

**Freedom of Information Act 2000 (Section 50)  
and  
The Environmental Information Regulations 2004.**

**Decision Notice**

**Date: 21 February 2011**

**Public Authority:** Northumberland County Council  
**Address:** County Hall  
Morpeth  
NE61 2EF

**Summary**

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The complainant submitted a request for information on income generated from 'section 106' agreements under a certain policy. The Council disclosed some information to the complainant under the Freedom of Information Act, but this did not include all of the information held. After the intervention of the Commissioner, the Council reconsidered the request under the EIR, and stated that the requested information would only be provided if the complainant paid a fee of £925. The Commissioner explained to the Council that the activities it had taken into account could not be included in a fees notice. The Council then confirmed that it relied upon the exception at regulation 12(4)(b) which applies to manifestly unreasonable requests. However, the Council has failed to provide any arguments which explain why the request is manifestly unreasonable and so the Commissioner finds that the exception was applied incorrectly. The Commissioner finds that the Council has breached regulation 8(3) by issuing an unreasonable fees notice, and regulation 8(4) by failing to issue this within the statutory time for compliance. The Council has breached regulation 11(4) by failing to conduct an internal review within 40 working days. The Commissioner also finds that the Council has breached regulation 14(1) by failing to provide a refusal notice, regulation 14(2) by failing to provide a refusal notice within the statutory time for compliance, regulation 14(3)(a) by failing to cite the exception it relied upon regulation 14(3)(b) by failing to conduct a public interest test in relation to the exception, and regulation 14(5) by failing to inform the complainant enforcement and appeal provisions of the EIR. The Commissioner requires the Council to either disclose the requested information to the complainant or issue a valid refusal notice. The Council must take these steps within 35 calendar days.

## The Commissioner's Role

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1. The Environmental Information Regulations (The Regulations) 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 Regulations 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 Regulations.

## Background

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2. Northumberland County Council was created on 1 April 2009. The former Tynedale District Council, Alnwick District Council and Castle Morpeth, as well as the previous Northumberland County Council, were amalgamated into one public authority. The Development Management function of the new authority structure is built around 3 geographical area teams (West, North and South East), together with a "functional" central team that deals with larger strategic planning matters.
3. A 'section 106 agreement' is a Planning Obligation authorised by Section 106 of the Town and Country Planning Act 1990 (as amended). It is a legal agreement between the Local Planning Authority and the applicant or developer, and any other parties with an interest in the land in question. These agreements are a way of delivering or addressing matters that are necessary to make a development acceptable to planning authorities. Section 106 agreements require the owner of the land to take specific actions in order to make an otherwise unacceptable development acceptable. These actions might include the construction of local facilities, designating a proportion of the proposed development as 'affordable housing', or an order to make payments which are used to improve services and infrastructure in the local community.

## The Request

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4. On 1 December 2009, the complainant submitted a request to the Council for:

"the amount of income which has been collected by Tynedale / West Region under 'Supplementary Planning Document New

Housing Planning Obligations for Sport and Play Facilities' [‘the SPD policy’] adopted on the 7th March 2006 which has been spent and where this has been spent in relation to the developments where the charge was levied.”

5. The Council acknowledged this request on 2 December 2009 and stated that it would be dealt with under the Freedom of Information Act (‘the Act’).
6. On 24 December 2009, the Council provided the complainant with a spreadsheet of “S106 obligations under this SPD policy”. The complainant was advised that a more comprehensive database which tracked expenditure and compliance across the whole county was being developed, but was not yet available. The Council provided no information about the amount of money that had been spent or what this had been spent on. Instead it gave the complainant the name of a Council member of staff to contact with such queries.
7. On 28 December 2009, the complainant emailed the Council to say that the information provided in the spreadsheet was at least 18 months out of date. The complainant informed the Council that he was aware of other “approvals with s.106 or direct contributions” that did not appear on the spreadsheet. The complainant asked that the Council forwarded an up to date version of the spreadsheet, and again specified that he was only interested in information relating to West Region, rather than the whole county. The Commissioner considers that this constitutes a request for an internal review on the complainant’s part.
8. On 30 December 2009 the Council emailed the complainant and asked that he clarify which specific area or development he was interested in. The Council stated that if the complainant wished to receive information about all developments in the former Tynedale area, it might be best if he arranged to visit the Council’s premises so that he could collate the information himself.
9. On 9 January 2010, the complainant emailed the Council to clarify again that he was interested in information relating to Tynedale since the SPD was adopted. The complainant stated that he expected the Council to collate the information in response to his request.
10. Following the intervention of the Commissioner, the Council reconsidered the complainant’s request under the EIR and provided an response to him on 4 June 2010. This stated that the information provided to the complainant was the only collated form of data about contributions and expenditure under the SPD. The Council explained

that the information was up to date from April 2009. The Council stated that work was ongoing to create an up to date database, but that this was not yet complete. The complainant was advised that if he wished to receive a spreadsheet containing all contributions and expenditure since 2006, a charge of £925 would be levied for this work, based on an estimated 37 hours spent on collating the information, charged at a rate of £25 per hour.

11. On 13 June 2010 the complainant wrote to the Council to explain that he was dissatisfied with this response.
12. On 15 June 2010 the Council provided an internal review of this response under the EIR to the complainant. This upheld the response of 4 June 2010.

## **The Investigation**

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### **Scope of the case**

13. On 23 January 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant explained that all of the requested information had not been disclosed to him.

### **Chronology**

14. On 5 February 2010, the Commissioner wrote to the Council to inform it that a complaint had been received. The Commissioner asked the Council confirm whether it had responded to the complainant, and if this was the case, to conduct an internal review.
15. On 7 April 2010, the Commissioner wrote to the Council and explained that he was of the opinion that the request for information should have been considered under the EIR, rather than the Act. The Commissioner asked that the request was reconsidered under EIR and a response sent to both the complainant and the Commissioner by 21 April 2010. The Commissioner also drew the Council's attention to his published guidance on handling requests under the EIR.
16. On 22 April 2010 the Commissioner telephoned the Council to ask that it responded to his email of 7 April 2010. On 23 April 2010, the Council telephoned the Commissioner and explained that responsibility for dealing with the complaint had been passed to a different member of

- staff. The Commissioner agreed a new deadline of 30 April 2010 for the request to be reconsidered under the EIR.
17. On 27 April 2010 the Council emailed the Commissioner to ask that he telephone one of its members of staff. The Commissioner telephoned the Council on the same day. The Council explained that it was still attempting to establish what information was held in response to the request. The Commissioner agreed a new deadline of 14 May 2010.
  18. On 18 May 2010, the Council emailed the Commissioner to ask that the deadline for a response be extended to 21 May 2010.
  19. On 25 May 2010, the Commissioner emailed the Council to ask that it provided a response to the complainant's request compliant with the EIR, as requested in his email of 7 April 2010. On the same day, the Council emailed the Commissioner to state that the response would be sent by 28 May 2010.
  20. On 2 June 2010, the Commissioner emailed the Council to ask that it provided a response to his email of 7 April 2010. On the same day, the Council emailed the Commissioner a draft copy of a response it stated it intended to send to the complainant by 4 June 2010.
  21. On 4 June 2010, the Council sent a response to the complainant. This stated that "there is currently no composite database" of the requested information prior to April 2009. The information provided to the complainant was the only collated form of data about contributions and expenditure under the SPD and was up to date from April 2009. The Council stated that work was ongoing to create an up to date database, but this was not yet complete. The complainant was advised that if he wished to receive a spreadsheet containing all contributions and expenditure since 2006, a charge of £925 would be levied for this work, based on an estimated 37 hours spent on collating the information, charged at a rate of £25 per hour.
  22. On 5 June 2010, the complainant contacted the Commissioner and explained that he was dissatisfied with this response. The complainant also wrote to the Council on 13 June 2010 to state this.
  23. On 15 June 2010, the Council wrote to the complainant to address his complaint about the way his request had been handled. This reiterated that the requested information was not available in a collated form, but stated that the Council anticipated completing a spreadsheet of this information "by the end of the summer", at which point it could be provided to the complainant free of charge. The Council reiterated that

it would levy a charge of £925 if the complainant wished the work to be completed more quickly.

24. On 20 July 2010, the Commissioner wrote to the Council to explain that the Tribunal decision in the case of [David Markinson v Information Commissioner](#) had established that costs included in fees notices under regulation 8 could only include disbursements. The Commissioner therefore explained that the Council's fees notice issued to the complainant on 4 June 2010 was likely to be invalid. The Commissioner however explained the provisions of the exception at regulation 12(4)(b) of the EIR. He asked that the Council confirm if it wished to apply this exception, and if so, provide answers to a series of questions about how it had calculated its estimate that it would cost £925 to comply with the request.
25. On 5 August 2010, the Commissioner emailed the Council to ask that it respond to his email of 20 July 2010. The Commissioner explained that if the Council chose not to respond further, he would draft a Decision Notice based on the information available to him.
26. On 19 August 2010, the Council emailed the Commissioner to confirm that it wished to rely on the exception at regulation 12(4)(b). However the Council stated that it would not be able to provide answers to the Commissioner's queries on the application of this exception until 15 September 2010. The Commissioner has received no further response from the Council.

## Analysis

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### Regulation 2

27. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
28. The Commissioner considers that the information requested falls within regulation 2(1)(c): information on "measures (including administrative measure), 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 these elements". Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The Commissioner therefore considers the information requested by the

complainant to be environmental information, because the information relates to agreements about conditions placed on planning applications.

### **Regulation 8**

29. Regulation 8(1) provides that a public authority may charge for making environmental information available. Regulation 8(3) provides that any charge "shall not exceed an amount on which the public authority is satisfied is a reasonable amount".
30. The Council wrote to the complainant on 4 June 2010 to explain that if the complainant wished to receive the requested information, a charge of £925 would be levied. The Council explained that this charge covered the cost of staff time in collating and cross-checking the requested information.
31. However, a public authority can only take certain costs into account in calculating this amount. These are disbursements such as the cost of photocopying or postage. The cost of staff time in identifying, locating or retrieving information cannot be taken into account. This view was confirmed in the Tribunal decision in the case of [David Markinson v Information Commissioner](#). (EA/2005/0014). The Commissioner therefore concludes that the charges detailed by the Council cannot be taken into account in a fees notice, and finds that the Council has breached regulation 8(3) by attempting to impose an unreasonable fee for providing information.
32. Regulation 8(4) provides that where a public authority levies a charge for providing environmental information, it should notify the applicant of this and the amount to be paid within 20 working days after it receives the request for information. The complainant's request was made on 1 December 2010. The Council did not write to the complainant to levy a charge of £925 until 4 June 2010, and consequently the Commissioner finds a breach of regulation 8(4).

### **Regulation 12(4)(b)**

33. In its email to the Commissioner of 19 August 2010, the Council confirmed that it wished to rely on the exception at regulation 12(4)(b).
34. Regulation 12(4)(b) provides an exception for requests that are 'manifestly unreasonable'. Whilst the EIR do not define the term, the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.

35. There is no single test for what sorts of requests may be considered to be manifestly unreasonable. Instead, each individual case is judged on its own merits taking into account all of the circumstances surrounding the request. It is the Commissioner's view that regulation 12(4)(b) will apply where it is demonstrated that a request is vexatious or that compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
36. Section 12 of the Freedom of Information Act provides an exemption for requests that would exceed an 'appropriate limit'. This limit is set in the [Freedom of Information and Data Protection \(Appropriate Limit and Fees\) Regulations 2004](#) (the Fees Regulations). For public authorities like the Council, the limit is £450. Using a standard rate of £25 per person per hour, this equates to 18 hours work. The following activities can be included in a public authority's estimate:
- *determining whether it holds the information,*
  - *locating the information, or a document which may contain the information,*
  - *retrieving the information, or a document which may contain the information,*
  - *extracting the information from a document containing it*
37. However, this limit applies only to section 12 of the Act, which is an absolute exemption. Regulation 12(4)(b) of the EIR does not provide an equivalent exception, as there is not a defined 'appropriate limit', and the exception is subject to a public interest test. However, the Commissioner acknowledges that estimating the costs of complying with a request using this model can be a useful starting point in establishing whether a request is manifestly unreasonable, although a number of other factors must be considered.
38. In its letter to the complainant of 4 June 2010, the Council explained that it estimated that it would take over 37 hours to provide the requested information, including the time spent on gathering information from different Council departments and cross-checking the information.
39. The Council has failed to respond to the Commissioner's email of 20 July 2010 and chasing email of 5 August 2010 enquiring how it calculated this estimate. It has also failed to provide any arguments for why it considers that the time spent on responding to the request would engage the 'manifestly unreasonable' exception, or any public interest considerations it has taken into account in deciding the exception should be maintained. In the absence of any evidence to support the Council's assertion that the request is manifestly



unreasonable, the Commissioner concludes that the exception was applied incorrectly.

## **Regulation 14**

40. Regulation 14 (1) provides that any refusal of a request should be made in writing. Regulation 14(2) provides that any refusal notice should be issued as soon as possible and no later than 20 working days after the date of receipt of the request. Regulation 14(3)(a) provides that a refusal notice shall specify the exception a public authority relies upon, and regulation 14(3)(b) provides that any public interest matters taken into account in applying an exception should also be explained. Regulation 14(5) provides that the enforcement and appeal provisions of the EIR should be explained to the complainant.
41. The Council has confirmed to the Commissioner that it relies on the exception at regulation 12(4)(b) in relation to this request. However, it failed to inform the complainant of this. The Commissioner therefore finds that the Council has breached regulation 14(1) by failing to provide a refusal notice, regulation 14(2) by failing to provide a refusal notice within the statutory time for compliance, regulation 14(3)(a) by failing to cite the exception it relied upon regulation 14(3)(b) by failing to conduct a public interest test in relation to the exception, and regulation 14(5) by failing to inform the complainant of the EIR's enforcement and appeal provisions.

## **Regulation 11**

42. Regulation 11(3) provides that upon receiving representations from an applicant unhappy with a response to a request for information, the public authority should review its response. Regulation 11(4) provides that the outcome of this internal review should be communicated to the applicant within 40 working days.
43. On 28 December 2009 the applicant wrote to the Council to explain that he was dissatisfied with the information disclosed to him. The complainant clarified this on 9 January 2010. The Council did not provide the outcome of its internal review until 4 June 2010 and so the Commissioner finds that it has breached regulation 11(4).

## **The Decision**

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44. The Commissioner finds that the Council has handled the complainant's request under the EIR incorrectly. The Council has:

- Applied the exception at regulation 12(4)(b) incorrectly
- Breached regulation 8(3) by issuing a fees notice that took into account factors that the Fees Regulations do not allow it to consider.
- Breached regulation 8(4) by failing to issue its fees notice within the statutory time for compliance.
- Breached regulation 11(4) by failing to provide the outcome of its internal review within the statutory time for compliance.
- Breached regulations 14(1), 14(2), 14(3)(a) and (b), and 14(5) by failing to issue a refusal notice that detailed the exception relied upon, any public interest considerations, and the enforcement and appeal provisions of the EIR.

## **Steps Required**

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45. As the Council has incorrectly relied on regulation 12(4)(b) it is not relieved of its obligation to comply with the request under the EIR. Therefore the Commissioner requires the Council to either make the requested information available in accordance with regulation 5(1), or issue a valid refusal notice compliant with regulation 14(1).
46. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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47. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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48. 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 21<sup>st</sup> day of February 2011**

**Signed .....**

**Andrew White  
Group Manager – Complaints Resolution**

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

## Legal Annex

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### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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 form 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) and (b) as well as measures or activities designed to protect those elements;

## **Regulation 8 - Charging**

**Regulation 8(1)** Subject to paragraphs (2) to (8), where the public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

**Regulation 8(2)** A public authority shall not make any charge for allowing an applicant –

- (a) to access any public registers or lists of environmental information held by the public authority; or
- (b) to examine the information requested at the place which the public authority makes available for the examination.

**Regulation 8(3)** A charge under paragraph (1) shall not exceed an amount on which the public authority is satisfied is a reasonable amount.

**Regulation 8(4)** A public authority may require advance payment of a charge for making environmental information available and if it does it shall, no later than 20 working days after the date of receipt of the request for the information, notify the applicant of this requirement and of the amount of the advance payment.

## **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 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;

## **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and

- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

**Regulation 14(4)** If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

**Regulation 14(5)** The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and  
(b) of the enforcement and appeal provisions of the Act applied by regulation 18.