

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

**Decision notice**

**Date:** 1 August 2019

**Public Authority:** Neath Port Talbot County Borough Council  
**Address:** [foi@npt.gov.uk](mailto:foi@npt.gov.uk)

**Decision (including any steps ordered)**

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1. The complainant requested information about a noise complaint and planning/land use in respect of a piece of land near to this property. Neath Port Talbot County Borough Council ('the Council') applied section 14 of the FOIA to the first request and relied on the provisions of section 17(6) as the basis not to respond to the second and third requests. Following the Commissioner's involvement the Council agreed that the requests should have been considered under the EIR as opposed to the FOIA. The Council indicated that it considered regulation 12(4)(b) to apply to two requests and 12(4)(a) to apply to all three requests. The Commissioner's decision is that the Council correctly applied regulation 12(4)(b) to two requests and that on the balance of probabilities it does not hold any information relating to the third request and as such it applied regulation 12(4)(a) correctly. However, in failing to consider the request under the correct access regime, the Council breached regulation 11 as it did not issue a refusal notice within the statutory timescale. The Commissioner does not require any steps to be taken.

**Request and response**

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**Request 1**

2. On 10 May 2018 the complainant wrote to the Council and requested information in the following terms:

*"In the most recent communication that I have received fromt [sic] he [sic] NPT Council it was claimed that the recordngs [sic] that I requested*

*in my **First ever** request to view a set of recordings made at my property did not exist at the time that I made that First request.*

*Do your records show that this claim is true?*

*To avoid any procrastination [sic] I have not made this information request before.*

*Secondly ex-Cllr I.D.Williams informs me that he ahs [sic] handed over to you his entire list of files. In those files ,there existed a number of completed compliant forms returned to ex-Councillor Williams by a number of his constituents which complained about, and confirmed the existence of, both a noise nuisnace [sic] and a smell nuisance.*

*Do your records show the existence of these complaint forms?*

*or have you yet again destroyed relevant but embarrassing [sic] evidence?*

*If these froms [sic] still exist how many complaint forms are there?*

*I expect a reply within the statutory period".*

3. The Council responded on 19 May 2018 and referred to previous correspondence with the complainant, the most recent being its letter of 26 February 2018, where he had been advised that the Council would no longer respond to correspondence from him about historic noise complaints.

## **Request 2**

4. On 22 July 2018 the complainant submitted a second request to the Council for information in the following terms:

*"To avoid any pricrastinations [sic] on the part of the NPT Council, I will preface my request by stating that I have not previously requested the information listed below.*

*Do you records show WHEN BOTH of the noise recordings were made at my premises?*

*Do you records show WHEN tboth [sic] sets of information were communicated to me?*

*Do your records show HOW tboth [sic] sets of information were communicated to me?*

*Do yur [sic] records show if any other resident(s) made complaints about the noise emanating from the adjacent riverside?. I am NOT*

*requesting the names or addresses of any complainant, if such a complainant exists.*

*If other complainants exist do your records show if any recordings were made at the complainants' addresses?.*

*If any complainants exist, then how was the response of the Council communicated to these complainants?"*

### **Request 3**

5. On 11 September 2018 the complainant submitted a third request to the Council for information in the following terms:

*"Amongst other criteria, a development project cannot be considered to be an agricultural [sic] project if it is*

*Less than a hectare in area*

*Less than 30 metres from a main road*

*Has no previous history of being an agricultural site*

*Since the land adjacent to my property [sic] at [address redacted] is less than the stipulated value( it is 30 yards x 10 yards = 300 sq yards which is considerably less than a hectare [sic]) , is within 30 metres of the main designated link road( at certain point it is actually touching), do you records show on what grounds these planning laws have been disregarded and why the proper planning laws have not been applied to this land?"*

6. Following correspondence with the Commissioner the Council wrote to the complainant on 29 January 2019 and advised that it was relying on the provisions of section 17(6) of the FOIA to not respond to the requests 2 and 3 in light of its application of section 14 to previous, related requests from the complainant.

### **Scope of the case**

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7. The complainant initially contacted the Commissioner in July/August 2018 to complain about the Council's failure to respond to his requests. He contacted the Commissioner again following receipt of the Council's internal review response of 29 January 2018 to express his dissatisfaction with its handling of the requests

8. During the course of the Commissioner's investigation the Council agreed that the requests should have been considered under the EIR as opposed to the FOIA. The Council confirmed that it considered regulation 12(4)(b) applied to requests 1 and 2 and regulation 12(4)(a) applied to all three requests.

## Reasons for decision

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### Environmental Information

9. Regulation 2(1) of the EIR defines environmental information as being information on:

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*

10. Under regulation 2(1)(c), environmental information is any information on activities affecting or likely to affect the elements and factors of the environment listed in regulation 2(1)(a) and 2(1)(b). The factors listed in regulation 2(1)(a) include noise and the elements of the environment listed in regulation 2(1)(b), land and landscape
11. The Commissioner considers that information relating to a noise complaint about cockerels crowing ie requests 1 and 2 are captured by regulation 2(1)(b) of the EIR. The Commissioner considers that any information within the scope of request 3 would relate to planning matters. It would therefore constitute information on a "measure" likely to affect the elements of the environment and therefore the EIR is the correct access regime. During the course of her investigation, the

Council accepted this view and relied on alternative exceptions, which have been considered below.

### **Regulation 12(4)(b) – manifestly unreasonable requests**

12. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
13. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
14. A request may be manifestly unreasonable for two reasons; either where it is vexatious or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case the Council considers that requests 1 and 2 are vexatious.
15. There is no definition of the term "vexatious" in the FOIA or the EIR., However, the nature of vexatious requests has been considered by the Upper Tribunal in the case of *The Information Commissioner and Devon County Council v Mr Alan Dransfield* (GIA/3037/2011). In the Dransfield case the Tribunal concluded that the term could be defined as "manifestly unjustified, inappropriate or improper use of formal procedure."
16. The judgment proposed four broad issues that public authorities should regard when considering whether requests are vexatious:
  - (i) the burden of meeting the request;
  - (ii) the motive of the requester;
  - (iii) the value or serious purpose of requests; and
  - (iv) any harassment or distress caused.
17. The Commissioner's guidance on vexatious requests suggests that the key question a public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear, the Commissioner considers that public authorities should weigh the impact on the authority and balance this against the purpose and value of the request. In addition,

where relevant, public authorities also need to take into account wider factors such as the background and history of the request.

### **The Council's view**

18. Requests 1 and 2 in this case relate to historic noise complaints about cockerels on land near to the complainant's property, commencing in 2011. The Commissioner understands that there has been considerable correspondence and complaints about the matter between the Council and the complainant over a number of years. The Council advised the Commissioner that, as far as it is aware, the offending cockerels were removed from the land in question a number of years ago ie circa 2016. The Council is not aware of any complaints being submitted about the matter, either from the complainant or others, within the last few years.
19. Noise monitoring equipment was installed at the complainant's property in March 2011 during a visit by Council officers. At the time the equipment was installed officers noticed a regular beeping noise within the property, which was thought to indicate a smoke alarm was not operating correctly. The complainant was advised that the beeping noise might interfere with the noise monitoring equipment. When the noise monitoring equipment was collected, officers again drew the complainant's attention to the beeping noise within the property.
20. The Council informed the complainant of the results of the noise monitoring equipment both verbally and by letter in April 2011. The Council advised that the results of the monitoring reflected a regular spike every 40 seconds, which was believed to be the beeping noise of the fire/smoke alarm, and the spike was at a higher volume than the recordings of the cockerel crowing. The complainant was advised that the cockerel crowing did not constitute a statutory nuisance and no further action could be taken at that time.
21. The Council advised that noise monitoring equipment was installed at the complainant's property again in May 2012 as a result of further complaints. During installation of the equipment officers noticed that the regular beeping was still present at the property and the complainant was advised to take action to 'remove the beep' which had interfered with the previous monitoring data. When officers called to collect the equipment the beeping noise was found to still be present. The Council confirmed that in light of the presence of the beeping noise and the knowledge that it had interfered with the previous noise recordings, a decision was made to delete the recordings without further analysis. The Commissioner understands that the complainant has disputed the fact that a beeping noise was present within his property.

***Request 1 – part 1 – second set of noise recordings***

22. The first part of this request relates to the noise recordings which were taken in May 2012 and asks the Council to confirm whether its statement that the recordings taken did not exist at the time he first requested them is true.
23. As referred to above (paragraphs 18 to 22), the second set of noise recordings, which were taken in May 2012, were destroyed without any analysis being undertaken. The reason for this was because it was deemed that the beeping noise present at the property during the analysis period would have interfered with the recordings, in the same way that it had when the first recordings were taken in March 2011.
24. The Council confirmed that it had told the complainant on repeated occasions, both verbally and in writing, that the second set of recordings were destroyed as they were deemed to constitute inconclusive evidence due to the beeping noise present at the property. The complainant has alleged on a number of occasions that, if the second set of recordings are no longer held, the information was deliberately destroyed by the Council after he first requested it. The Council takes this assertion extremely seriously in light of the fact that if there was any basis in evidence for the allegation then it would potentially constitute a criminal offence under section 77 of the FOIA.
25. The Council considers that the request of 10 May 2018 asserts that its previous responses to the complainant that the information was not held at the time he first requested were untrue. The Council confirmed that it does not hold a record as to when the complainant first requested a copy of the second set of recordings. However, it referred to previous correspondence from the complainant in February 2017 where he stated that he had been requesting the information "*for over 3 years*". The Council is of the view that this suggests the earliest the complainant would have requested copies of the information would have been sometime between February 2013 and February 2014.
26. Although the Council does not hold a record of the destruction of the second set of recordings it believes that the information would have been deleted within days of the equipment being collected from the property in May 2012. This is because the monitoring equipment in question used an internal SD card to store data and, as such, storage on the device is limited. In light of the limited storage capacity of the equipment, in practice, it is necessary to delete recordings stored on the internal SD card to maintain free capacity for future monitoring. The Council explained that the deletion can occur prior to downloading any data on to a separate device eg a laptop.



27. In this particular case, the Council reiterated that no analysis of the recordings was undertaken. It also confirmed that the data was deleted from the equipment without it ever having been downloaded onto another recording format (eg laptop or PC).

**Request 1 – part 2 – complaint forms**

28. This part of the request refers to a file handed into the Council by an ex Councillor. The complainant referred to *"completed compliant [sic] forms returned to ex-Councillor Williams by a number of his constituents which complained about.....a noise nuisance and a smell nuisance"* which he believed were contained within the file. The request then asks the Council whether its records show the existence of the complaint forms, and, if so, the number of forms.
29. The Council confirmed to the Commissioner that the electronic log sheets held within its Environmental Health Department indicate that a number of residents, including the complainant, had raised concerns with their local ward councillor about the site in question. The ward councillor then duly raised the matter with Environmental Health Officers. The electronic log sheets also suggest that residents in the area, again including the complainant, had signed a petition about the site in 2012. However, the Council confirmed that the only 'complaint forms' or statements about the subject matter that were submitted to officers originated from the complainant. The Council also advised that one other local resident had previously had noise monitoring equipment installed in their property on one occasion in the past. However, no actual recording was produced due to the fact that the individual had been unable to operate the equipment correctly.

**Request 2 – various details of noise recordings and complaints**

30. The Council considers that this request is intrinsically linked to request 1 in that it is asking for details of noise recordings taken at the complainant's property. The request refers to the two monitoring exercises undertaken at the property. In respect of the first recording event, the Council confirmed that the complainant has previously been advised of the outcome of this exercise on a number of occasions, the first of which was in writing on 19 April 2011. In respect of the second monitoring exercise, the Council confirmed that the complainant had also been advised on a number of occasions the outcome of this exercise and the reason why no information is held, as referred to in paragraphs 22 to 26 above.
31. The Council considers that the parts of the request relating to complaints from other residents to be a repeat of the second part of request 1.



### ***Summary of the Council's position***

32. The Council advised the Commissioner that it has been in discussion and protracted correspondence with the complainant about the subject matter associated with this request for several years.
33. The Council considers requests 1 and 2 to be vexatious on the basis that whilst the complainant may not have made the requests with the deliberate intention of wasting officers' time, it had previously explained to him on numerous occasions that the second set of recordings was not held and the reasons why it had been erased. In addition, the complainant had been advised of the outcome of the first noise monitoring exercise on a number of occasions. With regard to the complaint forms, the information is not held as it was only the complainant who submitted any complaint forms or statements about the matter. The Council is of the view that the effect of the complainant continuing to repeatedly raise issues relating to the noise complaint has had the practical effect of distracting officers from their core duties to investigate current matters as opposed to dealing with closed issues.
34. The Council provided the Commissioner with a sample of correspondence exchanges it has had with the complainant regarding the subject of noise complaints. The sample shows that the complainant has been provided with information about both monitoring exercises; ie the results of the first exercise and an explanation as to why the second set of results is not held, on a number of occasions since 2011/12. It also shows that the complainant has made a number of previous requests for information about the subject matter, both in terms of subject access requests for his own information and FOIA/EIR requests. The Council has also undertaken a number of internal investigations into the subject matter associated with the request in 2015 and 2016.
35. In an email to the complainant on 10 November 2017 the Council advised the complainant that it had provided him with all the information held relating to the matter. In this email the Council also offered the complainant the opportunity to visit its offices to go through all of the records held relating to the noise and odour complaints in an attempt to demonstrate that it was not withholding any information.
36. The Council provided the Commissioner with copies of correspondence to the complainant warning him that it would not enter any further correspondence about the subject matter, as detailed below:
  - Letter 19 October 2016 – *"In my letter dated 9<sup>th</sup> September 2016, I informed you that I was not prepared for this service to correspond with you on matters prior to the 9<sup>th</sup> September and therefore are*

*not going to comment on the specific points raised in your latest letter".*

- Letter 4 January 2017 – *"Previous correspondence has made it clear that we feel that we have answered you as fully as possible, and we are not prepared to continue to correspond regarding historic complaints and investigations".*
- Letter 31 January 2017 – *"I trust that this concludes matters and I reiterate that I will not be responding to these matters again as I have addressed them in numerous responses to you".*
- Letter 26 February 2018 (response to previous FOI request dated 25 January 2018) – *"as you are aware, a considerable amount of time and resources has already been spent responding to your correspondence on the issues raised in your most recent FOI request. Given our restricted resources and the fact that we have already provided you with this information, and on the basis that we have already advised you that we will no longer engage in correspondence with you on this issue, I am not going to re-send you this information".*
- Response to request 1 dated 19 May 2018 – *"As you are aware from previous correspondence, the most recent of which was dated 26 February 2018, we confirmed that we would no longer respond to letters from you in relation to historic noise and odour complaints. Despite this, you continue to submit requests for information on this matter, I therefore write to advise you for the final time that we will neither acknowledge nor respond to any further requests for information from you on this topic".*

### **The complainant's position**

37. The complainant has not submitted any specific arguments to explain why he does not consider the requests to be vexatious. However, he has made a number of allegations that the Council has not handled the matter in accordance with its statutory obligations. He also considers that the Council has previously issued *"inconsistent and conflicting replies"* to his enquiries about the matter. The complainant stated that request 1 was made to confirm that the Council's *"last reply on this matter is indeed their confirmation [sic] of the veracity [sic] of the final [sic] communication"*.

### **The Commissioner's position**

38. Firstly, the Commissioner would like to highlight that there are many different reasons why a request may be vexatious, as reflected in the Commissioner's guidance. There are no prescriptive 'rules', although

there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the authority.

39. The Commissioner's guidance has emphasised that proportionality is the key consideration for a public authority when deciding whether to refuse a request as vexatious. The public authority must essentially consider whether the value of a request outweighs the impact that the request would have on the public authority's resources in providing it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.
40. The Commissioner notes the Council's representations in relation to its previous dealings with the complainant. In this case, the Council has been able to demonstrate that it has engaged to a significant extent with enquiries, complaints, requests for information and other correspondence from the complainant relating to noise and odour issues relating to a neighbouring property, and it has taken his correspondence seriously. The Commissioner is prepared to accept that, cumulatively, the Council has spent a significant amount of time and resources in dealing with the complainant's correspondence and information requests. The Commissioner notes that in a letter from the complainant to the Council he alludes to the fact that he has a file of correspondence *"4/6 inches thick filled with correspondence that I have received from NPT council departments and purporting to contain the information that I had requested"*. The Commissioner also notes that the Council has offered the complainant the opportunity to visit its offices and go through the file on the subject matter. It appears to the Commissioner that the problem here is not a lack of engagement from the Council but simply that the complainant disagrees with what the Council has done and its justification for it.
41. The Commissioner has seen a small sample of correspondence exchanges between the Council and the complainant. She notes that since 2011, various officers within the Council have been involved in responding to the complainant regarding the subject matter. The officers include the Planning Development Managers, Environmental Health Officers, Team Leaders and Managers, and the Heads of Planning & Public Protection and Business, Strategy, Housing and Public Protection.

42. The Commissioner notes that the Council has advised the complainant on several occasions that it has provided him with all of the information held relevant to the subject matter and explained why no further information (eg the second set of noise recordings) is not held. The Council has also indicated on a number of occasions that it does not intend to enter into further correspondence on the matter.
43. The Commissioner notes that the request in this case relates to noise complaints relating to neighbouring property of the complainants. The matter has been subject of a number of stages of the Council's internal complaint procedures in 2015 and 2016. The complaint investigated in 2016 made a number of recommendations including the Council issuing an apology for not advising the complainant in writing the reason why the second recordings was assumed to be inconclusive and not analysed and consider creating a policy on the retention/destruction of sound recordings made in respect of noise complaints. However, from the information available to the Commissioner it appears that the investigations all found that the complainant had been provided with all of the information held relevant to subject matter.
44. The Commissioner is prepared to accept that the request in this case is a further attempt to challenge the decisions and actions taken by the Council. For example, the Commissioner considers that it is arguable whether the first part of request 1 is a valid request for information. This is because the way it is worded simply requires the Council to confirm whether a statement it previously made is true. The Commissioner considers that it is unlikely that such information would be held in a recorded format. In any event the Commissioner notes that the complainant is asking the Council to confirm a statement which it has made in writing on a number of occasions.
45. It appears to the Commissioner that the Council has made all reasonable attempts to explain and justify its actions to the complainant. The Commissioner agrees with the Council that responding to the requests would not resolve this matter, but would instead prolong the argument when the Council has already made its position clear. Pursuing numerous avenues of complaint and not being satisfied with any view that differs from one's own is a common characteristic in cases involving vexatious requests.
46. The Commissioner also considers that, based on the evidence provided in terms of the length of time that the complainant has been corresponding with the Council about the subject matter it is reasonable to conclude that he will continue to submit requests, and/or maintain contact about the subject matter regardless of any response provided to the request in question. The disruption to the Council resulting from any continuing correspondence would be disproportionate. The

Commissioner is therefore satisfied that, in the context of the Council's previous and ongoing dealings with the complainant, compliance with the request would result in a disproportionate burden on its resources.

47. Taking into account all the circumstances of the case, the Commissioner considers that a strong case has been presented to demonstrate that the request is vexatious. It was not the intention of the legislation that individuals should be allowed to pursue personal grievances to an unreasonable extent through the use of the EIR. Limited public resources should not be spent on continuous unproductive exchanges.
48. The EIR gives significant rights to individuals and it is important that those rights are exercised in reasonable way. There comes a point when the action being taken and the associated burden being imposed on the authority is disproportionate to the objective that the complainant is attempting to achieve. The Commissioner considers that the complainant's correspondence has now passed a point where it has become unreasonable for the Council to continue to respond. The Commissioner's decision is that the burden created is disproportionate for the resources available at the Council. Consequently, the Commissioner has decided that regulation 12(4)(b) is engaged in respect of requests 1 and 2.

### **Public Interest Test**

49. The exception at regulation 12(4)(b) is subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception at regulation 12(4)(b) outweighs the public interest in complying with the request.
50. There is a general public interest in openness and transparency, and complying with the request would enhance that public interest. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters and more effective participation in environmental decision-making.
51. However, there is a strong public interest in ensuring that scarce public resources are not disproportionately used to respond to requests for information from an applicant who is clearly dissatisfied about an issue and seeks to keep it alive until there is a conclusion or resolution he considers favourable. That is simply not what information access legislation was designed to achieve and consequently there is a strong public interest in ensuring that the EIR is not brought into disrepute from a manifestly unjustified and improper use of the legislation.

52. In this case, the Commissioner notes that the requests relate to a historic noise complaint as opposed to one that is currently live. The Commissioner understands that the cause of the noise complaints, ie the offending cockerels, were removed from the site in question around 2016. The Council has confirmed that it has not received any complaints from local residents in recent years.
53. Whilst the Commissioner is happy to accept that the complainant himself has a particular interest in the information, she does not consider there is any wider public interest in disclosure of the information requested which would outweigh the ongoing burden to the Council in dealing with the complainant's requests about the subject matter.
54. The Commissioner's decision is that the Council was entitled to refuse the requests as being manifestly unreasonable under the exception at regulation 12(4)(b) of the EIR, and that the balance of the public interest lies in the exception being maintained.

### **Regulation 12(4)(a) – information not held**

#### **Request 3 – Planning and land use**

55. As referred to earlier in this notice, the Council originally handled all three requests under the FOIA and applied section 14 of the FOIA to all of the requests. However, during the course of the Commissioner's investigation the Council accepted that the requests should have been handled under the EIR. Although all three requests refer to the same parcel of land, the Council acknowledged that request 3 about planning and land use should not have been grouped together with requests 1 and 2 which relate to noise complaints about the land. The Council confirmed that it did not hold any recorded information relating to request 3 and as such it considered regulation 12(4)(a) to apply.
56. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
57. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
58. The Council explained to the Commissioner that it considered the wording of request 3 to be *"unusual in that in making his request that he did was to first make an assertion about a specific piece of planning*



*legislation, to then set out why he considered that the smallholding next to his property fell outside the ambit of that provision". The request then asks whether the Council's records show "on what grounds those planning laws have been disregarded and why the proper planning laws have not been applied to this land?".*

59. The Council advised that it is the professional opinion of its planning officers (not just one planning officer) that the Council has not disregarded the planning laws set out in the first part of the request. The Council's opinion is that it has applied those planning laws (including the specific provisions referred to in the request) appropriately to the land/development in question. In light of this, the Council confirmed that it does not hold any recorded information showing the grounds on which the planning laws had been disregarded and why the planning laws have not been properly applied.
60. The Council advised that Commissioner that that it has had a number of correspondence exchanges with the complainant about an alleged breach of planning control and use of the land in question over a number of years. It contends that it has explained its reasons for taking the stance it has in terms of planning matters relating to the land in question. The Council advised that the complainant has referred planning matters relating to the land in question to the Public Services Ombudsman for Wales ('PSOW') in 2017. The PSOW acknowledged that the Council failed to formally acknowledge the complaint initially and keep the complainant informed of progress. However, the PSOW also found that the complaints were investigated appropriately by the Council and the decision taken not to take planning enforcement action was properly taken.
61. In weighing up the balance of probabilities that the Council holds any relevant information the Commissioner has had regard to the fact that the Council's view is that there has been no breach of any planning laws. The Commissioner understands that this position has been relayed to the complainant on a number of occasions. It is clear to the Commissioner that the complainant is dissatisfied with his previous dealings with the Council and its stance in respect of planning matters associated with the land in question. It follows that, if the Council does not consider there has been a breach of planning control, it would not hold any recorded information as to the grounds on which any planning laws have been disregarded or why planning laws have not been applied to the land.
62. In the circumstances of this case, the Commissioner does not consider that there is any evidence that would justify refusing to the Council's position that it does not hold any information relevant to this request. She does not find it difficult to accept that the Council does not have any



recorded information relating to the grounds on which planning laws have been broken. The Commissioner is therefore satisfied that on the balance of probabilities, the information requested is not held by the Council.

63. Regulation 12(4)(a) is subject to the public interest test. However, the Commissioner considers that it is not necessary to consider the public interest as to do so would be illogical. The public interest cannot favour disclosure of information that is not held.

#### **Regulation 14 – refusal to disclose information**

64. In the circumstances of this case the Commissioner has found that although the Council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
65. In these circumstances the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the Council failed to cite any exception(s) contained within the EIR as it actually dealt with the request under FOIA.
66. Since the Council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

## Right of appeal

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67. 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: 0870 739 5836

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)

68. 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.
69. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**