

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Enforcement notice

Date: 20 June 2016

Public Authority: Cheshire West and Chester Council
Address: HQ Building
Nicholas Street
Chester
CH1 2NP

Enforcement (including any steps ordered)

1. The complainant has requested dates relating to a specific building control application which were previously available online. The Commissioner considers that Cheshire West and Chester Council has breached regulation 4 of the EIR.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Reinstate web access to the building control dates that were on Cheshire West and Chester Council's website prior to this request.
3. The public authority must take this step within 35 calendar days of the date of this enforcement notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 2 November 2015, the complainant wrote to Cheshire West and Chester Council ('the council') as follows:

"I am trying to view a Building Control Application 03/01091/MUL using the online facility but it is only giving me limited information. It appears any relevant dates relating to the property have now been removed e.g. approval dates, completion dates etc. is this an error with the system or have these been removed for a reason?"

5. The council responded on 3 November 2015 as follows:

"Please be advised Building control now charge for the search service therefore all dates have now been removed from our on line facility.

Please see the link below for our supplementary fees.

<http://www.cheshirewestandchester.gov.uk/residents/planning%20and%20building%20consulta/building%20regulations/buildingconsultancyforms.aspx> "

6. On the same day, the complainant expressed his dissatisfaction with the response. He referred to Regulation 4 of the EIR, said that the council has deliberately removed the Building control certificate dates, completion dates and decision dates from its website to enable it to charge for the information to the detriment of the public, and requested that the council reinstate access to the information via its website. He also said that the charge of £59 is unreasonable.
7. The council responded on 12 November 2015 stating that the complaint is being considered as per its internal review process for a request for information and provided the reference number of 3554750.
8. Following an email from the complainant on 12 January 2016 chasing a response, the council informed the complainant on 13 January 2016 that the internal review included a wider corporate review of its charging regime for requests for environmental information. It said that the decision is currently in draft and will be sent as soon as possible. It also said that in the meantime, the complainant may refer the matter to the Information Commissioner.
9. The council provided its internal review response on 13 March 2016. The internal review was conducted with a wider remit to consider the council's position overall in charging for environmental information. the In summary, the council made the following points in its review response:
- There is no statutory requirement to publish information/certificates generated under Building Control. Applicants will be issued with original copies and they may apply for further copies but this will ordinarily incur a legal charge.

- The council is being asked to consider ways in which it can save money and reduce spend. One way this can be achieved is to reduce unnecessary or unneeded publications on line as there are infrastructure costs, such as servers and internet access, involved in online publication.
- The council recognises the balance that must be achieved for its residents and the general public to provide relevant information without unduly burdening the public purse, by either spending more money on infrastructure fees or adding to staffing resource time spent and/or providing copy documents without recharge.
- A decision was made to stop publishing building control information for two main reasons:
 - Such information is not required to be published for statutory purposes.
 - Producing copy documents in response to requests could generate income for the council and contribute to the financial savings required on a corporate basis.
- The council is entitled to charge in two situations:
 - Producing copy documents which were produced in pursuance of the council undertaking a statutory function, e.g. building control approval.
 - Responding to a request for information under the EIR.
- In respect of EIR requests, the council is entitled to charge for making environmental information available but any charge must be reasonable.
- Building control information could fall under either/both of the above circumstances.
- In this case, the requester is not the original applicant and his request is not for duplicate copies. Therefore there is no reasonable link to the statutory function and the request must be considered under the EIR.
- As a consequence of the above the council will:
 - Continue with its programme of reviews in relation to its Publication Scheme
 - Reconsider its fees and charges schedule with relevant justifications added/revised

- Review its website and server availability
- Review its EIR request handling
- Once these reviews are complete the council will publish a clear and easily accessible statement on its website confirming how requests for environmental information where charges are likely to apply will be dealt with paying due regard to its statutory obligations under information and other legislation, ICO guidance, the ECJ ruling *East Sussex County Council v Information Commissioner and others* [2015] and LGA guidance.

Scope of the case

10. The complainant initially contacted the Commissioner on 13 November 2015 to complain about the way his request for information had been handled. Following receipt of the council's internal review response, the complainant expressed his opinion that the council is misrepresenting his request, its actions and its entitlement to impose charges. He confirmed that he does not require copies of certificates at this point but simply wants dates. He said that the council already has this information so no work would be involved in providing access. He also said the following:

"As you have some of the data online already and as you have created and provided the information requested, and been paid to do so in order that it becomes a public record, available for the public to view you are creating work by redacting the dates from the information you hold. This is in breach of your statutory duty.

Having the dates online originally means that it is in suitable format for display or easy extraction."

He said that the council is flouting the letter of the regulations and certainly the spirit of the regulations in order to thwart his businesses legitimate competition and requested that the council inform him of a place provided by it where he can view this information, free of charge under EIR.

11. Pursuant to regulation 18 of the EIR, the enforcement provisions of the FOIA apply for the purposes of the EIR. Included within the enforcement provisions in FOIA is section 52(1) which relates to the power of the Commissioner to serve an enforcement notice on an authority. The Commissioner believes that section 52(1) FOIA allows for an enforcement notice to order steps in relation to regulation 4 of the EIR.

12. Therefore, in this enforcement notice, the Commissioner has considered whether the council has breached Regulation 4 of the EIR.
13. The Commissioner has considered whether the council has breached Regulation 8 of the EIR in a separate decision notice (case reference FER0612185).
14. The Commissioner contacted the council on 29 March 2016 to enquire whether it has responded to the complainant's request to view the information free of charge. On 31 March 2016, the council confirmed that it would contact the complainant and invite him to view the requested information at the council's offices at Wyvern House. Any issues arising from this will be dealt with separately from this enforcement notice.

Reasons for enforcement

15. The purpose of regulation 4 is to set out public authorities' duties to make environmental information available proactively, so as to increase public awareness of and involvement in environmental issues.
16. Regulation states that:
 - 4.—(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—
 - (a) progressively make the information available to the public by electronic means which are easily accessible; and
 - (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.
17. Regulation 4(4)(a) states that public authorities must organise and publish, as a minimum, any information they hold that is listed in Article 7(2) of EU Directive 2003/4/EC.
18. Regulation 4(4)(b) states that public authorities must also organise and publish facts and analyses they consider "relevant and important" to "major environmental policy proposals".
19. The above requirements are a minimum and the Commissioner would encourage authorities to consider publishing more information where appropriate.

20. The Commissioner notes the wording of Article 7(2) of EU Directive 2003/4/EC as follows:

"The information to be made available and disseminated shall be updated as appropriate and shall include at least:

- (a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;
- (b) policies, plans and programmes relating to the environment;
- (c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;
- (d) the reports on the state of the environment referred to in paragraph 3;
- (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
- (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;
- (g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.

21. The Commissioner considers that information relating to building control may fall within (b), (c) or (e). However, he has not considered this further as it is not necessary for the requested information to fall within any of the above categories. This is because regulation 4(4) provides that the information to be progressively made available to the public by electronic means which are easily accessible 'shall include at least' the information referred to in Article 7(2) of EU Directive 2003/4/EC. Therefore, the intention of regulation 4 is for the proactive dissemination of wider information.
22. It is clear in this case that the requested information was available on the council's website prior to this request being made. The council has explained (as detailed in paragraph 9 above) that the information was removed as it is not required to be published for statutory purposes and

producing copy documents in response to requests could generate income for the council and contribute to the financial savings required on a corporate basis. The council also said that one way to save money and reduce spending is to reduce unnecessary or unneeded publications on line as there are infrastructure costs, such as servers and internet access, involved in online publication.

23. The Commissioner has accessed the council's building records which are available on its website. He notes that the website contains various building control and related information including the 'Valid Date' and associated planning dates such as 'Application Received' and 'Decision Issued Date'. He does not envisage that the council would save a significant amount of money in terms of infrastructure costs by removing the requested building control dates.
24. The Commissioner is aware that the council's building control records are maintained in an electronic format. As the building control approval and completion dates are relevant to the CON29 property search form, the Commissioner considers that the council must be able to undertake searches for such information. He does not envisage that the council would have to undertake a significant amount of work in order to once again provide the requested dates on its website.
25. More importantly, and key to the enforcement in this case, the Commissioner considers that by actively removing information from its website, the council has breached regulation 4. Rather than progressively making information available in an easily accessible electronic format, it has taken the regressive step of removing information.

Right of appeal

26. Either party has the right to appeal against this enforcement 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Signed

Stephen Eckersley
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