IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2009/0069

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FER0236058
Dated: 27 July 2009

Appellant:	**EAST RIDING OF YORKSHIRE COUNCIL**
Respondent:	**INFORMATION COMMISSIONER**
Additional Party:	**STANLEY DAVIS GROUP LIMITED t/a YORK PLACE**

Heard at: Pocock Street, **London**

Date of hearing: 26 and 27 January 2010

Date of decision:

Before
CHRIS RYAN
(Judge)
and
ROSALIND TATAM
JENNI THOMSON

Attendances:

For the Appellant:	Jane Oldham
For the Respondent:	Anya Proops
For the Additional Party:	Jane Collier

Subject matter: Environmental Information Regulations 2004:

Charging, Reg 8
Format and means of communication, Reg 6

Cases: Cabinet Office v Information Commissioner EA/2008/0049

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed and the Decision Notice date 27th July 2009 is to stand.

REASONS FOR DECISION

Introduction

1. We have decided that the Information Commissioner was right to decide that East Riding of Yorkshire Council ("the Council") should have made available for inspection, without charge, certain information on the impact of building regulations and traffic/highways control on a particular property. On the basis of the Information Commissioner's interpretation of the scope of the request for information, which we consider to have been correct, the Council's stance in refusing to permit inspection of the information was not reasonable under regulation 6 (1) (a) of the Environmental Information Regulations 2004 ("EIR").

2. this case started as an appeal to the Information Tribunal. However, by virtue of the Transfer of Tribunal Functions Order 2010, the Tribunal which has decided it is now constituted as a First-tier Tribunal.

Background

3. There has been a long established practice in England and Wales that, before residential or commercial property is purchased, the purchaser carries out what is commonly called a "local search". The local authority would be requested to conduct a search of the Land Charges Register which it maintained and to answer certain questions designed to establish whether the property in question was, or might become, affected by certain activities which the local authority knew about. A standard set of questions was developed over the years by the Law Society and was incorporated in a standard form, known as Form CON29R. This would be sent to the relevant local authority with the appropriate fee and returned in due course completed to show the information and answers provided. Since the introduction of Home Information Packs in 2007 it is the seller, and not the buyer, who carries out local searches.

4. It is possible to obtain the answers to most, but not all, of the questions set out in Form CON29R by inspecting various public registers maintained by local authorities, as well as from other sources. A number of private organisations have developed services for obtaining the necessary information in this way and providing it to property sellers and those advising them. One such personal search company is Stanley Davis Group Limited. It provides its service under the trading name "York Place" and we will refer to it by that trading name in this decision.

The Request for Information and Complaint to the Information Commissioner

5. On 16 January 2009, York Place wrote to the Local Land Charges Department of the Council in the following terms ("the Request"):

> "*I would like to make arrangements to inspect the Building Control/Traffic Schemes abutting/Highway Schemes within 200m records in situ as soon as possible for the following land and buildings* [names property]'"

6. The Request was rejected. Correspondence then followed between the Council and York Place and its solicitors concerning the scope of the Request and the question of whether the Council was required to comply with it under either the Freedom of Information Act 2001 ("FOIA") or the EIR. It is now accepted by all parties that the Request was covered by the EIR, but we will have to examine the correspondence in more detail later in this Decision as it is relevant to an issue on the scope of the Request.

7. The Council's rejection of the Request was maintained following an internal review and on 17 February 2009 York Place complained to the Information Commissioner. In the course of the investigation that followed the Council informed the Information Commissioner that it accepted that the information in question fell within the scope of the EIR, that none of the exceptions to disclosure provided in the EIR applied, and that it should therefore be made available to York Place. However, it claimed that the information was not in a form which enabled it to be inspected without further collation by the Council. Accordingly, it said, the information should be made available as a document in that collated form and the Council was entitled to impose a reasonable charge for providing it. The Council relied on EIR regulation 6 (1) and regulation 8 (1) and (2) in support of its position. Those provisions must be read alongside regulation 5, which sets out the obligation of a public authority in respect of environmental information, and regulation 9 (1), which imposes an obligation to

provide advice and assistance. It is convenient to set out all four provisions here:

> *"5* ***Duty to make available environmental information on request.***
> *(1) Subject to paragraph (3) and in accordance with … the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*
>
> *"6.* ***Form and format of information***
> *(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless-*
> *(a) it is reasonable for it to make the information available in another form or format…"*
>
> *"8.* ***Charging***
> *(1)…where a public authority makes environmental information available …the authority may charge the applicant for making the information available.*
> *(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 that examination"*
>
> *"9.* ***Advice and assistance***
> *(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."*

8. On 27 July 2009, after completing his investigation into York Place's complaint (with commendable speed), the Information Commissioner issued a Decision Notice in which he rejected the Council's case on the following grounds:

    a. He found as a fact that the Request was for information from which York Place could obtain the answers to questions1.1 (f) – (h), 3.4 and 3.6 of Form CON29R. They are as follows:

> *"1.1 Which of the following relating to the property have been granted, issued or refused or (where applicable) are the subject of pending applications?*
> *…*
> *(f) building regulations approval*
> *(g) a building regulation completion certificate*
> *(h) any building regulations certificate or notice issued in respect of work carried out under a competent person self-certification scheme"*
>
> *"3.4 Is the property (or will it be) within 200 metres of any of the following?*
> *(a) the centre line of a new trunk road or special road specified in any order, draft order or scheme*
> *(b) the centre line of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road, or dual carriageway*
> *(c) the outer limits of construction works for a proposed alteration or improvement to an existing road involving (i) construction of a roundabout (other than a mini roundabout) or (ii) widening by construction of one or more additional traffic lanes*
> *(d) the outer limits of (i) construction of a new road to be built by a local authority (ii)an approved alteration or improvement to an existing road involving the construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway or (iii) construction of a roundabout (other than a mini roundabout) or widening by construction of one or more additional traffic lanes*
> *(e) the centre line of the propose route of a new road under proposals published for public consultation;*
> *(f) the outer limits of (i) construction of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway (ii) construction of a roundabout (other than a mini roundabout) or (iii) widening by construction of one or more additional traffic lanes, under proposals published for public consultation."*

"3.6 Has a local authority approved but not yet implemented any of the following for the roads, footways and footpaths (named in Box B) which abut the boundaries of the property?
(a) permanent stopping up or diversion
(b) waiting or loading restrictions
(c) one way driving
(d) prohibition of driving
(e) pedestrianisation
(f) vehicle width or weight restriction
(g) traffic calming works including road humps
(h) residents' parking controls
(i) minor road widening or improvement
(j) pedestrian crossings
(k) cycle tracks
(l) bridge building"

b. In order to obtain those answers it would be necessary to inspect information held by the Council which fell within the relevant definition of environmental information with the result that the EIR applied.

c. The effect of EIR Regulation 5 (1) was that environmental information should be made available by the Council on request.

d. The words "made available in a particular form…" in EIR regulation 6 (1) should be interpreted broadly to include a request for inspection of the information in question.

e. The Council had not established that it was reasonable for it to make the information available in a form (hard copy) that was different to that requested, it could not therefore rely on EIR regulation 6 (1) (a) and York Place had been entitled to gather the information it requested by means of inspection.

f. It followed that the Council was not entitled to levy a fee, but should have permitted inspection to take place free of charge.

The appeal to the Tribunal

9. On 20 August 2009 the Council appealed to this Tribunal, then known as the Information Tribunal. The Grounds of Appeal accepted that the matter should be determined under the EIR and that a request for inspection was a request for information in a particular form, for the purposes of EIR regulation 6.1 (a). However, it challenged the Decision Notice on the basis that the reasonableness test set out in that regulation should be applied to a request to inspect, not just the information needed to answer the questions in the CON29R form at 1.1(f) – (h), 3.4 and 3.6, but all of the Council's records on Building Control and Highway Schemes within 200 metres of the property identified and on Traffic Schemes abutting it. It argued, in any event, that York Place should have been refused inspection because it was "reasonable for it to make the information available in another form or format", namely a hardcopy document containing the information which the Council had extracted from the original records and which the Council would have checked, collated and appropriately redacted in order to remove information which should not be disclosed. This was said to be reasonable because

    (i) the information might contain personal data, which the Council was prohibited from disclosing, but which would be apparent to anyone inspecting the original records;

    (ii) some of the records were in electronic form which was not restricted to "read only" access, so that security would be put at risk if outsiders were permitted to have access;

    (iii) some of the records would be unintelligible due, for example, to the use of particular symbols with which untrained outsiders would not be familiar;

(iv) the software licence for the Council's system limited the number of users to 10 at any one time and permitting outsiders to inspect would cause the maximum to be exceeded; and

(v) the records were situated in several different locations within the area administered by the Council.

It followed, the Grounds of Appeal claimed, that EIR regulation 8(2)(b) was not engaged, so that the Council was entitled to charge for preparing the information and providing it to York Place in hard copy form.

10. On 28 September 2009 the Tribunal issued directions for the disposal of the Appeal. These included an order that York Place be joined as an Additional Party to the Appeal. In its Reply York Place raised a new issue as its primary contention in support of the Information Commissioner's Decision Notice. This was that, on a proper construction of EIR regulations 5 and 8, the Council had an obligation to permit inspection of the requested information, without the right to make it available in another form if that was a reasonable thing to do. If this argument succeeds then it is unnecessary to consider the reasonableness test under EIR regulation 6.

11. The Council filed witness statements from four of its officers. Mr A J Blackburn (who dealt with traffic and parking information), Mr A Allott (highway schemes), Mr C J Ducker (building regulations) and Mr M Jackson (computer security). Mr Blackburn and Mr Ducker subsequently signed supplemental witness statements and all of them attended at the hearing and were cross examined. Evidence for York Place took the form of two witness statements from Mr J C Round, the Divisional Managing Director of York Place and one from Mr S C Davies, the Chief Executive of the Association of Independent Personal

Search Agents. These two witnesses also attended the hearing and were cross examined.

12. In the following paragraphs we summarise the evidence of each witness. But we start with some general comments on the evidence as a whole. With the exception of Mr Ducker, whose evidence was unsatisfactory in a number of respects (some of which we detail in paragraph 15 below), we felt that the witness evidence was given with care and was generally credible. However, the evidence of the Council's witnesses generally was very limited covering just the areas of its property search services on which they could speak authoritatively. That is not a criticism of them, as individuals, but the Council's failure to provide evidence from a more senior member of staff, capable of providing an overview of the Council's general approach, was a surprising omission when one of the key issues was whether its overall approach was reasonable. The evidence filed on behalf of York Place was largely irrelevant, as we shall explain in the course of summarising it.

13. Mr Blackburn's evidence.

    a. Mr Blackburn gave evidence on the records the Council holds on traffic and parking. He is an engineer employed in that section of the Council and explained in his witness statement the full process for receiving proposals for traffic and highway schemes and related aspects of regulation. He also explained how information on each such proposal is maintained in the Council's filing system and that this may include information about individuals, who may, for example, respond to a consultation on a proposal and, in the process, disclose information about themselves that may constitute personal data or, in some cases, sensitive personal data.

b. When a decision is made to take a suggestion for a new scheme forward to further consideration an indication to that effect is added to a computerised record operated through a software package called PARKMAP. Subsequent access to the record is gained by identifying a property on a screen view of a street map and then navigating from there to schedules of detailed information on the progress of any proposal likely to affect the property up to and including its adoption or abandonment. Mr Blackburn ultimately conceded on cross examination that a person interrogating the PARKMAP system could access all the information needed to answer questions 3.4 and 3.6 of the CON29R form (with the possible exception of information on pedestrian crossings and cycle tracks) without needing to look at the paper files and that, provided he or she stayed within that system (and did not use access to it as a means of gaining unauthorised access to other parts of the Council's computer network), no personal data would be disclosed**.**

c. Mr Blackburn had not been involved in the formulation of the Council's response to the Request. He did not know why York Place was refused inspection of PARKMAP although, as those directly involved in searching answers were in a different section his lack of knowledge was not, perhaps, surprising.. He himself interrogated the system at a later date when he was asked to provide the Information Commissioner with the information that would have been required to answer the identified questions and confirmed that he had been able to do this. He also confirmed that it was possible that PARKMAP would include some personal data.

d. He was aware that the Council had some knowledge of at least one other local authority which had created a web access search system to enable road traffic data to be searched by

members of the public without compromising security. He did not have any detailed knowledge of how it operated, but believed that there had been some discussion with the Council about the possibility of introducing a similar system. However, he had not been a party to the discussions and we had no further information on whether or not the discussions pre-dated the Request.

e. His witness statement also included a statement to the effect that PARKMAP is not an intuitive system and that anyone using it to access road or highway scheme information would need training from the Council's support and procurement section. However, he accepted that, at the appropriate level of detail to answer the identified questions, the assistance needed would be limited.

14. Mr Allott's evidence.

a. Mr Allott is an Assistant Property Officer in the Asset Strategy Team and part of his duties is to provide responses to queries on the CON29R form relating to local highway schemes, pedestrian crossings and cycle routes i.e. the information required to question 1.1 (j) and (k) and question 3.4. During cross examination he estimated that approximately 150 search requests crossed his desk each week.

b. His evidence was that he did not use PARKMAP because information on proposed highway schemes was in fact already available from maps published on the Council's web site. York Place ultimately accepted that statement, although it had originally experienced difficulty in navigating to the relevant web pages. Mr Allott also explained that information about pedestrian crossings and cycle routes was held by him on a

hardcopy schedule, updated from time to time. He relied on that document to answer questions, rather than rely on PARKMAP, which he did not use. A copy of the schedule was made available to us during the hearing and the Council confirmed at that stage that it would have no objections to it being made available to the public through the Council's Customer Service Centre.

15. Mr Ducker's evidence.

a. Mr Ducker said that he was responsible for the Council's Building Control Services, a significant operation involving 19 Building Inspectors, 6 Assistants and 2 Trainees and handling all matters relating to building regulations within the area administered by the Council. He explained the wide range of matters that would be included in the Council's Building Control records. He stated that, unlike Planning Applications, there is no statutory requirement to maintain a public register of certain categories of information extracted from the Department's files and records. The relevant files and records consisted of a computerised case management system, which has been given the name "UNIFORM", together with pre-computerised records comprising paper files and a card index system to record and locate such files. UNIFORM itself records all aspects of case information including details of the applicant and other individuals who may be involved in a building project or any site inspection or complaint investigation. His evidence explained the structure of the database, in general terms. It enables a person interrogating it to access a "reception" screen which displays basic information about an application for building regulation approval and then to move in succession through other screen displays to access greater detail on, for example, inspections or decisions. Those screens in turn include tabs

which may be selected to open more detailed screens on, for example, individual inspection records. It was evident from this material that a searcher who was given free access to UNIFORM could drill down to quite specific detail about individuals involved in a building project in either a professional or personal capacity, as well as specific events such as conversations that took place during an inspection visit. However, Mr Ducker also stated that access to particular screens may be restricted (although once the screen has been accessed there is no mechanism for preventing access to any of the information on it).

b. Mr Ducker exhibited to his witness statement a small selection of screen shots, but this did not provide a complete picture of the information available at every level, which a searcher might be able to access, or demonstrate whether he or she might discover extraneous information in the course of exploring whether approval had been granted or a completion certificate or equivalent notice had been issued. Although, therefore, Mr Ducker asserted that, once a person had been given access to the system, it would be difficult to prevent him or her navigating to records that contained personal data on individuals involved in one capacity or another, it was not apparent from his evidence how this would happen or what degree of access control between screens would be needed to prevent it. Similarly, despite his assertion that the information disclosed in this way might concern those who would not expect the detail to be made public, he accepted during cross examination that disclosure of the identity of the property owner or professionals involved in a building project, would not be regarded as breaching data protection principles.

c. Mr Ducker claimed that the staff responsible for seeking the information needed to answer the identified questions would not limit their search for information to UNIFORM but would also look at the paper files, which contain much detailed information which is not recorded on UNIFORM and which might also include personal data. He suggested that outside searchers would also need to look at those papers if they were to find answers to the identified questions, although his answers under cross examination indicated to us that he had based his conclusion on a mistaken understanding of what was needed to answer them and (as we explain below) on a very vague understanding of what those responsible might or might not do when responding to a CON29R form.

d. In a second witness statement Mr Ducker indicated that the Council could permit inspection of paper copies of the information needed to answer question 1.1(f) (building regulations approvals) and completion certificates (1.1(g)). His evidence on whether information in respect of certificates or notices issued under the system (whereby those recognised as "competent persons" may self-certify building work for the purposes of question 1.1(h)) was difficult to follow. We interpreted what he said in his witness statement and under cross examination as meaning that the Council could create a searchable system of such data. However, he did not provide any information on the cost or practicability of doing so and nor did he say whether the Council had given consideration to proceeding in this way.

e. Mr Ducker was cross examined on his evidence during the hearing and we regret to say that we found his evidence unsatisfactory in a number of respects. While we are sure that he tried to be truthful he seemed to have very little concern as to

whether his answers were accurate or not. His knowledge of the work of those carrying out searches in the building regulation area was limited and he seemed to have made little attempt to fill the gaps in his knowledge before giving evidence. Worse still, he seemed to be unable to distinguish speculation from factual evidence. When asked in cross examination whether there existed any written instruction to staff on extending a search beyond the UNIFORM system and into the paper files his first answer was “yes”, followed immediately by “well there should be”. Then, under prompting from his own counsel to take time to consider his answers, he stated “I’ll say no”. We were left with the impression that Mr Ducker had taken as much care in his evidence on the point as he might to a general knowledge quiz. In the event we were subsequently informed that, following further investigation at the Council’s offices, no protocol or written instruction existed at the date when the request for information had been made.

f. Mr Ducker was also asked about a document that had been attached to a search for another property carried out by the Council for York Place in September 2008, which set out a number of caveats to the answers provided. It included a statement to the effect that the Council’s search had not extended beyond the data held on computer. It was suggested to Mr Ducker that this indicated that the Council was in the habit of not searching through the paper files but limited itself to a search of UNIFORM. Mr Ducker’s evidence was that he had not seen the document before and was not aware of it. Since it had first been presented to him he had made enquiries and he told us that he had established that the document contained a set of standard form terms and conditions, which had been introduced by the Council’s legal team (which collates and sends out the responses to local searches) after the UNIFORM

system had been implemented. He said that this had been done without consulting the building services team in advance or telling it what had been done after the event. Accordingly, he said, in January 2009 the building services team was continuing to carry out both computer and paper-based searches even though, in the circumstances this seemed to be an unnecessary waste of resources.

g. Mr Ducker was shown a copy of the note on the Information Commissioner's file, mentioned in paragraph 26 below, which recorded that Mr Michael Buckley, the Council's Head of Legal, informed the Information Commissioner during a telephone conversation in June 2009 that the Council's search in relation to the question 1.1 (f) – (h) was limited to the UNIFORM database. Mr Ducker said that he had no idea whether Mr Buckley had made any enquiry of the building control personnel before providing that information. He had not himself enquired whether any of his colleagues within the building control team were aware that others in the Council believed that paper file searches were no longer required, but he reiterated that in January 2009 the process was for both database and paper file search to be carried out. Mr Buckley did not give evidence and we were left with very considerable uncertainty on the precise scope of the search that the Council conducts and on whether search companies would need to have access to any paper files in order to obtain the information to answer them

h. Mr Ducker stated that at the time when the Request had been received he had himself tried to conduct a search against the property identified, but had been unable to identify the property in the UNIFORM database. He did not pursue it further but presumed that someone else within the Council had done so. He provided no helpful information on what investigation may

have been conducted by anyone else either at the time of the Request or, later, when the Information Commissioner asked for, and was given, the information necessary to enable the identified questions to be answered in respect of the particular property named in the Request.

i. Mr Ducker suggested in his witness statement that searching for information on UNIFORM also required the application of "certain techniques", but he did not provide any indication of what they might be or how difficult it might be to master them. The screenshots that he produced indicated to us that the system uses a very common system of tabs that may be clicked to move, step by step, to different levels of detail.

16. Mr Jackson's evidence.

a. Mr Jackson is the Council's Corporate ICT Manager, having responsibility for its IT systems. He explained that the IT application used primarily by the Council's Traffic & Parking Team (who would be responsible for the information sought under Form CON29R questions 3.4 and 3.6) was a map-based system called PARKMAP. It is used by the Council under a licence that is limited to ten individual users having access to it at any one time, although it was not totally clear from his evidence how the limit was policed or what cost would be involved in any increase in the number of users.

b. He said that PARKMAP is used to record the location of road and parking restrictions and Mr Jackson expressed his concern that, if the Council allowed open public access to it, members of the public might be able to gain unauthorised access to other applications and data such as the social care system, payroll

application and benefits systems. Once there, he said, they might corrupt the existing data.

c. Mr Jackson explained that the access of employees to particular parts of the Council's system was regulated by a password system. This prevents them gaining access to programs or data that they do not have authority to view. However, he considered that, once an outsider had been given access to a public part of the system, it would be easier for them to hack through to other parts containing information that they were not authorised to inspect. He provided no detailed information, even in closed evidence, on any particular weaknesses in the security systems incorporated in PARKMAP. During cross examination he accepted that the current system provides a satisfactory level of security to prevent employees gaining unauthorised access to information they should not see and outsiders hacking into the system as a whole. However, he maintained the view that allowing any outsider access to any part of the system enabled them to pass through the first security barrier and they were, to that extent, a greater security risk than anyone held outside it. Asked why such a person might be considered a greater risk than an employee, when in both cases their onward access to other parts of the network was password controlled, he said that he thought that the Council's policies and procedures, and the terms of employment of all members of staff, provided a further level of security which did not apply to an outsider.

d. Mr Jackson considered that the security risk he identified was increased because the system did not incorporate a facility to log unauthorised access to, or tampering with, data. He was also concerned that the weakening of security might prevent the Council being permitted to continue operating its connection to

the Government's Secure Extranet, but did not go into any detail as to how this might occur.

e. Mr Jackson also mentioned during his cross examination that he believed that the company that marketed the PARKMAP system had developed a module which permitted web browser access and that the Council itself made information available through this secure method in respect of planning and tree preservation. He told us that one local authority was operating such a system for local searches, possibly under a special arrangement with the supplier prior to its official launch. He also believed that the Council may have had a "light discussion" with the supplier about the possibility of adding a public access module, but he did not know whether this had been followed up. He pointed out that the current system had been acquired in 2001, sometime before the EIR increased the obligations on public authorities to disclose environmental information.

17. Mr Round provided information about York Place and the property search service it provides. He provided some history of how local searches have been conducted over the years, including the rise of personal search organisations and the tensions that exist between such organisations, on the one hand, and local authorities, on the other. This was largely irrelevant because decisions on whether public authorities are required to disclose information are not based on the motives of either the person making the request or the organisation holding the relevant information. Mr Round's witness statements also included a certain amount of submission and argument.

18. Mr Davies is himself the proprietor of a personal search business as well as the Chief Executive of the body representing such businesses. His evidence also covered background history on how local searches have changed over the years and included irrelevant information on the

intervention of the Office of Fair Trading into the services provided by local authorities and (even more irrelevant), Mr Davies' own view on how the Government should have responded to its recommendations. However, he did provide some, rather skimpy, evidence suggesting that other local authorities had made available to the public some or all of the categories of information covered by the Request and that in the process they had either redacted information that might constitute personal data or had apparently come to the conclusion that it could be disclosed without breaching data protection principles. This evidence was supplemented during the hearing by print outs from the websites of other local authorities suggesting that they had public access search systems for at least some of those categories.

19. EIR regulation 18 provides that the enforcement and appeals provisions of the FOIA apply, with specified modifications, to appeals under EIR. The relevant provision of the FOIA is section 58 which provides that if the Tribunal considers that a Decision Notice issued by the Information Commissioner is not in accordance with the law or involved an exercise of discretion, which the Tribunal thinks should have been exercised differently, it may allow an appeal from the Decision Notice and issue a substituted Decision Notice. On such an appeal the Tribunal is expressly entitled (under FOIA section 58(2)) to review any finding of fact on which the Decision Notice was based.

20. The Appeal was heard over two days on the 27 and 28 January 2010.

<u>The questions for the Tribunal</u>

21. The issues that we have to decide are as follows:

    a. Should the Request be construed as a request for inspection of <u>all</u> the Council's records on Building Control and Highway Schemes within 200 metres of the property identified and on

Traffic Schemes abutting it, or should it be regarded as limited to just those of the Council's records that contain the information necessary to obtain the answer to Form CON29R questions 1.1 (f) – (h), 3.4 and 3.6?

b. Did York Place have an unqualified right to inspect those of the Council's original records identified in the conclusion we reach under a. above?

c. If the answer to b. is no, was it reasonable under EIR regulation 6 (1) (a) for the Council to insist that the requested information should only be made available in the form of a checked, collated and, (where appropriate), redacted document, or should it have made it available in the form of inspection of its original records?

d. If the answer to question c. is that it was reasonable for the Council to refuse inspection was it also released from the prohibition on charging under EIR regulation 8 (2)?

We will deal with each of those issues in turn.

Scope of the Request

22. We have set out the terms of the Request in paragraph 5 above. The Council invited us to look at it afresh and not accept the conclusion reached by the Information Commissioner in his Decision Notice as to its scope. It argued that, properly construed, the words "*Building Control/Traffic schemes abutting/Highway Schemes within 200m records"* required the Council to permit inspection of all the records it held at the time on those topics, without qualification, in respect of the identified property. It drew attention to the fact that the Request made no mention of information being sought to enable York Place to answer any part of the CON29R form and suggested that the subsequent

communication between the parties demonstrated considerable confusion of thought and should not lead to any widening of the scope, beyond what appears from the plain language of the Request. It will therefore be necessary for us to examine the detailed correspondence that passed between the parties to see whether it clarifies the meaning (as the Information Commissioner and York Place contend) or simply demonstrates general confusion (as the Council contends). In doing this we bear in mind that in *Cabinet Office v Information Commissioner* EA/2008/0049 a differently constituted panel of the Information Tribunal warned that it is for us to determine the meaning of any request for information and that the way in which the parties interpreted it at the time is not determinative. That was a case in which the original request was quite clear, but was misinterpreted by the public authority. The person who had made the original request then appears to have adopted that meaning and to have argued his case for disclosure on that basis. However, the Tribunal ruled that the public authority was entitled to revert to the original request, and to base its decision on that and not on the erroneous meaning that had been attributed to it subsequently. We are, of course, not bound to follow other decisions of the Tribunal. We would be particularly reluctant to treat a decision based on such unusual facts as creating a broad ranging rule on the proper approach to be taken to the interpretation of requests for information. The language of the request was quite clear in that case; the parties simply mis-read it. That is not the case here and we do not regard the decision as placing any restriction on our freedom to apply the normal rules of construction in order to identify the correct meaning of the Request.

23. The Council's first response to the Request, on 30 January 2009, argued that the information requested fell within the Freedom of Information Act 2000 and not the EIR. In the process it stated:

"The records to which you refer are part of the Local Land Charges Search service and are available in the CON29R on payment of the appropriate fee."

On 3 February 2009 solicitors for York Place requested an internal review of the refusal. Their letter included the statement:

"The specific information requested by York Place is that contained in Sections 1.1 (f) to (h) and Section 3.6 of the Form CON29R, Enquiries of a Local Authority (2007)."

The Council's letter of 13 February 2009 continued to challenge the application of EIR but did so by specific reference to the detailed matters listed in the sections of Form CON29R identified in that quotation.

24. The next step taken was for York Place to complain to the Information Commissioner, which it did by a letter dated 17 February 2009. Its letter recorded the history of the correspondence up to that date and explained that:

"The information requested was requested in order to enable the Applicant to reply to various standard enquiries, which have to be inserted in a Search Report for inclusion in a Home Information Pack as required by the relevant HIP Regulations. Details of those enquiries are also duplicated in the standard conveyancing Form CON29R and a copy of that form is attached to assist and the relevant question numbers are set out in our letter to the public authority dated 3 February 2009."

The letter then went on to explain the information that York Place considered would need to be inspected in order to respond to all but one of the questions in which it was interested.

25. Very early in the course of the Information Commissioner's investigation the Council wrote to him, on 26 March 2009, stating that it considered that the information should be made available, under EIR, but that this should not be free of charge because the information requested was not in a form that could be inspected without further collation by the Council. It is to be noted that there is no suggestion in that letter that the Council interpreted the Request as involving inspection of all records on the relevant building controls, traffic schemes or highway schemes. Its view of what was covered was made even clearer in its letter to York Place's solicitors on the following day when, having repeated its willingness to make the information available in collated form, it explained that the charges it proposed to raise were as follows:

"Question 1.1 – (f) £5.00, (g) £4.50 and (h) £4.50

Question 3.6 – (a) to (i) inclusive £6.00

Question 3.4 – (a) to (f) inclusive £6.50"

26. It has to be said that all parties can be accused of a certain looseness of language from time to time in seeking to identify the information requested. The trend started with the Request itself, but we interpret the correspondence we have summarised as clearly clarifying it so that, by the time York Place wrote to the Information Commissioner on 17 February 2009 to complain about the Council's refusal it was justified in identifying it as being the information that would enable it to answer the identified questions set out in Form CON29R. In the course of his investigation the Information Commissioner checked his understanding of the scope of the Request. We were shown a note of telephone conversations between a member of his staff and Mr Buckley, the Council's Head of Legal and Democratic Services, on 27 May 2009 and 2 June 2009. Neither the authenticity of these notes,

nor the accuracy of the record they represent, was challenged by the Council, although it has made submissions on how they should be interpreted. The first one reads:

> *"I spoke with Mathew Buckley to clarify his understanding of the scope of the complainants request.*
>
> *"He confirmed that he understood that the information being sought in this case was questions 1.1 f-g and 3.5 and 3.6 of the CON29R form"*

The relevant part of the second one reads:

> *"I asked Mathew to explain what records needed to be inspected to provide the answers for the relevant questions on the CON29 form."*

The note then records what Mr Buckley said about the searches that were required in order to provide the answers to those questions and then concluded:

> *"I asked him to confirm that if they had answered the complainants original request to inspect the building control/traffic control records if this is the information they would have been granted access to in relation to the request and he confirmed it was".*

27. The Council argued that the notes showed that the Information Commissioner was proceeding at that stage on a false interpretation of the Request. It also criticised the Information Commissioner for having stated in his Decision Notice that *"Both the Council and the complainant agree that the information request relates to question 1.1 (f) – (h), 3.4 and 3.6 of the CON29R form."* It says that this was not a correct construction of the request that was actually made. In

particular, the Council accused the Information Commissioner of having allowed his knowledge of York Place's motivation for making the Request to affect his interpretation of what it actually said and suggested that, if he had not made that mistake, he would have concluded that the Request was to inspect all the records in the identified categories. The Council was helped in this submission by some rather casual language adopted by the witnesses who gave evidence on behalf of York Place. However, we do not think that any significant weight should be placed on materials created at that time because, by then, it had clearly been established that all parties were proceeding on the basis that the Request covered just the information needed to respond to questions 1.1 (f) – (h), 3.4 and 3.6 of the CON29R form and some lack of precision in referring back to those categories of information at that stage may be forgiven.

28. The language of the Request is, to our eyes, unclear on the scope of the information being sought. But we come to it with little or no prior knowledge of the process of property searching or the terminology used in that field. We are entitled to seek its true meaning by considering the factual matrix within which it was created and extrinsic evidence that may help us to resolve any ambiguity we found on a first reading of it. We do not agree with the Council that, by adopting these tools to assist construction, we risk moving away from the established principle that decisions on freedom of information issues are to be decided on a "motive blind" basis. There may well be a commercial background and motive to the stance adopted by both York Place and the Council in this case and, as we have mentioned, some of this was included in the evidence presented to us. It is irrelevant to our decision. We must treat York Place simply as a member of the public seeking to put certain information into the public domain. The fact that it wishes to use that information for a particular purpose must not influence our decision. And it does not. But that is not to say that we may not take into account the facts that:

a. the Request was prepared by a professional search organisation and directed to those within the Council's Local Land Charges Department who may be assumed to have a detailed knowledge of the property search process and the terminology associated with it;

b. the author of the first response from the Council, its letter dated 30 January 2009, had no apparent difficulty in identifying that the information covered by the Request was the same as that which would normally be provided in responding to a CON29R form;

c. the Council continued to interpret the Request in that way in subsequent exchanges; and

d. Mr Ducker, in the course of his cross examination told us that when he received the Request he immediately attempted to search for the information on the Uniform database. He said that he was prevented from completing the task, not by any difficulty in understanding what information was being sought, but by his inability to identify the property referred to.

29. In these circumstances we find that, read in context, the Request referred to the information that would be needed to answer questions 1.1 (f) –(h), 3.4 and 3.6 of the CON29R form.

30. Even if that were not the case the precise scope of the Request was clarified in the subsequent exchanges summarised in paragraphs 23 - 25 above. The significance of that is that any investigation undertaken by the Information Commissioner is required to consider whether, "in any specified respect" the request for information in question has been dealt in accordance with the EIR (FOIA section 50 (1) as applied by EIR regulation 18). In this case we consider that the "specified respect"

was clearly identified in the letter written to the Information Commissioner by the solicitors to York Place on 17 February 2009, when read together with the copy correspondence referred to in, and accompanying, that letter.

31. In the event the Information Commissioner went further in seeking clarification of the scope of the Request and completed his investigation on the basis of that information including, in particular, the telephone conversations with Mr Buckley recorded in paragraph 26 above. The Information Commissioner was entitled to conclude that the parties had agreed the scope of the Request and to base his conclusions on the finding of fact, recorded at paragraph 16 of his Decision Notice, that "*Both the Council and the complainant agree that the information request relates to question 1.1 (f) – (h), 3.4 and 3.6 of the CON29R form".*

32. Before us the Information Commissioner went so far as to invite us to conclude that, in the light of the Council's conduct, it should not be permitted to alter its position at the appeal stage, as it had agreed the scope of the request during the Information Commissioner's investigation, if not before, and had allowed the Information Commissioner to reach his decision on that basis, without raising objection. We do not think that it is necessary for us to attempt to lay down a broad principle on whether or not a public authority may propose a different interpretation of an information request at the appeal stage. To do so on the slightly unusual facts of this Appeal may risk hampering the flexibility of Tribunal panels considering different circumstances in future cases. However, for the reasons we have given, we have concluded that the Information Commissioner was correct to reach his decision on the basis that the information requested was that which would be required to provide answers to the identified questions.

Right to inspect unqualified by reasonableness test?

33. York Place argued that we did not need to consider whether the Council's stance on inspection was reasonable because it had, in any event, an unqualified right to inspect the requested information. It said that this arose out of the general obligation in regulation 5 to make environmental information available, when read with regulation 8(2), which provides that a public authority shall not make any charge for allowing an application to examine the information requested "*at the place which the public authority makes available for that examination."* It argued that this showed that the public authority was required to make a place available for the person making the request to examine the information requested. If that were not the intention, it said, regulation 8(2) would have included the phrase "(if any") so that it would read:

> *"A public authority shall not make any charge for allowing an applicant …to examine the information requested at the place (if any) which the public authority makes available for that examination."* (emphasis added)

34. York Place relied on Article 3 of EU Directive 2003/4 on Public Access to Environmental Information ("the Directive"). The EIR was intended to implement its provisions in the UK. Article 3 starts by requiring Member States to ensure that public authorities are required to make environmental information available to the public. It then sets out certain detailed requirements as to how it is to be made available before stating, in Article 3(5), that Member States should ensure that:

> *"a. officials are required to support the public in seeking access to information;*
>
> *b. lists of public authorities are publicly accessible; and*

c. the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:

…the establishment and maintenance of facilities for the examination of the information required…"

York Place argued that the final section we have quoted requires us to construe regulation 8 in a way that corresponds with the purpose it was evidently intended to achieve. It said that the purpose to be gleaned from the Directive (as well as the Aarhus Convention, from which it was developed) was to ensure that environmental information was available to everyone, even those who could not pay to have access to it. Accordingly the Council was under a duty to make the requested information available by way of inspection and was not entitled to argue that it could be made available in another form or format.

35. Against this it was submitted that the argument put forward by York Place would lead to a result that was inconsistent with both the EIR and the Directive.

36. We reject the York Place argument. We are required to read regulation 8 in the context of the EIR as a whole. We should not detach its language from the structure into which the various provisions have been organised. And we may take into account the language used in the headings to those provisions if we find that the meaning of regulation 8 is not clear. On that basis we see that regulation 5 first sets out the broad obligation to make environmental information available. It does so in general terms, without specifying the means by which it should be made available or whether conditions may be imposed on those requesting it. It suggests that detail of that kind may be found elsewhere in the EIR. That is indeed the case, with regulation 6 providing detail about how access may be provided (i.e. in

accordance with the requesting party's preference, unless it is reasonable to provide it in some other form) and regulation 8 setting out the circumstances when a charge may be made. We think that it is clear that, in that context, regulation 8(2) does not create a separate obligation to permit inspection, but simply provides that, where the person making the request asks for the information to be made available by inspection then, unless the public authority has the right under regulation 6 to override that preference and to make the information available in the form of a copy, it may not make any charge. We do not think that regulation 8, construed in that way, leads to a result that suggests that the UK government failed to comply with the Directive when drafting the EIR in the way that it did.

Reasonable to refuse inspection?

37. Having concluded, in paragraph 32 above, that the Request should be given a relatively narrow meaning, we turn to consider whether the Council was entitled to claim that it was reasonable for it to make that information available only in hard copy form (to be sent to the requester) and to refuse inspection. Before doing so we should record that, as is apparent from the summary of the evidence above, some concessions were made by the Council in the course of the Appeal. First, it conceded that its objection to the inspection of highways information could not be maintained as the relevant information was available on its own website (a statement that York Place at first challenged but ultimately accepted). Secondly, the Council also accepted that information about pedestrian crossings and cycle tracks was held in a schedule which could be inspected. On inspection of that schedule it became apparent to us that, without cross reference to a street plan on which the detail of the route or proposed route is marked, it might not, on its own, enable a reader to identify the detailed route of a cycle path or even, possibly, the precise location of a pedestrian crossing. However, we interpret the Council's concession

to apply to other information it holds that would identify the relevant location. Finally, the Council conceded that permitting inspection at its offices of information, appropriately redacted and collated would be possible without giving rise to an entitlement to charge under EIR regulation 8 (2) (b).

38. York Place invited us to consider the reasonableness test by reference to the Directive and drew particular attention to Article 1, which set out the objectives in the following terms:

> *The objectives of this Directive are:*
>
> *(a) to guarantee the right of access to environmental information held by or for the public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and*
>
> *(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.*

York Place also drew attention to Article 3 (4) which broadly reflects EIR regulation 6 but adds, at 3 (5):

> *"For the purposes of this Article, Member States shall ensure that:*

(a) officials are required to support the public in seeking access to information;

(b) lists of public authorities are publicly accessible; and

(c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:

- the designation of information officers;

- the establishment and maintenance of facilities for the examination of the information required,

- registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found."

39. It is clear that the UK Government chose to implement the Directive in terms that do not define the obligations of public authorities with the same precision or using the same language. However, we believe that our general approach should be to interpret the EIR in a way that reflects the broad objectives of the Directive and is at least consistent with its more detailed operative provisions. To the extent that this leads us to assess the reasonableness of the Council's stance by reference to the progress made towards the end set out in Article 1. b. we must, of course, consider the position as at the date when the Request was refused, not at today's date. Evidence as to what other local authorities are doing today in using technology to make environmental information available is not therefore likely to be relevant, except to the extent that it can be shown that those systems were already in use at that time.

40. York Place also argued that we should assess reasonableness solely by reference to the particular information covered by the Request. It would not be appropriate, it said, to consider the Council's justification for its decision on the basis that its approval was intended to avoid the problems it anticipates across a general range of requests that are likely to be received. We do not accept that argument. We believe that if a public authority is able to demonstrate that particular restrictions are reasonably necessary to prevent, for example, the inadvertent disclosure of personal data likely to be contained in certain types of record, it should be allowed to rely on a general practice intended to prevent disclosure across that range and should not be required to examine each request for information to see if it should be treated as an exception to the general rule. If the general rule can be shown to be reasonable then the public authority should be entitled to apply it in all cases falling within its scope. That is not to say that the test to be applied is not an objective one, or that our decision should be regarded as a test case, applicable to requests for other types of information and/or other public authorities. As we make clear, our decision has had to be made in circumstances where the evidence provided by both sides, but in particular the Council, failed in several respects to address important issues. It may be that in other cases involving the same broad subject matter a public authority will be able to demonstrate that its decision to refuse inspection was based on a well thought out and fairly applied policy, which achieved a reasonable balance between the requirement to make environmental information generally available and other legitimate factors. Our decision is simply that, in the circumstances of this particular case and this particular public authority, the case was not made out.

41. The basis for the Council's arguments that it was reasonable for it to refuse inspection were summarised in paragraph 9 above. In the event the Council did not persist with the argument (paragraph number 9 (v)), based on the fact that the information would have to be inspected in a

number of different locations. We deal with the remainder in the order in which they were summarised

42. Personal data visible on inspection.

a. The Council considered that personal data on individuals might be disclosed, contrary to Data Protection legislation, if members of the public were permitted to access either the building regulation or the traffic/highway schemes information which it held in electronic form.

b. It thought that might happen both in the course of a legitimate inspection and also as the result of a searcher navigating away from the part of the system which he or she was entitled to access.

c. So far as the traffic/highway information is concerned there was a suggestion from Mr Blackburn that in some circumstances PARKMAP might include information about an individual's requirement for disabled access but he also accepted in the course of cross examination that no personal data would be disclosed to anyone accessing PARKMAP for the purposes of seeking answers to the relevant questions. The only circumstances where that might happen would be if a member of the public, having been given access for this purpose, manipulated the system in an unauthorised manner in order to gain access to other information. (We consider that part of his evidence when we come to consider the security risk below).

d. Mr Ducker's evidence in respect of building regulation information proceeded on the basis that the Request was much wider in scope than we have interpreted it to be. And although he resolutely maintained that it would be necessary to inspect

paper files we were not convinced that this was so. While it might be necessary to do that if a person who had received a completed CON29R form wished to investigate a particular matter further, the evidence presented to us did not establish that it was necessary in order to establish the existence of the approvals, certificates and notices identified in the relevant questions.. Mr Ducker's evidence was similarly indeterminate as to whether a search limited to the UNIFORM system for the purpose of answering the identified questions might access personal data that the Council ought not to disclose. He did not know if such information would generally be visible to a person making that type of search or, if it would be, whether those whose information would be disclosed might have legal grounds to complain under data protection legislation. Although, therefore, the risk of a breach of data protection legislation cannot be wholly discounted, it was not apparent from Mr Ducker's evidence whether he, as the Council's spokesperson on this part of its search services, (or, indeed, anyone else within the organisation) had given any consideration to the extent of that risk or how it might be managed.

e. We do not believe, in those circumstances, that the Council has demonstrated that, in respect of legitimate access to either the UNIFORM or PARKMAP systems, its decision to impose an absolute prohibition on inspection was reasonable, in the light of the broad obligations imposed on it by the EIR.

f. As to a searcher surreptitiously gaining access to parts of either system, which he or she was not authorised to view, Mr Ducker told us that access could be limited to particular screens within the UNIFORM system. However, neither the ease or difficulty of imposing that level of control, nor its flexibility in filtering out particular information, was satisfactorily explained, beyond the

cryptic statement by Mr Ducker to the effect that it was not possible to limit the information available from a screen view once it had been accessed .

g. We found Mr Jackson's evidence on the level of risk under the PARKMAP system equally non-specific. However, we do accept that there will be some increase in the level of risk if members of the public, who previously had no access to the Council's network, are given limited access. No matter how well protected the rest of the network may be by password systems and other security measures it is self-evident that, if two separate barriers are reduced to one, then some increase in the level of risk will have occurred.

h. It was suggested, in the course of argument and cross examination, that any risk might be reduced in a number of ways and that it would have been reasonable for the Council to have adopted one of them. The use of more sophisticated software was suggested, including the possibility of operating a public web access system operating entirely separately from the Council's network and having no means of navigating from one to the other. We were told that Cumbria County Council had acquired some form of public access system, but there was at least a suggestion that this was still in development stage and the information we were given about it was quite insufficient to enable us to conclude that the Council had been unreasonable, in early 2009, in not having developed its search system in the same way, or at the same speed, as Cumbria appears now to have done. The same may be said of the other web page extracts which York Place appeared to have plucked, in a somewhat random manner, from the websites of three other local authorities and presented to us during the course of the hearing. The evidence overall suggested that a few other

authorities are currently more advanced in developing public search systems than the Council, but with no clear picture as to how successful those developments had been and at what cost. It fell far short of establishing that the Council was unreasonable for not having introduced such systems at the time when the Request was refused. The Council, on the other hand, adduced no evidence of the steps that it had taken at the time to explore the possibility of using technology to facilitate public access to environmental information.

i. An alternative system suggested for preventing unauthorised access to personal data was to provide a member of staff to accompany anyone making a search in order to monitor their activities and/or to prevent any searcher from seeing information that should not be disclosed. The evidence was, again, inadequate. The Council's witnesses did not address the issue in their witness statements and there was no suggestion that the Council had even considered the possibility, let alone given thought to the practicalities or cost. In the course of his cross examination Mr Blackburn speculated that a search of PARKMAP for the purpose of the Request might take 10 minutes (with much longer being required for a property with a complex building regulation history) and cause some disruption to the work of those involved. Mr Allott also estimated that approximately 150 searches passed through his hands each week. On that basis the total time spent on this activity, in respect of the traffic and highways questions, would be upwards of 25 man hours per week. That total would be increased once the time taken in monitoring those searching for building regulation data was also taken into account. But, given that the personnel carrying out the monitoring would be individuals who would otherwise be engaged in carrying out searches themselves, and that Mr Ducker told us that there were six

dedicated to searching work in the Building Control and Planning section alone, we would have expected the Council to adduce evidence of what steps, if any, it had considered in order to see if the request could have been handled in this way. On the basis of the evidence it did put before us we were not satisfied that it had even considered this possibility or, indeed, any alternative to the solution it sought to impose.

43. In summary, therefore, the Council did not satisfy us that it acted reasonably in apparently rejecting other means of maintaining security during an inspection in order to avoid unauthorised access to personal data. Such evidence as the Council did adduce tended to suggest that it had failed even to have explored other possibilities.

44. Security and integrity of network

a. We do not think that the evidence on this issue, principally that provided by Mr Jackson, demonstrated that the Council had applied its mind, in any coherent sense, to this aspect of security (the protection of its own systems and information) any more than it had in relation to the risk of personal data being accessed by persons not authorised to do so. No other witness was put forward by the Council who might have been able to give an overview of new security applications that it might have considered, its policy on whether or not to use them or other technology to fulfil its obligations to provide public access to environmental information, or the financial or technical issues that may have influenced its decisions and priorities in this area. Although, therefore, we do not think that the evidence of what other local authorities are doing demonstrated that, at the relevant time, the Council was behind its peers in using technology to overcome the difficulties it identified, we received little or no evidence from the Council about what it had

considered doing in order to overcome the difficulties which it foresaw in permitting access to its records in their current form. It did not convince us that it had adopted a reasonable approach to the problem. In this respect York Place relied on the obligation of public authorities to provide reasonable advice and assistance to those requesting information, pursuant to EIR regulation 9 (1). There was again no evidence of the Council having considered whether complying with that obligation may have overcome the potential risks it identified..

45. Unintelligible records

a. As we have mentioned, both Mr Jackson and Mr Ducker commented on their perception that neither PARKMAP nor UNIFORM are intuitive or user friendly systems. However, the evidence in each case was little more than assertion and did not convince us that a reasonably careful and determined searcher could not learn how to obtain useful information from either system or that such difficulties as might exist could not be overcome by a limited amount of assistance from the Council under EIR regulation 9 (1).

46. Limited licence

a. As we have indicated when summarising the evidence we received we were not provided with a particularly clear view of just how the ten user limit under the PARKMAP software was policed. And we were not provided with any evidence on whether increasing the number of licences and extending it to members of the public carrying out searches in the controlled environment of a customer services section would create any particular difficulty or be expensive.

b. York Place criticised the Council for seeking to rely on a self serving line of argument, in that the solution lay in the hands of the Council and that it should not be allowed to rely on a contractual restriction which it had assumed voluntarily. We would not go so far as to say that relying on a contractual restriction imposed by a software licensor would always be unreasonable. One can envisage circumstances where it might be unavoidable or involve disproportionate expense to overcome the restriction. But the Council adduced no evidence that it had even considered what options might be available, let alone discussed them with its supplier in order to assess the cost and practicality of extending the licence. As a result it fell some way short of satisfying us, on the facts of this case, that it acted reasonably in refusing inspection on this ground.

Right to charge

47. It follows from our conclusion that the Council was not entitled to force York Place to accept the information in question in the form of a separate hard copy document for which it would charge a fee. Having failed to satisfy us on the reasonableness of its refusal it was required to revert to York Place's preferred form of access, namely inspection. Under EIR regulation 8 (2) (b), it was not entitled to charge for that service.

48. It was suggested to us by the Council during argument that it could assemble into a document information relevant to an enquiry, such as that comprised in the Request, from which it would then redact personal data or other information that the enquirer should not see. It claimed that if it then made the resulting document available for inspection it would have satisfied the requirements of EIR regulation 6 (1) (a) and would be entitled to recover what it had cost it to create the copy for inspection (but not the cost of identifying or extracting from its

records the information recorded in the document). The Information Commissioner reserved his position on whether this would be a satisfactory approach to adopt in light of the charging regime created by the Local Authorities (England) (Charges for Property Searches) Regulations 2008. It may be that an arrangement to provide the relevant information in this form would have constituted a sensible compromise for the parties to reach. But it was not a proposal that was made in response to the Request at the time and it would not be appropriate for us to say whether, if it had been, it would have satisfied the test of reasonableness under EIR regulation 6 (1) (a). Our task is to determine whether the response it made at the time, which was to refuse inspection and to insist on charging on the basis set out in correspondence at the time was reasonable. We have decided that it was not. It must therefore follow that inspection should have been permitted of the limited information identified in our interpretation of the Request, and that this should have been without charge.

Conclusion and remedy

49. In light of our findings as set out above the Information Commissioner was entitled to conclude that the Council had not complied with its obligations under EIR regulation 5(1). The information covered by the Request, being the information required to answer the questions 1.1 (f) – (h), 3.4 and 3.6 of form CON29R, should have been made available for inspection by York Place when requested and should now be disclosed.

50. Our decision is unanimous.

51. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or

errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Chris Ryan
Judge
15th March 2010