

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

**Decision notice**

**Date:** 18 November 2014

**Public Authority:** Conwy County Borough Council  
**Address:** Bodlondeb  
Conwy  
LL30 8DU

**Decision (including any steps ordered)**

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1. The complainant requested information regarding the failed transfer of a particular piece of land which led to the pull out by Tesco in August 2012. Conwy County Borough Council stated that the information requested was exempt under section 43 of the FOIA. In its internal review the Council also stated that some of the information held was exempt under section 40(2) and section 41. During the course of the Commissioner's investigation, it became apparent that the Council had not in fact determined exactly what information was held relevant to the request. The Council therefore introduced reliance on sections 12(1) and 14(1) of the FOIA. In addition, the Council accepted that, at least some of the information held was likely to constitute environmental information and as such, it was also relying on regulation 12(4)(b) of the EIR. The Commissioner's decision is that the Council has correctly applied section 12(1) of the FOIA and regulation 12(4)(b) of the EIR to the request. He does not require any steps to be taken. However the Commissioner is not satisfied that the Council advised the complainant whether there was any information which could be provided within the appropriate limit, and if so, how to refine his request to capture that information. This is a breach of the duty to provide advice and assistance under section 16 of the FOIA and regulation 9 of the EIR.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.

- to take reasonable steps to advise and assist the complainant with a view to refining the request to bring it within the cost limit.
3. The public authority must take these steps within 35 calendar days of the date of this decision 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**

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4. On 13 August 2013 the complainant wrote to the Council and requested information in the following terms:
- “Please could you send to me copies of correspondence, emails and memos regarding the now failed transfer of Plas yn Dre, sent to, or received from, any potential retailer (or their agent), leading to the pull out by Tesco in August 2012”.
5. The Council issued a refusal notice on 9 October 2013 stating that the information requested was exempt under section 43 of the FOIA.
6. On 9 October 2013, the complainant requested an internal review of the Council’s handling of the request.
7. The Council provided the outcome of its internal review on 25 October 2013 and upheld its decision that the information requested was exempt under section 43 of the FOIA. The Council also stated that some of the information requested was also considered to be exempt under section 40(2) and 41 of the FOIA.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 20 February 2014 to complain about the way his request for information had been handled.
9. On initial consideration of the complaint, the Commissioner asked the Council whether any of the information held relevant to the request was environmental information, and therefore should have been considered under the EIR. This is because the subject matter of the request appeared to relate to a proposed development of land for the building of a new superstore.
10. During the course of the Commissioner’s investigation the Council provided him with three CDs of information held relevant to the request.

The Council accepted that some of the information was likely to constitute environmental information. It also stated that it was now also relying on section 14(1) of the FOIA and regulation 12(4)(b) of the EIR in light of the burden and diversion of resources to review the information held to determine what information could be disclosed, and what exemption(s) applied to any information held.

11. However, on reviewing this information, the Commissioner raised queries with the Council that that the information provided did not all appear to be relevant to the request. He therefore made further enquiries with the Council. The Council accepted that it had provided the Commissioner with all information relating to the Plas yn Dre Site, and not the information that fell within the scope of the request in this case. However, in light of the volume of information held, the Council stated that to locate, retrieve and extract information relevant to the request would impose a disproportionate burden on the Council and as such it was relying on sections 12(1) and 14(1) of the FOIA and regulation 12(4)(b) of the EIR as the basis to refuse the request.
12. In light of the above, the Commissioner has therefore considered whether the Council was required to comply with the request.

## Reasons for decision

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### **Is any of the requested information environmental information?**

13. The Council initially dealt with this request under the FOIA. During the course of the Commissioner's investigation it became apparent that the Council had failed to identify the actual information it holds relevant to the request. The Council accepted that at least some of the information is likely to constitute environmental information. However, the Council's position is that locating, retrieving and extracting information falling within the scope of the request would represent a disproportionate burden.
14. In circumstances such as this case where it is not possible for the Commissioner to view the requested information because a public authority's position is that to provide it is too costly, he has to make a determination as to whether information is environmental information based simply upon the wording of the request, along with any other relevant factors, e.g. the broader context of the request.
15. In the Commissioner's opinion, at least some of the information held by the Council would represent environmental information as defined by regulation 2(1)(c) of the EIR. This provides that:

“environmental information’ has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material on—

(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) and (b) as well as measures or activities designed to protect those elements.”

16. The Commissioner considers that the phrase “any information ....on” should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
17. The Commissioner understands that the Council was in the process of considering proposals to redevelop the Plas Yn Dre area of Llanrwst which included the sale of land for the purpose of building a new superstore. In August 2012 it was announced that the developer had confirmed it did not intend to proceed with the development of a store on the site<sup>1</sup>.The request in this case is for information sent to or received from potential retailers (or their agent) leading to the pull out by Tesco Stores in relation to the site at Plas yn Dre.
18. In the Commissioner’s opinion, development or proposed development of land constitutes a measure that is likely to affect the factors and elements of the environment. For example, the construction of a superstore would obviously affect numerous elements of the environment. Based on the subject matter associated with the request and the wording of the request the Commissioner considers it likely that some of the information the Council holds relevant to the request is likely to constitute environmental information. This is because it is information on (concerning, relating to, or about) a measure (development of land) which is likely to affect the elements of the environment as set out in regulation 2(1)(a); in particular land and landscape.

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<sup>1</sup> <http://www.bbc.co.uk/news/uk-wales-north-west-wales-19267597>

19. The Commissioner is therefore satisfied that the request would fall under the FOIA and EIR.

### **Section 12 – the appropriate limit**

20. The Commissioner's guidance on calculating costs where a request spans different access regimes states that, where information held relevant to a single request spans both FOIA and another access regime (EIR and/or the Data Protection Act 1998), the first step is for the public authority to consider the request under the FOIA. This is the case when some of the requested information may be environmental information to which the exemption at section 39 of the FOIA would apply. When an individual request is likely to cover information that falls under more than one regime – e.g. mixed requests – then the Commissioner:
- Will allow the costs of responding to the whole request under the FOIA.
  - Will allow only the costs of providing the environmental information to be considered under the EIR. However, the Commissioner recognises that in some cases, including this one, in order to provide any such environmental information the public authority will need to collate all of the requested information before identifying which is environment and which is not. Thus the costs of collating all of the requested information will be allowed.
21. In light of the above, the Commissioner has first considered the request under the FOIA. Section 12 of the FOIA allows a public authority to refuse to comply with a request if to do so would exceed the appropriate limit. In the case of the Council this limit is £450, representing 18 hours work at a charge of £25 per hour. The only activities that a public authority can take into account are set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations (the 'Fees Regulations') and are the following:
- determining whether it holds the information;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
22. The Council asserts that compliance with the request would impose a disproportionate burden on its resources, when weighed against the value of the information being made public. The Council's arguments in terms of the burden relate primarily to locating, retrieving and extracting information held relevant to the request.

23. The Council explained that, in order to determine exactly what information is held relating to the request it would be necessary to manually review and check all of the information held relating to the Plas yn Dre site to determine whether it contained information caught by the request.
24. The Council confirmed that it holds around 4,000 pages of information relating generally to the Plas yn Dre site. The information is held both in electronic and manual format. All of the information held within the manual files (some of which is still held electronically) was scanned and copied onto CDs, in order for the Council to provide the Commissioner with evidence to demonstrate the volume and complexity of locating, retrieving and extracting information held relevant to the request.
25. However, even though all of the information originally contained within manual files is now technically held electronically by the Council (as PDF documents), it is not held in a searchable format. Whilst emails relating to the site will still be held electronically (albeit most will be archived), the Council explained that it was not possible to carry out any meaningful electronic search that would isolate the relevant information. Any search criteria would by necessity be wide and would in all likelihood return a large amount of possible relevant and irrelevant information that would require manual sifting and review.
26. The Council undertook a sampling exercise on two randomly selected files contained on one of the CDs it provided to the Commissioner. The files comprised a total of 112 pages and the information was reviewed to determine whether it contained any information relevant to the request. The Council confirmed that this exercise took 2¾ hours to complete, which works out at an average of 1½ minutes per page. If these figures are extrapolated, it would indicate that it would take in excess of 110 hours to check all 4000+ pages of information held about the site.
27. Having viewed a sample of the information held relevant to the Plas yn Dre project, the Commissioner accepts that it would be necessary to review all of the information held to identify relevant information, as there is no separate file held in relation to information sent to, or received from retailers about the project.
28. The Commissioner has no reason to doubt the estimate provided by the Council, in that it took an average of 1½ minutes per page to review the information held about the scheme to identify information relevant to the request. The Commissioner also notes that even if it were to possible to review each page of information held within 30 seconds this would still equate to 33 hours of work and would still exceed the cost limit.

29. In view of the large amount of information concerned and the way in which it is held, the Commissioner is satisfied that the Council has provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. The Commissioner is therefore satisfied that the Council was correct to refuse the request under section 12.
30. In light of the fact that some of the information held by the Council is likely to constitute environmental information, the Commissioner has gone on to consider any additional obligations on the Council under the EIR. This is because even if the request is refused under FOIA, the complainant still has a separate right of access to environmental information under the EIR.

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

31. 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.
32. In the Commissioner's view, "manifestly" means that there must be an obvious or tangible quality to the unreasonableness.
33. Unlike FOIA and, specifically, section 12, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance. The considerations associated with the application of regulations 12(4)(b) of the EIR are, instead, broader than section 12 of FOIA. Specifically there is a requirement under regulation 12(1) of the EIR to consider the public interest test and the EIR has an express presumption in favour of disclosure. These factors will be taken into account when determining whether the request is manifestly unreasonable.
34. The Council's position is that it is not possible to devise a strategy to search only for environmental information held relevant to the request. This is because it has no way of knowing in advance what parts of documents held will contain environmental information, and which won't. The Council asserts, therefore, that it would be necessary to collate all information falling within the scope of the request before it can separate information held into environmental and non-environmental information. From this point the information would then need to be considered under the provisions of the relevant access regime.
35. The Council relied upon the same reasons as set out in paragraphs 22-26 to apply regulation 12(4)(b) to the request.



36. Having considered the financial cost in terms of staff time that would be required to comply with the request, the Commissioner is satisfied that compliance with the request would be manifestly unreasonable on the grounds of cost and diversion of resources and therefore the Council correctly engaged regulation 12(4)(b).

### **The public interest test**

37. The EIR explicitly requires a public authority to apply a public interest test, in accordance with regulation 12(1)(b), before deciding whether an exception should be maintained. The Commissioner accepts that public interest factors such as proportionality and the value of the request will have already been considered by a public authority in deciding whether to engage the exception, and that these arguments will still be relevant considerations in the public interest test.
38. The complainant advised the Commissioner that, following the leaking of a confidential email giving notice of a meeting between the Council and Llanrwst Town Council, protestors turned up at the meeting along with members of the media. Subsequently, a public meeting was held with the local Assembly Member where the Council promised total transparency relating to the scheme. The complainant confirmed that he was not particularly interested in the financial elements of the scheme. However, he is of the opinion that there was some "wheeler dealing" involved, including the developer making substantial offers of land for a waste transfer station to be built, and used as a "bribe" to progress the development.
39. The Commissioner appreciates the complainant's interest in the requested information and the purpose and value behind the request. However he has had to balance this against the burden that would be placed on the Council if it was to comply with the request.
40. The Commissioner recognises the importance of accountability and transparency in decision-making by public authorities. He further recognises that there is an express presumption of disclosure within the EIR and that public authorities should aim to provide requested environmental information where this is possible and practicable. The Commissioner further recognises that a public authority will always be expected to bear some costs when complying with a request. For the sake of the public interest test, however, the key issue is whether in all the circumstances this cost is disproportionate to the importance of the requested information. In the Commissioner's view, in this case, it is.
41. The Commissioner considers there is a strong public interest in the Council being able to carry out its core functions without the disruption that would be caused by complying with requests that would impose a



significant burden in terms of both time and resource, particular in the current climate where human and financial resources are scarce. The Commissioner is of the view that there is a very strong public interest in public authorities being able to carry out their wider obligations fully and effectively, so that the needs of the individuals they serve are met. The Commissioner is also mindful of the fact that the Council's ability to comply with other requests for information would be undermined if it had to routinely deal with requests requiring significant resources.

42. Taking into account all the circumstances of this case, the Commissioner considers that it would be unreasonable to expect the Council to comply with the request because of the substantial demands it would place on its resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation. Therefore, in all the circumstances, the Commissioner has found that the weight of the public interest arguments favours maintaining the exception.

### **Section 16 FOIA/Regulation 9 EIR**

43. Under section 16 of FOIA and regulation 9 of the EIR a public authority is required to provide advice and assistance to someone who has made a request. In particular a public authority is expected to provide advice and assistance where the public authority has refused to comply with a request because the cost of doing so would exceed the appropriate limit.
44. The aim of such advice should be to help the applicant make a fresh request which could be dealt with within the appropriate limit. As the Council did not seek to rely on section 12 of the FOIA or regulation 12(4)(b) of the EIR until after the Commissioner had started his investigation into this complaint, at the time of the request the Council did not contact the applicant to provide any advice on how the request could be refined or provide an indication of what, if any, information it could provide within the appropriate limit.
45. The Commissioner accepts that, in light of the way that the information is held, it is possible that the Council may not be able to provide any meaningful information to the complainant within the cost limit. It may be that any information which can easily be located and provided is not of any interest to the complainant. However the Commissioner finds that the public authority has failed to properly address its obligations to provide advice and assistance under section 16 of the FOIA or regulation 9 of the EIR.
46. The Council should now inform the complainant what, if any, information could be provided within the cost limit. If it is possible to provide information within the cost limit the Council should provide advice and

assistance aimed at enabling the complainant to refine his request so as to target the information of most interest to him.

## **Other matters**

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47. As covered under the "Scope of the case" heading above, it was only after the intervention of the Commissioner that the Council reached a settled position on the legislation under which this request should have been handled and under which provisions it was being refused. The Council should bear in mind that requests relating to planned development of land are likely to involve environmental information.
48. It also became apparent at the point the Commissioner asked to be supplied with a copy of the withheld information that the Council had not done a thorough job of identifying what relevant information was held prior to citing sections 43, 40(2) and 41 of the FOIA. The Council should ensure in future that its first step upon receiving an information request is to identify all relevant information it holds. Only then should it consider to what extent this information may be covered by exemptions or exceptions. A failure to obtain or consider the actual information requested could, as in this case, result in an incorrect or inaccurate response being issued. The Commissioner considers that this is extremely poor practice.

## Right of appeal

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49. 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)

50. 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.
51. 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 .....**

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