

## Environmental Information Regulations 2004 Decision Notice

**Date: 29 November 2010**

**Public Authority:** Milton Keynes Council  
**Address:** Civic Offices  
PO BOX 111  
Saxon Gate East  
Central Milton Keynes  
MK3 3HN

### Summary

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On 10 November 2008 the complainant requested that Milton Keynes Council (the 'council') should make all the documentation it held which related to Petsoe Wind Farm available for inspection. The council's response to the request was piecemeal and protracted. Initially, some information was provided and some refused under section 21 and section 22 of the Freedom of Information Act 2000 and the complainant was invited to inspect the council's planning files. However, the complainant argued that the council was deliberately withholding information. After the Commissioner's intervention, the council agreed to consider the request under the Environmental Information Regulations 2004 (the 'EIR'). It provided further information and after some negotiation, it was agreed that the complainant would be satisfied with specific emails from the accounts of individuals which the council should have provided at the time the request was made. The Commissioner is satisfied that the council has provided those requested emails which it now holds. However, the Commissioner finds that the council breached regulation 5(1), 5(2), 11(3)(a) and (b), 11(4) 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 EIR.

## Background

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2. This case concerns a wind farm now built at Petsoe Manor, Olney, Buckinghamshire. A campaign against the proposed development had been organised by two organisations who objected to it. They were concerned about both the wind speed (ie. whether there was enough wind for a wind farm) and the noise that would be generated by the turbines. Throughout 2007 these organisations requested that the council should provide them with all the information that it held concerning the planning application.
3. As part of the assessment and planning process, the proposed developer produced a CD containing information relating to noise and raw wind speed data. This was sent to the council in August 2007 with a covering letter. This CD was not provided to the two objecting organisations.
4. In May 2008, [a firm of solicitors] requested the CD from the council on behalf of their client (the representative of one of the objecting organisations).
5. The campaigners against the wind farm brought a legal action against the council and in July 2008 a Judicial Review was held of the council's decision to grant planning permission for the wind farm. The case was dismissed.
6. The CD was provided to one of the objecting organisations after the High Court Hearing on 3 July 2008.
7. The solicitors continued to request further information regarding the planning process. They believed that there should be emails which would explain why the CD of noise and wind-related data was not supplied to the objecting organisations when they requested such information in 2007/2008.

## The Request

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8. On 10 November 2008 the solicitors requested that all the documentation held by the council relating to the Petsoe Wind Farm application should be made available for inspection under the Freedom of Information Act 2000. They made the point that the council should have provided the CD in response to the requests made in 2007/2008 for all the planning information.

9. The request was for:

*'Under the Freedom of Information Act 2000 we now request that all the documentation held by the council relating to the Petsoe wind farm application, up to the time when the present litigation began (at which point we accept that much of the information will be legally privileged and therefore exempt), is now made available to us for inspection. This should include the working (including electronic, such as email) files of the officers and councillors who were in communication with the developers, [name redacted], and containing such communications.'*

10. On 25 November 2008 the council responded to the complainant now acting on behalf of [the firm of solicitors]. It advised him that it had assumed that the request related only to information regarding the wind farm application which (a) was generated before a pre-action protocol letter dated 26 February 2008, (b) had not been disclosed in the course of proceedings, and (c) was not placed on the planning file or the officer's working file. It asked the complainant to clarify whether its interpretation was correct.
11. On 18 December 2008, the complainant confirmed that he accepted the limitations given at (a) and (b) of the council's letter. He advised the council however that he did not accept the limitation suggested at point (c). Finally he informed the council that he believed the Freedom of Information Section 45 Code of Practice suggested that a council should assist an applicant with an outline of the information which might meet the terms of the request. He nevertheless suggested some sources of information which he believed should be assessed.
12. On 10 February 2009 the complainant reminded the council that he had provided the requested clarification of his request on 18 December 2008. He requested a review of the council's failure to respond to this request and its failure to provide advice and assistance.

## **The Investigation**

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### **Scope of the case**

13. On 11 February 2009 the complainant contacted the ICO to complain about the way his request for information had been handled. The complainant explained that no information had been provided in response to the request of 10 November 2008.

14. On 15 April 2010 the complainant agreed that the Commissioner's investigation would now focus upon obtaining copies of the information regarding the wind farm, as contained in the email accounts of [individual one], [individual two] and [individual three].
15. The Commissioner therefore considers the information within the scope of his investigation to be as follows: information contained in the email accounts of [individual one], [individual two], and [individual three] as at the date of the request, regarding the Petsoe Wind Farm application, generated prior to 26 February 2008, and not already disclosed in the course of proceedings.

### **Chronology of the case**

16. Between 6 March 2009 and 6 July 2009, on 4 separate occasions the council sent the complainant some information. Initially on 6 March 2009 it refused one email under section 21 of the Act and then at internal review on 18 June 2009 it refused to disclose correspondence and documents relating to draft conditions for the application under section 22 of the Act. The internal review also explained that some of the previously undisclosed information which had needed to be reviewed had been held on a memory stick which was now lost. This information had therefore been retrieved again from electronic records.
17. On 3 July 2009 the council explained that the final documents were on the planning file and were part of the public documents which were available. The council informed the complainant that this file contained all the up-to-date information that it held.
18. On 12 August 2009 the complainant confirmed to the ICO that he had inspected the 15 planning files. He explained that the council had confirmed that the relevant planning officers ([individual four] and [individual five]) had stated that they did not hold any further relevant information which was not on the planning file. The primary planning officer involved with the wind farm, [individual one], had retired from the council in [date redacted] prior to the receipt of this request and both [individual four] and [individual six] had stated that they believed his email account had been deleted by the council's IT department.
19. The complainant detailed the documents which he now considered the council to be deliberately withholding:
  - He sent the ICO documents (dated between February 2007 and August 2008) which he had in his possession which he had obtained from third parties or from the council in earlier Freedom of

Information requests. The complainant explained that these documents were NOT in the council's planning files.

- He sent the ICO documents which made a reference to information which he believed is (or should be) in the council's possession. The complainant explained that these documents were NOT in the council's planning files.
20. The complainant questioned the claim that [individual one's] email account had been deleted.
  21. On 7 September 2009 the ICO passed the above allegations to its Investigations Department.
  22. On 21 September 2009 the council confirmed to the ICO that it was now applying the EIR to this information request and that it was therefore refusing the draft conditions because 'the material is still in the course of being completed and internal communications'.
  23. On 11 November 2009 the council provided the draft conditions and related emails which had previously been withheld to the complainant.
  24. On 2 December 2009 the ICO Investigations Officer met with the council and inspected the planning files. [Individual one's] email account had now been found. The ICO officer asked the council to review the material held in the email accounts of [individual four] and [individual one]. The council was asked to explain why certain emails and records of 'discussions' were not included on the planning file.
  25. On 17 December 2009 the council replied to the above. It confirmed that it held emails from the email accounts of [individual one] and [individual four]. It also confirmed that it intended to pursue any documentation that its Councillors might hold but which had not yet been provided. It confirmed that it was reviewing the extra information that it had now gathered and would be providing this to the complainant. It acknowledged that it needed to improve its records management.
  26. On 4 January 2010 the council informed the ICO that it was still evaluating the information it had now gathered. It explained that to locate the emails of Councillors from archived backups would be costly and that it was therefore asking Councillors who had not responded to its request to provide it with the required emails or confirm that they had been deleted.

27. On 4 January 2010 and 18 January 2010 the ICO reminded the council that it was waiting for an estimate of the cost of the copying, recovery and restoring process with respect to the emails of the Councillors who had not provided the required emails when asked.
28. On 1 February 2010, following complaints about the delay from the complainant, the council agreed to send him the material discussed at the meeting of 2 December 2009. The ICO confirmed that it would continue to pursue the matter of undisclosed emails held by Councillors.
29. The council raised the issue of whether it had any rights in respect of the cost implications of this request. The ICO explained that it could submit a breakdown of the work so far undertaken on answering this information request, excluding the section 77 investigation which had been completed.
30. On 25 February 2010 the council provided the complainant with emails and attachments from [individual one's] account and emails from Councillors who had responded to its request for any information that they might hold. The council confirmed to the complainant that some documents were withheld due to 'Legal Professional Privilege'.
31. On 11 March 2010 the council confirmed to the ICO that it had revealed all of the information that it held to the complainant apart from some documents it was withholding under Legal Professional Privilege. The council also provided a breakdown of the work so far undertaken in this request (90.50 hours) and an indication of how long it would take to restore from backups the emails of Councillors who had failed to provide them (7-10 hours each).
32. On 25 March 2010 the complainant again asserted that he believed that the council had wilfully withheld information. He was dissatisfied with the council's response and particularly with the information which had been provided from the [individual one] account.
33. On 26 March 2010, in an effort to find an informal resolution to this case, the ICO suggested the complainant might visit the council's offices and inspect the [individual one] email account.
34. On 12 April 2010 in a telephone call to the ICO, the complainant expressed his dissatisfaction with the lack of emails he had been provided with. He had specified to the council that he was particularly interested in emails from/to [individual one's] account from [individual three] and [individual two] and it had provided him with another email from [individual two]. He believed that it had deleted some emails and

- was withholding others. He believed that it was only providing individual emails when a specific request was made for them.
35. On 15 April 2010 the ICO confirmed to the complainant that the suggested meeting would not take place. It was agreed that the case would now focus upon obtaining copies of the information contained in the email accounts of [individual one], [individual three] and [individual two], as they existed at the time of the information request. The documents withheld under Legal Professional Privilege on 11 March 2010 were therefore removed from the scope of the case.
  36. On 15 April 2010 the ICO wrote to the council and explained that it was concerned that the council was only supplying specific emails when the complainant directly asked for them. The ICO asked the council to therefore now provide the complainant with a copy of all the emails that he had not yet received which were relevant to the wind farm from the accounts of [individual one], [individual three] and [individual two]. These were the emails which existed at the time that the information request was made. The council was asked to list the keywords it used to search for the relevant emails.
  37. On 29 April 2010 the council sent the complainant a CD of the emails provided by [individual three]. It told him that [individual two] had searched her emails and had not identified any correspondence as being held. The council also put all relevant emails from [individual one's] account onto the CD. The council confirmed that it only held a snapshot of [individual one's] inbox at the time he left the council in [date redacted] which was prior to the receipt of this request.
  38. The council had sorted his emails into subjects and searched the inbox, sent box, deleted and draft boxes individually identifying all the relevant emails. The council confirmed that a keyword search of the emails by application number, wind or Petsoe Windfarm would not have revealed the information that is held which is why the information was retrieved by individual email. There were approximately 600 emails provided from [individual one's] account.
  39. On 9 May 2010 the ICO wrote to the council and again asked it to provide the complainant with the relevant emails (unless exemptions applied) from the accounts of [individual two] and [individual three] which had existed at the time of the information request. The council was asked to perform a search of [individual one's] email account of [date redacted] (the date he left) and because there appeared to be emails missing from this account, if possible perform a search of his email account of one month before.



40. The council explained that [individual three's] emails would be taken from his personal computer as there were no backups of his account as at the date of the request. He could therefore only provide his emails as they existed at this point in time. He had given the Audit Department his permission to perform their keyword searches on his account.
41. The council explained that the request to restore [individual two's] email account had been passed to an external company. It was explained that this email account could be restored 3 months before or 3 months after the date of the request. It was agreed that the restore would be performed as at August 2008. This was questioned by the complainant and the council was therefore asked to explain its retention policy.
42. The council explained that its retention policy was to keep email backups for 2 years. The council backs up tapes on a 'Grandfather-father-son' principle. This is a standard operating system practice which means that backups are taken on a daily basis but then retained on a less frequent basis the older they become, as the older tapes are recycled back into use.
43. The council explained that the only backup it held of [individual one's] email account was that of [date redacted]. The backup of this account had taken place when he left the council at the request of his manager. This was council policy.
44. On 14 June 2010 the council sent the complainant a CD of relevant emails from the accounts of [individual three], [individual two] and [individual one]. These email accounts had now been searched by the council's Audit Department using keywords. There were 277 emails from the account of [individual three]. There were 9 relevant emails from [individual two's] account and 244 emails from [individual one's] account. The council listed the keywords used in the search of each email account: Windfarm; wind farm; Petsoe; turbine; 06/01349/fuleis. Further details of the council's searches were provided to the complainant in a letter dated 14 June 2010.
45. On 27 June 2010 the complainant pointed out to the ICO that there were significant emails missing from the set of [individual one] emails which had been provided to him as a result of the Audit search. He explained that performing a keyword search on the provided emails did not result in those emails. This applied whether the search was performed on keywords in the title of the email or the body of the email.



46. When the [individual one] email account was manually searched, approximately 600 emails were identified and provided to the complainant. When the same account was searched using keywords, 259 emails were identified and 244 were provided as relevant. However, the complainant explained that some emails provided in the first search have the keywords in their title but these have not been provided in the second 'keyword' search.
47. When asked about this discrepancy, the council again performed the keyword search on the [individual one] email account. This time the council used a different search mechanism in Outlook and the search resulted in a different set of emails. This time the 670 emails were found. This included the 596 emails which had been provided after the manual search. These were provided to the complainant.
48. The Commissioner has seen evidence of the different search methods employed and the resulting different outcomes; and whilst satisfied that the initial search was done in good faith, is concerned that a basic checking of the results did not highlight this discrepancy.

## Analysis

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49. The complainant is not satisfied that the council has provided all the information that it held as at the date of the request with respect to the narrowed scope of this complaint. He believes the council has deliberately withheld information from him and has not been honest about what it does hold.
50. The complainant has specifically raised the following points:
  - [Individual two] had told the council that she had no emails but the council then provided the complainant with one from her to [individual one] which had been found in [individual one's] account. The complainant wanted to know why [individual two] had not provided any emails from 2007 in her response.
  - The complainant wanted to know why only 9 of the 63 emails found in [individual two's] account were provided as relevant. He wanted to know why the others had been judged as not relevant.
  - The complainant questioned why there were missing emails from [individual three's] emails. Certain emails had been provided but not his replies.

- He also questioned why the council had only provided 244 emails from [individual one's] account when in May they had indicated that they had found 400 emails in this account. He wanted to know exactly what had been preserved of [individual one's] email account when he left.
- In a letter dated 9 December 2009 (which the complainant has a copy of) the council suggested to councillors that the council's Audit and Risk Service would be able to retrieve backup tapes from between August 2006 and December 2009. The complainant was therefore not satisfied with the council's statement that its backup policy only keeps archives for two years.
- The council has explained that [individual one's] email account was saved at his manager's request but the complainant had been told by [individual four] and [individual six] that it may have been deleted. The complainant wanted to know if [individual four] was [individual one's] manager.
- The complainant believes there are still significant emails missing from [individual one's] account.

## **Substantive Procedural Matters**

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

51. The Commissioner's investigation into the council's compliance with regulation 5 has considered whether or not the council provided all the information it held as at the date of the request, in relation to the narrowed scope of the complaint to the Commissioner as set out at paragraph 15 of this Notice.
52. Regulation 5(1) of the EIR states that:

"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."
53. Regulation 5(2) of the EIR states that:

"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."

54. The full text of regulation 5 can be found in the Legal Annex at the end of this Decision Notice.

[Individual one's] email account

55. The council has explained its policy concerning the steps which are taken regarding an email account when an individual leaves the council. The standard procedure for a 'user leaving request' is that the account is removed. It is marked for archive, disabled and the email address hidden.
56. The relevant manager may optionally request that the individual's email account be saved. In this case, a request was also made on the leavers form for access to the personal folders, a copy of these was taken and provided to [individual five] as per the request (these usually take the form of files on the H: drive as well as a copy of the email folders at the time of archive).
57. Archived accounts remain on the system for a short period of time before being completely removed by Windows Ops, however they are in a disabled state so cannot be used in any way. It was thought that an email address is not completely removed until the account is fully deactivated from the system.
58. In general, the Commissioner considers that information in backups is not held for the purposes of the EIR. However, in this case, it would appear that [individual one's] manager had decided that there was a specific business need to retain them. For this reason, the Commissioner would consider that [individual one's] backed up email accounts were held by the council for the purposes of the EIR, as at the date of the request
59. The Commissioner is concerned that in its initial responses to the request, the council did not provide the relevant contents of [individual one's] email account to the complainant. It did not reveal that the account had been specifically saved when he left and it did not attempt to restore it from its routine backup tapes.
60. On 6 August 2009 [individual six] told the complainant that the planning officer, [individual five], had confirmed that he did not hold any further information which was not on the planning file. She told the complainant that she believed the [individual one] account had been deleted. In addition, [individual four], rang the complainant on 6 August 2009 and stated that he had disclosed all relevant information and that he believed [individual one's] email records had been deleted.

It would appear that at this point it was not widely known that [individual five] had asked for [individual one's] account to be saved.

61. The Commissioner has confirmed with the council that its archive policy only retains backups for two years.
62. The council has confirmed that the [individual one] account held approximately 600 relevant emails which were found by the manual search. It has since clarified that the account held 1360 emails in the deleted box, 6 in drafts, 676 in the inbox, and 225 in the sent box. It has provided 670 emails from the Audit keyword search of the account.
63. The Commissioner is satisfied that the council has now provided all the relevant emails from the backup of [individual one's] account which was taken at the time he left the council in [date redacted], and was held as at the date of the request. He finds however that in failing to provide this information by the date of completion of the council's internal review the council has breached regulation 5(1). He also finds that in failing to provide this information within twenty working days the council has breached regulation 5(2).

[Individual three] and [individual two's] email accounts

64. The council has confirmed that the searches it had performed on the accounts of [individual three] and [individual two] had been completed using the second search mechanism (which produced more emails from [individual one's] account). This was therefore the mechanism used on 14 June 2010 when the Audit Department had performed the search and had produced 277 emails from the account of [individual three] and 9 relevant emails from the account of [individual two].
65. The council has explained that [individual three] does not have a Milton Keynes email account and his emails are forwarded to a personal account at the council's gateway. The Commissioner considers that [individual three's] emails are relevant to this information request as they are emails relating to council business held on behalf of the council by the Councillor on his Personal Computer.
66. The Commissioner notes the council's comments that it could only provide [individual three's] emails as they existed at April 2010, as there were no back-ups of his account from the time when the request was made.
67. The Commissioner is satisfied that the council has now provided all the emails of [individual three] which are relevant to this complaint and which were held on behalf of the council on his Personal Computer as

at the time the search was made in April 2010. He notes however that as at the date of completion of the council's internal review it had not provided the complainant with this information. The Commissioner finds that in failing to provide this information by the date of completion of the council's internal review the council breached regulation 5(1). He also finds that in failing to provide this information within twenty working days of the request the council breached regulation 5(2).

68. In light of the council's admission that it has not been able to restore [individual three's] email account as at the date of the request, and the evidence from the complainant that certain of [individual three's] emails appeared to be missing replies, the Commissioner also concludes that on a balance of probabilities further information was held as at the date of the request that was not provided to the complainant by the date of completion of the council's internal review. This information has still not been provided to the complainant as it is no longer held. The Commissioner finds that in failing to provide this information by the date of completion of the council's internal review the council breached regulation 5(1). He also finds that in failing to provide this information within twenty working days of the request the council breached regulation 5(2).
69. The Commissioner is satisfied that the email account of [individual two] dated August 2008 has been searched for relevant emails and the resultant information has now been given to the complainant. This is the closest email account to the date of the request that could be searched. He notes however that this information had not been given to the complainant as at the date of completion of the council's internal review. The Commissioner finds that in failing to provide this information by the date of completion of the council's internal review the council breached regulation 5(1). He also finds that in failing to provide this information within twenty working days of the request the council breached regulation 5(2).
70. As noted above the council was unable to restore this email account to the date of the request. The Commissioner has therefore considered whether it is more probable than not that information was held at the date of the request but not held in August 2008. Taking into account that both parties had agreed that the request should be limited to information generated before 26 February 2008, the Commissioner finds that, on a balance of probabilities, no further relevant information in addition to that held in August 2008 was held as at the date of the request.

## **Regulation 9 – Advice and Assistance**

71. The full text of regulation 9 can be found in the Legal Annex at the end of this Decision Notice.
72. The complainant has suggested that when the council asked for clarification of his request on 25 November 2008 it should have identified and advised him of the location of any information it held, under its Regulation 9 duty to provide appropriate advice and assistance.
73. Whilst the Commissioner considers that the council should clearly have identified the location of any information it held in order to comply with its duties under regulation 5(1), he does not consider that it had a duty under regulation 9 to advise the complainant of where the requested information was located.
74. Under regulation 9(2)(a) and the regulation 16 Code of Practice a public authority has an obligation to assist a complainant if it considers that the request is formulated in too general a manner and that more particulars are required in relation to the request. In the particular circumstances of this case the Commissioner considers that the council was asking for clarification on very specific points. Namely whether the information requested was limited to (a) information generated before a pre-action protocol letter dated 26 February 2008, (b) information that had not been disclosed in the course of proceedings, and (c) information that was not placed on the planning file or the officer's working file. In the Commissioner's view the complainant did not need to know the location of information in order to provide the requested clarification. Indeed the clarification was provided without these details on 18 December 2008.
75. The Commissioner acknowledges that there may be other circumstances in which it is appropriate to provide an applicant with details of the locations in which it holds information. For example where an applicant has asked for assistance in submitting a manageable or easily answered request, or has indicated that access to indexes would help clarify what information is required. However, having considered the circumstances of this case he does not accept that the council failed to comply with regulation 9 by failing to advise the applicant of the locations in which it held information.
76. In the Commissioner's view the failure of the council to identify the information within the scope of the request led to the failure to provide

the information as required under regulation 5(1) and is therefore a regulation 5 issue, rather than a regulation 9 issue.

### **Regulation 11 - Internal Review**

77. The full text of regulation 11 can be found in the Legal Annex at the end of this Decision Notice.
78. Regulation 11(1) of the EIR provides that an applicant may make representations to a public authority, if he considers that the authority has failed to comply with the requirements of the EIR in relation to his request.
79. Regulation 11(3)(a) and (b) requires that the authority should consider the complainant's representations, along with any supporting evidence provided by the complainant, and should decide whether it has complied with the requirements of the EIR.
80. Regulation 11(4) requires that the authority notify the applicant of its decision in relation to the applicant's representations no later than forty working days after receipt of those representations.
81. The Commissioner is concerned that the council failed to conduct an internal review within forty days when informed by the complainant that there were important omissions in the documents provided. This was sent on 10 February 2009 and the review was performed on 18 June 2009.
82. The council did conduct an internal review; however it did not address the complainant's concerns that there was information missing from 2007. The Commissioner finds that in not providing an internal review within 40 working days, the council failed to comply with regulation 11(4) of the EIR.
83. In not addressing the issue of the missing information as identified by the complainant, the council is found to be in breach of regulation 11(3)(a) and (b).

### **The Decision**

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84. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the requirements of the EIR:



- Regulation 5(1) in that the council failed to provide the information that it held at the date of the request (as specified in the narrowed scope of the complaint agreed on 15 April 2010) by the date of completion of its internal review.
- Regulation 5(2) in that the council did not provide the above information to the complainant within 20 working days of receiving clarification of the request.
- Regulation 11(3)(a) and (b) in that the council failed to consider the representations put forward by the complainant and decide if it had complied with the requirements of the EIR.
- Regulation 11(4) in that the council did not provide an internal review within 40 working days.

## Steps Required

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85. The Commissioner considers that the council has now provided all the information that it currently holds with respect to the narrowed complaint. He therefore requires no steps to be taken.

## Other matters

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86. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
87. In the Commissioner's opinion, the initial absence of certainty as to the extent of information held by the council unnecessarily prolonged his investigation.
88. When combined with an apparent lack of knowledge of the requirements of the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, this has frustrated the Commissioner's attempts to resolve the matter informally. In order to avoid a similar situation arising in future, the Commissioner therefore wishes to highlight the following issues with the council's handling of the request, the review and the subsequent investigation. The council is advised to consider improvements to its approach to handling requests for information in light of these observations:

## Quality of responses

89. The council's initial responses to this information request were poor. When the request was first received, the council did not properly articulate the reasons for refusing the requested information. Specifically it did not specify which exception it was relying upon, and failed to provide its considerations regarding the public interest test. The Commissioner makes reference to this here as these failures occurred on more than one occasion. The Commissioner also considers that the authority's responses to his own enquiries could have been improved, particularly when explaining reliance on a specific exemption or exception.

## Understanding of the legislation

90. The failure to recognise the applicability of the Environmental Information Regulations 2004 to the complainant's request may have contributed to the subsequent confusion as to what information would be suitable for release. Therefore if it has not already done so, the council should familiarise itself with the Commissioner's guidance on environmental information, available at:

[http://www.ico.gov.uk/what\\_we\\_cover/environmental\\_information\\_regulation/guidance.aspx](http://www.ico.gov.uk/what_we_cover/environmental_information_regulation/guidance.aspx)

91. The council may also wish to make use of the guidance provided by the Department for Environment, Food, and Rural Affairs available at:

<http://www.defra.gov.uk/corporate/policy/opengov/eir/index.htm>

## Identifying the information held

92. The Commissioner's investigation was, in his view, unnecessarily complicated by the difficulties the council experienced in identifying the information held in relation to the request. Whilst considerable progress was made in the latter stages of the Commissioner's investigation, the authority had difficulty in determining what it held and in locating information which was specifically required. In the Commissioner's opinion this approach contributed significantly to the piecemeal disclosure of information to the complainant.
93. More generally, it is the Commissioner's view that such an approach is suggestive of poor records management, and in a letter dated 17

December 2009 the authority itself recognised its shortcomings in this area.

94. In order to ensure that the management of records within the context of the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 works effectively in future, the Commissioner therefore recommends that the authority contact the Records Management Advisory Service at The National Archives for advice:

*The National Archives  
Kew  
Richmond  
Surrey  
TW9 4DU*

[rmadvisory@nationalarchives.gov.uk](mailto:rmadvisory@nationalarchives.gov.uk)

The Commissioner would hope that such advice will improve the council's handling of future requests for information.

## Right of Appeal

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95. 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)

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 sent.

**Dated the 29<sup>th</sup> day of November 2010**

**Signed .....**

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

## Legal Annex

### **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)** 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)** 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)** 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)** 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)** 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.