made by English Heritage to identify the information the complainant required.
- English Heritage believed that the request was made as a result of a misunderstanding when one of their regional directors had stated in a letter to the complainant that English Heritage was 'consulted' on proposals by the local authority. It further explained that this is a standard part of its statutory remit and means that English Heritage provided its advice and views to Norwich City Council on the planning proposals. All correspondence was in the case file and had been provided to the complainant in response to previous requests.

The Commissioner understands from this response that English Heritage's view is that it has already provided any held information that falls within the scope of the 9 May 2009 request to the complainant in response to previous requests.

19. English Heritage went on to respond more fully to the Commissioner's questions as outlined in his letter of 22 November 2010:

- What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

English Heritage responded stating that information on each case dealt with by the Regional Planning and Development teams is held in a registered, paper case file. This is the official and formal record and all information about a case will be placed on that case file. In this situation this would have included any correspondence it had produced in relation to the case. Information amounting to the whole of the case file had previously been provided to the complainant.

- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

English Heritage explained that all information generated relevant to a case of this kind would be printed and stored on the relevant, manual case file as its formal record. This is an organised and formally

documented process. It was not necessary to search personal computer records.

- If the information were held would it be held as manual or electronic records?

English Heritage said that if the information existed in the form implied by the complainant's question, it would be placed on the manual case file.

- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

English Heritage stated that the file is held in its entirety and no information has been deleted.

- What does English Heritage's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can English Heritage describe the way in which it has handled comparable records of a similar age?

English Heritage explained that part of its ongoing Records Management strategy is to apply a retention policy to all records held and currently work is being undertaken to progress this. At present files pass into long-term storage and are retained as a record of dealings with a particular site, area or monument. A retention period for such records would be towards the longer end of the spectrum and would probably be around 15-25 years in order to inform further cases, advice-giving and decision making.

- If the information is electronic data which has been deleted, might copies have been made and held in other locations?

English Heritage stated that the case file is held manually at present. Copies of records in the file may also be held electronically on its Concase system or as word-processed documents but the core record remains the documents held in the manual case file.

- Is there a business purpose for which the requested information should be held? If so what is this purpose?

English Heritage explained that it is consulted by the local authority on matters affecting listed buildings. This is its statutory role in the planning process. The term "consultation" does not apply to any wider consultation carried out by it. The records of the advice it had given is held in the case file.

- Are there any statutory requirements upon English Heritage to retain the requested information?

English Heritage said that there are no specific statutory provisions which require it to retain this information, although the need for English Heritage to retain such records can naturally be inferred from the duties that it carries out. The information is retained as a record of what it has done in a particular case, for operational purposes and for future reference where required. It is required to manage its records under the provisions of the Public Records Act.

20. On 24 January 2011 the Commissioner wrote to the complainant outlining his preliminary view, having taken into account the response he had received from English Heritage. He stressed that he had been copied in to English Heritage's response to the complainant which stated that it had provided everything it holds that falls within the scope of the complainant's request. The Commissioner acknowledged that the complainant's view was different. He explained to the complainant that the Commissioner can only determine whether, on the balance of probabilities, further information is held (this approach has been supported by the Information Tribunal in a number of cases such as *Linda Bromley & Others / Environment Agency (EA/2006/0072)*). The Commissioner explained that in considering the balance of probabilities test he had looked at:

- the scope, quality, thoroughness and results of the searches and;
- other explanations offered as to why the information is not held.

21. The complainant maintained that further information must be held. In particular she did not accept that the files were organised in the way claimed by English Heritage based on previous disclosures made to her by it.

22. On 8 March 2011 the Commissioner telephoned English Heritage in order to further query the fact that no electronic searches had been conducted according to its submission of 22 November 2010. English Heritage explained that it was certain that nothing further was held. However English Heritage did make the proviso that, despite attempting to clarify the scope of the complainant's request in order to decide the extent of its searches, it had been unable to fully satisfy itself in this respect. As a result of this inability to clarify the request, it had taken the view that there was "consultation" only in the sense that English Heritage provided advice and views regarding planning proposals to Norwich City Council. It did not recognise what appeared to be the complainant's interpretation of "consultation" as a wider requirement. English Heritage did however state that electronic

searches would have been carried out in order to respond to the complainant's initial request. It also confirmed that its formal record keeping policy is based on paper files and, although an electronic casework system exists, information about "consultation" in the sense the complainant appears to attach to it would not be held.

## **Analysis**

### **Substantive Procedural Matters**

#### **Regulation 5 – Duty to make environmental information available**

23. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. The full text of Regulation 5(1) can be found in the Legal Annex at the end of this Decision Notice.
24. The Commissioner notes that the purpose of any consultatory information with regard to the Norwich Cathedral Precinct was to provide its advice and views to Norwich City Council on planned developments. He decided therefore, that any information that might be held would be likely to be information on a measure, plan or programme (the development plan) likely to affect the state of the elements of the environment and therefore best regarded as environmental information as set out in EIR Regulation 2(1)(c).
25. In determining whether a public authority does hold any requested information the Commissioner uses the normal standard of proof, the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
26. The Commissioner has addressed the complainant's contention that she believed that English Heritage's filing system was not held centrally due to her experience over a previous request. English Heritage explained on 8 March 2011 that all offices (both Head Office and local offices) use the same centrally registered filing system. The Commissioner understands that this has been the situation for some years. English Heritage gave an example of a local officer ringing up and requesting a case file from the central filing system. The file/s would then be sent and returned at a later date. The file itself is not altered nor does the way in which files are stored.
27. The Commissioner has concluded, after considering English Heritage's response to his letter of 13 January 2011, that English Heritage had



provided the complainant with all the information it held falling within the scope of her request in response to previous requests. He accepts that although some documents were provided in response to the 9 May 2009 request (part of the planning record for 56A, B and C The Close) that this information had previously been provided to the complainant. In reaching this conclusion he has noted the comments provided by the complainant both by telephone and in writing but does not consider these provide any further information or detail to enable him to reach a different conclusion. The Commissioner is satisfied that English Heritage had responded to each of the questions asked and explained what it meant by the term "consultation" which had apparently led the complainant to assume that more information was held than proved to be the case. Whilst this can never be certain, the Commissioner gave his opinion that its response was sufficient to satisfy the balance of probabilities test he had referred to above and that there were no further steps he would ask it to take. Having considered English Heritage's response the Commissioner is therefore satisfied that it does not hold any further information that had not already been supplied to the complainant.

## **The Decision**

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28. The Commissioner's decision is that no further information requested is held that had not already been provided to the complainant in previous requests and that therefore:
- English Heritage did not breach the requirements of Regulation 5(1) in failing to provide any further information.

## **Steps Required**

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29. No further information to that which has already been supplied is held and the Commissioner requires no steps to be taken.

## Right of Appeal

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30. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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)

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 14<sup>th</sup> day of March 2011**

**Signed .....**

**Lisa Adshead  
Group Manager**

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

## Legal Annex

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### The Environmental Information Regulations 2004

#### **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.