

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 9 December 2013

**Public Authority:** North Devon District Council  
**Address:** Civic Centre  
North Walk  
Barnstaple  
Devon  
EX31 1EA

**Decision (including any steps ordered)**

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1. The complainant requested information as to whether her own address and/or the gas yard had been identified as contaminated land. North Devon District Council (the 'Council') confirmed that land at the specified address had not been identified as contaminated and stated that it did not hold any information in relation to the gas yard. The complainant accepted the Council's position in relation to her address but contested it as regards the gas yard.
2. The Information Commissioner finds that the information requested constitutes environmental information and therefore should have been considered under the Environmental Information Regulations 2004 (EIR). He has concluded on the balance of probabilities that no information was held by the Council about the gas yard and possible contamination. It therefore complied with regulations 5(1) and 5(2) in making available the information it held within 20 working days of receipt of the request and in stating that no information was held. The Commissioner does not require the Council to take any steps.

## Request and response

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3. On 6 June 2013 the complainant wrote to the Council and requested information in the following terms:

*"Is [address redacted] and or the gasyard identified as contaminated land, or likely to be in both cases?"*

4. The Council responded on 7 June 2013. It stated that the land at the specified address has not been identified as contaminated and said it did not hold any information in relation to the gas yard.
5. Later that same day the complainant emailed the Council confirming that the first part of her request had been answered. She also stated:

*"Question 2 is not. To explain – it is for councils to identify contaminated land. NDDC [the Council] have had the reports from this address (for over a year) and reports from N.G. (commencing in 2005) on the gasyard. We are entitled to know whether there is any prospect of such a decision being made. There has been plenty of time to evaluate and make a decision. We wish to move ie sell this house, until this is answered we can't. Surely you can understand this is not reasonable? I'm putting this to you again, before contacting the Information Commissioner based on previous experience (they will ask me to do so)."*

6. The Council replied on 10 June 2013, stating that it had noted the complainant's comments but that the response to the question about the gas yard was *"correct at this time"*. It reiterated that it did not hold this information, stating: *"The Freedom of Information Act requires the Authority to release information that is held. I cannot give you information that is not held by this Authority"*.

## Scope of the case

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7. The complainant contacted the Commissioner on 10 June 2013 to complain about the way her request for information had been handled. As the complainant had previously confirmed to the Council that her remaining concerns centred on the gas yard and not her own address, the Commissioner has only investigated this part of the request.
8. The Commissioner has considered whether, on the balance of probabilities, any of the requested information about the land at the gas yard being contaminated was held by the Council at the time of the request than it has previously provided to the complainant.

9. As the request appears to have been handled by the Council under FOIA (see paragraph 6 of this notice), the Commissioner has also considered whether the requested information was environmental and should instead have been handled under the EIR.

## **Reasons for decision**

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### **Regulation 2 - Is the information environmental?**

10. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil and land. The request in this case relates to information about flooding. Regulation 2(1)(c) provides that:

*"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."*

11. In the Commissioner's view this constitutes environmental information under regulation 2(1)(c) as it is on an activity affecting or likely to affect the elements of the environment in 2(1)(a), in particular the land and landscape.
12. The Commissioner has concluded that the correct regime under which to handle the request is the EIR; he has therefore considered the Council's responses about what recorded information is held under the EIR.

### **Regulation 5(1) – What recorded information was held?**

13. Regulation 5(1) provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to locate information falling within the scope of the request, and its explanations as to why the information is not held. For clarity, the Commissioner is not expected to prove categorically whether additional information was held. He is only

required to make a judgement on whether the information was held "on the balance of probabilities"<sup>1</sup>.

14. The Council explained that the complainant and her next-of-kin have a long history with it on this issue, stating that the complainant has made a series of requests, together with other correspondence outside FOIA/EIR, on this subject. It provided the Commissioner with copies of key correspondence and a summary of the relevant requests.
15. The complainant contended that the Council should hold the reports from the N.G. (National Grid Property Holdings Ltd) commencing in 2005. In response to the Commissioner, the Council advised that in 2005 this issue was being handled as part of a planning application with Devon County Council, not North Devon District Council. It stated there is no reason why it would hold documents relating to a planning application made to another Council.
16. The Council confirmed to the Commissioner that it has responsibility for identifying contaminated land, with a statutory duty under Part 2A of the Environmental Protection Act 1990 (as amended). It stated that in the course of dealing with this issue, the complainant now has copies of all the documents and correspondence which the Council holds.
17. The Commissioner asked the Council about the searches it had undertaken in response to the request. In reply, the Council confirmed it had searched its online 'Planning Tracker' which records all planning related applications, together with files, both electronic and hard copy, held by the relevant Council officers.
18. It said that its officers are very familiar with this particular ongoing issue and therefore know where the information is held, confirming that searches were made via the address of the gas yard and via the complainant's name, together with the names of her next-of-kin, and that no information was found.

The Council stated that it has never held information relevant to this part of the request, neither has it destroyed nor deleted any such information. It confirmed that there is no business purpose for the Council to hold such information and that there are no statutory requirements upon it to retain the requested information.

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<sup>1</sup> This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others/Environment Agency (31 August 2007) EA/2006/0072*.

19. By way of additional explanation, the Council provided the Commissioner with an extract from an internal email between its officers:

*"To identify land as being contaminated and thus appearing on our register (under part 2a) [of the Environmental Protection Act 1990] would have required a process of investigation. Determination also relies upon an ultimate finding of Significant Possibility of Significant Harm (SPOSH.) We undertook no such investigation and no investigation was necessary until the point that National Grid took it upon themselves to voluntarily do so..."*

20. The Council continued:

*"...The gasworks site as it is now and as it will be if developed does not exhibit SPOSH. Bear in mind that the investigation has already been carried out and remediation has taken place – we are dealing with a known quantity. Although there are areas that have not been fully explored and so it might remain an area of interest (if undeveloped) we have no evidence as yet of remaining contamination – no SPOSH. Don't forget, remediation for ground contamination (to take it out of Part 2A classification) does not always require removal of contamination, only that the source – pathway receptor is removed. This could simply mean a covering (600mm min) of inert material or that a barrier is provided to prevent the migration of contaminants.*

*It would only appear on the register as 'contaminated' once investigation work had identified SPOSH. In it's [sic] present state there is no source receptor pathway and if developed for housing sufficient protection will be incorporated to ensure that it is not classed as contaminated land. Therefore it is unlikely ever to appear on the Part 2A register as contaminated land."*

### **Regulation 11 – Representations and reconsideration (internal review)**

21. Regulation 11 of the EIR provides applicants with the right to an internal review of a public authority's response. It is a statutory requirement which must be completed within 40 working days. In this case, the Council did not offer the complainant an internal review in its response of 7 June 2013. It told the Commissioner this was because the request was part of a string of email requests and the requisite response was straightforward such that it had responded the day after receipt. The Council said, in hindsight, that it could have offered an internal review, but that it had previously provided the information in "letters of response on ten occasions".

22. Although the Council subsequently carried out an internal review on 10 June 2013, the Commissioner would remind it of the need to incorporate the right to an internal review when replying to future requests.

*Conclusion*

23. The Commissioner considers that the Council has provided a reasonable explanation as to why it does not hold information about the gas yard and contamination. His decision is, on the balance of probabilities, that apart from the information disclosed to the complainant within 20 working days, no further information is held that is relevant to the request and therefore the Council complied with regulations 5(1) and 5(2) of the EIR in this case.
24. Under the EIR, where information is not held, this means that the exception to the duty to disclose provided regulation 12(4)(a) applies. In this case this exception was not cited by the Council as it did not deal with the request under the EIR. The Commissioner therefore also finds that the Council breached regulation 14(3) of the EIR, which requires a response specifying any exceptions that are relied upon, as a result of applying the FOIA to information which is environmental.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**