

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 October 2007

Public Authority: Gloucestershire County Council
Address: Shire Hall
Westgate Street
Gloucester
GL1 2TG

Summary

The complainant requested minutes of meetings between the National Trust ("the Trust") and Gloucestershire County Council ("the Council") regarding the extent of highway rights over land which had been traditionally managed or owned by the Trust. The Council refused the requests under regulation 12(5)(f) of the Environmental Information Regulations 2004 (EIR). The Information Commissioner ("the Commissioner") considered the arguments proposed by the Council for the application of the exception and is of the view that disclosure of information relating to issues which had not been resolved by the Joint Liaison Committee ("the JLC") between the Trust and the Council when the requests were made would have adversely affected the interests of the Trust and the public interest favoured withholding that information. The Commissioner also found however that there was other information which could have been disclosed to the complainant at the time of the requests without adversely affecting the Trust's interests because the information related to issues which had by then been resolved. The Commissioner's decision is that this information should be disclosed to the complainant within 35 days.

The Commissioner's Role

1. The EIR 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 EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 ("the Act") are imported into the EIR.

Background

2. In 1993, the Council received enquiries regarding the status of land constituting a verge in the vicinity of Minchinhampton Commons and concluded that the verge formed part of the public highway. This conclusion was challenged by the Trust

on the basis that the verge land formed part of the “manorial waste”. Following on from this, the Trust initiated discussions with the Council in 1996 which mainly concerned the existence and the extent of highway rights in the vicinity of Minchinhampton Commons. At this time, the Trust was working towards registering the title to the land it owned with the Land Registry. Minchinhampton Commons is owned by the Trust and the Trust also manages other smaller areas of land in the vicinity. Following significant agreement on the issues raised, the Trust drew up documents to submit to the Land Registry. Further to a number of subsequent enquiries, mainly from the public, about the status of the land, particularly the smaller areas of verge land which had always been traditionally managed by the Trust, the Council decided to review its position and formed the JLC with the Trust. The JLC was set up with the main aim of resolving the highway enquiries. The first of these meetings took place on 15 May 2006 and are understood to be ongoing. Following the completion of the discussions to reconcile the different views of the Council and the Trust, the Commissioner understands that the JLC intends to issue a number of “decision letters” setting out the agreed position on the probability of highway rights existing over the land. It does not propose to disclose copies of the minutes of its meetings.

The Requests

3. On 24 May 2006, the complainant requested from the Council a copy of the minutes of the meeting of the JLC on 15 May 2006 (request 1). He wrote to the Council again on 19 November 2006 and requested a copy of the minutes of the meeting of the JLC on 25 October 2006 (request 2). The complainant made a further request to the Council on 24 December 2006 (request 3) and requested information in the following terms:

“Please...provide me with the minutes requested, along with those of the meetings which I believe took place at:

End of August
19 September
25 October
Some time in December

N.B. If I have excluded any please include those also – it is just that I am not aware of any others”.

4. The Council responded to request 1 on 21 June 2006 and refused the request under regulation 12(5)(f) of the EIR. It also explained that the exception is qualified and that it considered that in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information. The full text of the exception can be found in the Legal Annex at the end of this Notice.

5. The complainant requested an internal review of the refusal on 28 June 2006 and on 5 July 2006 the Council wrote to the complainant to advise that his appeal had been unsuccessful.
6. The Council responded to request 2 on 21 December 2006 and stated that this information was also covered by the exception under 12(5)(f) of the EIR and that the public interest was not in favour of disclosure.
7. The complainant requested an internal review of the refusal of request 2 on 24 December 2006 by fax and also made request 3 within the same fax. The Council wrote to the complainant on 4 January 2007 and stated that its reasons for refusal of all three requests were the same and suggested that the complainant referred his further requests directly to the Commissioner.

Validity of the complaint

8. Although the Commissioner would usually expect the Council to complete an internal review before a complaint is referred to his office for investigation, he recognises that in this case, the Council had already conducted an internal review in relation to request 1 and had explained to the complainant that its reasons for refusal of requests 2 and 3 were no different. As the Commissioner accepts that a further internal review was therefore unlikely to yield a different result, he considers the Council's actions in this regard were reasonable and the Commissioner has exercised his discretion to consider the complainant's subsequent requests (requests 2 and 3).

The Investigation

Scope of the case

9. On 7 July 2006, the complainant contacted the Commissioner to complain about the way request 1 had been handled. The complainant asked the Commissioner to consider whether the Council had correctly refused the request under 12(5)(f) of the EIR.
10. On 5 January 2007, the complainant contacted the Commissioner to complain about the Council's response to requests 2 and 3. He specifically asked the Commissioner to consider his complaint that:
 - The Council had failed to respond to request 2 within the 20 working day deadline.
 - The Council had failed to complete a proper internal review in response to request 2.
 - The Council had failed to apply the exception under 12(5)(f) of the EIR correctly in relation to requests 2 and 3.

Chronology

11. The Commissioner wrote to the Council on 14 November 2006 to request more information about the Council's refusal of request 1. This information was provided on 22 December 2006 along with a copy of the minutes requested in request 1 and some relevant background information.
12. On 20 November 2006, 24 December 2006, 5 January 2007 and 3 February 2007, the complainant supplied copies of his correspondence with the Council regarding requests 2 and 3 and arguments opposing the Council's refusal. The complainant asked the Commissioner to consider his subsequent requests (2 and 3) which the Commissioner agreed to do in a letter to the complainant on 11 January 2007 providing that the Council confirmed that its reasons for refusal were the same as for request 1.
13. The Commissioner wrote to the Council on 15 February 2007 to clarify that its reasons for refusal of request 2 and 3 were the same as for request 1. The Commissioner addressed the arguments raised by the Council so far concerning the application of 12(5)(f) and invited the Council to respond to the points raised. The Commissioner also asked for copies of the minutes requested in requests 2 and 3 in a telephone conversation on 6 March 2007.
14. On 20 March 2007, the complainant supplied a copy of further correspondence in which he had made another request to the Council which was similar in nature to his previous requests. During a telephone conversation, the Commissioner advised that there was unlikely to be any benefit in making a further complaint unless the complainant was seeking information other than that in the minutes already requested.
15. The Council responded to the Commissioner on 29 March 2007 and included a copy of a letter from the Trust to the Council on 26 March 2007 in which the Trust had set out its views and also copies of the minutes which had been requested. The Commissioner noted that the Trust had argued that the information requested was not environmental and he therefore wrote to the Council on 29 March 2007 to request clarification on how far the Council agreed with this view, and other views expressed by the Trust.
16. The Council responded to the Commissioner on 5 April 2007. It confirmed that it maintained its position that the information requested is environmental and provided rationale. The Council also stated that it did not agree with the Trust's view that the information was subject to legal professional privilege or exempt from disclosure because it was "legally confidential" but that it agreed with all other views expressed by the Trust.
17. On 13 April 2007, the complainant supplied to the Commissioner a copy of a letter from the Council to a third party which set out the JLC's view on the probability of highway rights existing in that particular case. The complainant also made further arguments in favour of disclosure based on his understanding of the progress which had been made in considering the highway enquiries.
18. The Commissioner wrote to the Council on 18 April 2007 and set out his view on whether the information was environmental information according to the definition

in the EIR. The Commissioner also provided further provisional considerations in relation to each of the arguments and invited the Council to respond to the points raised. The Commissioner received the Council's response on 16 May 2007. The Council also enclosed a copy of a letter from the Trust to the Council dated 14 May 2007 in which the Trust had responded to the points raised in the Commissioner's letter.

19. In emails to the Council on 24 May 2007 and 29 May 2007, the Commissioner requested details as to whether any issues remained unresolved at the time of the complainant's requests and whether any were still outstanding. He also sought some further clarification regarding the background to the case. This was communicated by one of the Council's legal representatives in a telephone conversation on 1 June 2007 and a formal response to the Commissioner's enquiries was supplied in an email on 7 June 2007.
20. On 26 September 2007, the Commissioner contacted the Council to ask for some further clarification regarding the background to the case. The Commissioner emailed his enquiries to the Council on 27 September 2007 and received a response from the Council the following day.

Analysis

21. The Commissioner notes that the Trust itself is a charitable organisation and is not a public authority for the purposes of the EIR.
22. For clarity, the Commissioner's analysis has been based both on his contact with the Council and copies of letters from the Trust to the Council commenting on the points raised by the Commissioner during the investigation. The Commissioner understood from the Council that the views set out in the Trust's correspondence were to be taken as representative of the view of the Council. There were only two exceptions to this, namely that the Council did not agree with the Trust's contention that the information requested was not environmental information or that the minutes for the meetings attracted a claim of legal professional privilege or were "legally confidential". The Commissioner has therefore referred to all except the latter arguments as originating from the Council irrespective of whether those arguments were presented to the Commissioner in the form of correspondence from the Trust to the Council or in correspondence from the Council.
23. The full text of the relevant regulations of the EIR can be found in the Legal Annex at the end of this Notice.

Procedural matters

24. Firstly, the Commissioner considers that the information requests were correctly handled by the Council under the EIR. This is because the Council stated that its principal interest in meeting with the Trust was restricted predominantly to the protection of highway rights and not with title to the land. It explained that the

surface of any publicly maintainable highway is vested in the Council as Highway Authority by virtue of section 263 of the Highways Act 1980. The Council argued that a finding of highway rights is likely to affect the land because if there are highway rights, the management of the land falls to the Council and the Trust does not then retain the same level of control over it. The Commissioner understands that the Trust has powers granted to it to manage the commons to preserve, so far as practicable, their natural aspect, features, animal and plant life. It is also notable that Minchinhampton Commons is a site of special scientific interest. A change to the management of the land directly affects the Trust's conservation objectives as for example, where there are no highways, the Commissioner understands that the Trust can charge for vehicular access across the land. As Highway Authority, the Council also has a number of duties and powers in relation to works and structures which are likely to affect the land but the Commissioner believes that the information already presented here is sufficient evidence that the EIR is the correct legislation. There is clearly a reasonable argument to be made that highway rights relate to the use of land and this is likely to affect the state of that land. In view of this, the information requested fits within the scope of regulation 2(c) of the EIR.

25. The complainant specifically complained that the Council did not respond to request 2 within the 20 working day deadline provided by the EIR. The request was submitted on 19 November 2006 and a response was sent by the Council on 21 December 2006. Although the Council apologised to the complainant, it is clear that a response to request 2 was issued outside of the 20 working day deadline.
26. The complainant asked the Commissioner to consider whether the Council had failed in its duty to conduct a proper internal review in response to request 2. The Commissioner does not consider this to be the case for the reasons set out in paragraph 8 of the Notice.
27. Upon inspection of the minutes, the Commissioner also noted that some of the information requested includes the personal data of the complainant. The fact that such information is not to be disclosed under the EIR by virtue of regulation 5(3) was not raised by the Council in its refusal. The Commissioner notes that the Council failed to consider this information for disclosure to the complainant under section 7 of the Data Protection Act 1998 ("the DPA")

Exceptions

The exception under regulation 12(5)(b)

28. Although the Council did not claim the exception under 12(5)(b), the Trust asserted that the minutes attracted legal privilege or that the minutes were "legally confidential". The Commissioner rejected this argument because the discussions of the JLC had not taken place between a client and lawyer and had not taken place when litigation was being contemplated by the parties. The latter is clear because the meetings had been organised with the express purpose of avoiding litigation. No further arguments were presented by the Trust in this regard.

The exception under regulation 12(5)(f)

29. In order to decide whether the exception had been correctly applied, the Commissioner considered whether the information requested had been provided to the Council by the Trust. In this case, the Trust produced the minutes of the JLC and provided them to the Council but in addition to that fact, the minutes clearly contain information which has been provided by the Trust to the Council. On account of the impracticalities of separating out the contributions of the parties in a meaningful way in this particular case and in view of the fact that none of the information within the minutes would have existed had it not been for the information provided by the Trust, the Commissioner considers that in this instance, it would be reasonable to treat all of the information within the minutes as information which had been provided to the Council by the Trust.
30. The Commissioner also made enquiries to the Council as to whether all of the conditions in parts (i-iii) of the exception had been met. Part (i) states that for the exception to apply under 12(5)(f) the case must be one where the person who provided the information, "was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority". The Council has explained to the Commissioner that the meetings of the JLC were an attempt to informally resolve a number of enquiries made by the public about the extent of the highway and as such, there was no statutory obligation to supply the information. The Commissioner therefore understands that part (i) applies.
31. Part (ii) of the exception states that the case must be one where the person who provided the information, "did not supply it in circumstances such that that or any public authority is entitled apart from these Regulations to disclose it". The Council has explained to the Commissioner that the Trust provided the information with an expectation of confidence as part of an informal mediation process. The Council has advised the Commissioner that neither it nor any other public authority would be entitled apart from under the EIR to disclose the information in question. The Commissioner therefore understands that part (ii) applies.
32. Finally, part (iii) of the exception states that the case must be one where the person who provided the information, "has not consented to its disclosure". The Council has advised the Commissioner that the Trust has objected to the disclosure of the information. The Commissioner therefore understands that part (iii) applies.
33. Having satisfied himself of the above, the Commissioner went on to consider the circumstances of the case at the time when the complainant's requests were received.
34. The exception under 12(5)(f) is a qualified exception involving two tests which must be satisfied before information may be withheld. The first test is whether it can be concluded that disclosure of the information would adversely affect the interests of the person who provided it. If it can be established that there would be adverse effect, the second test is whether in all the circumstances of the case,

the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The adverse effect

35. Turning to the first test, the Commissioner had regard to the comments made in the decision of the Information Tribunal (“the Tribunal”), *Office of Government Commerce v Information Commissioner EA/2006/0068 and 0080*. The Commissioner found the Tribunal’s comments about the wording of the prejudice test helpful in considering the interpretation of the word “would” in the adverse effect test as follows:

“The Tribunal has considered the meaning and application of the prejudice test, which is common to a number of qualified exemptions under FOIA, in several decisions e.g. *Hogan and Oxford City Council v Information Commissioner* and *John Connor Press Associates Limited v Information Commissioner*. These cases have found the term “would prejudice” means that it is “more probable than not” that there is prejudice to the specified interest set out in the exemption. The other part of the prejudice test, “would be likely to”, has been found by the Tribunal to mean something less than more probable than not but where “there is a real and significant risk of prejudice.” (*Hogan* at paragraph 35). This finding has drawn support from the decision in *R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin)*”.

36. As explained in paragraph 2 of this Notice, the background to the discussions is that the land in question is either owned or traditionally managed by the Trust and the JLC sought to establish the existence and extent of highway rights over the land. The Commissioner understands that whether highway rights exist would affect the level of control the Trust would retain over the land because the Council as Highway Authority would take over the responsibility for the management of the land. It seems that this could potentially come into conflict with the Trust’s wider conservation objectives. The Commissioner was therefore satisfied that the Trust had legitimate interests in the land in question.
37. The Council identified the Trust’s main interest to be the disposal of the enquiries about highway rights in the most effective and efficient way possible in order that an informal agreement could be arrived at between the Trust and the Council about highway rights. The Council proposed a number of arguments as to how disclosure would have adversely affected the identified interest. The Commissioner has conducted his investigation based on his understanding of what arguments there were for not disclosing the information at the time the requests were made. The Commissioner considered each argument that was proposed in the light of the Tribunal’s comments set out in paragraph 35.
38. The Council argued that disclosure of the minutes at the time of the requests would have created a significant burden in terms of people making further enquiries about the minutes or additional enquiries about highway rights (the Trust has referred to such enquiries as “challenges”). The Council explained that the JLC had not envisaged disclosing details of its decisions as soon as they

were made but seems to have decided to wait until the end of the discussions before revealing any details unless the situation was particularly urgent. The Council's position is that if the minutes had been disclosed at the time when the complainant's requests were made, the JLC would have been "overrun" with enquiries and this burden would have adversely affected the interests of the Trust because it would have had a "significantly deleterious affect upon the timescale envisaged for resolving the current challenges" and would have impacted upon resources. The Council argued that the general effect would have been disruption and delays to the ongoing discussions.

39. As evidence of the probability of this, the Council explained that the issues discussed by the JLC had been contentious and complex. It stated that it had received to date 32 enquiries from the complainant and between 15 and 20 from other individuals including legal representatives. The Council also expressed specific concerns about the difficulties of managing contact with the complainant and explained that the complainant had maintained frequent contact through telephone calls and multi-page faxes. The Commissioner understands that this contact has mainly been with the Council but that the complainant has also contacted the Trust directly.
40. In view of the above, the Commissioner accepts that disclosure of the minutes at the time of the requests would have generated further enquiries about the issues discussed in the minutes which may possibly have led to further "challenges" of the Trust's position. The Commissioner also accepts that in the complainant's case, these enquiries may have been particularly detailed. The Commissioner does not however find these arguments compelling in terms of adverse effect to the Trust's interests. This is because the Commissioner considers that once the JLC had had the opportunity to review all the evidence and argument in relation to a particular issue; it would have been in a reasonably strong position to respond to any further enquiries about the outcome of its review. Where there were specific concerns that the complainant's correspondence has been burdensome or inappropriate from previous experience, the Commissioner believes that these issues could have been addressed by other means.
41. The Council also pointed out to the Commissioner that in requests 1 and 2 the complainant had requested individual minutes and that the effect of such "piecemeal" disclosure of individual minutes would have been to present an incomplete picture of complex discussions which often overlapped between sets of minutes. In addition, the Council argued that disclosure of the minutes would have prejudiced the resolution of issues discussed within the minutes which were not resolved at the time of the requests. The arguments presented for this being the case largely focused upon the need for the parties to have time and space to discuss the issues involved free from outside pressure and interference.
42. The Commissioner's view is that where certain issues have been resolved by the JLC but simply overlap between minutes, this is essentially a matter of putting the minutes into context and would not in itself lead to adverse effect. The second argument that disclosure of the minutes would have prejudiced the resolution of issues which had not been resolved at the time of the requests is, however, more convincing than the first.

43. The Commissioner considers that a fundamental ingredient of an effective decision-making process in many cases is a degree of private space in which to reach a decision or discuss all the aspects of a particular problem without distraction, pressure or influence from outside of that process. This is to ensure that parties to discussions feel able to express their views freely and frankly and have a reasonable opportunity to explore all of the issues involved. It is the Commissioner's view that this is particularly so in decision-making processes involving complex and contentious discussions with a third party.
44. Considering all the circumstances of this case, the Commissioner has taken the view that premature disclosure of the information within the minutes concerning discussions of issues which had not been resolved at the time of the complainant's requests would have led to outside pressures being brought to bear upon the discussions owing to their contentious nature and the significant local interest. It is more probable than not that this would have affected the effectiveness of the meetings of the JLC because the Trust would have been exposed to immediate public scrutiny and would more probably than not have faced public opposition where it had argued against highway rights. It is the Commissioner's view that premature scrutiny would have discouraged the Trust from being open with the Council about the strengths and weaknesses of its arguments. Outside pressures would more probably than not have made the process more adversarial in contrast to the atmosphere of informal constructive co-operation which the Commissioner understands was developed between the two parties. Ultimately, this would have been to the detriment of the productive resolution of the points in issue, which would have been contrary to the interests of the Trust, the Council and the public.
45. Further, dealing with enquiries about discussions which are only in the provisional stages would more probably than not have caused delays and distraction to the discussions because the enquiries would have concerned issues which may or may not have turned out to be of any relevance to the final decision. Such enquiries may have also been very difficult, if not impossible, to answer properly because the parties involved had not themselves had opportunity to explore all the issues.
46. Further to the argument that premature release of the minutes would have immediately prejudiced issues which had not been resolved by the JLC, the Council also proposed that there was also a wider dimension to the harm to consider if the minutes had been disclosed. It argued that premature disclosure of the minutes would have been likely to lead to the breakdown of the whole process which would have left both parties having to resort to expensive litigation in order to resolve the highway enquiries. The Council argued that this would have resulted in financial harm to the Trust as a charitable organisation and would also have caused the Council to incur avoidable public expense.
47. As noted in paragraph 43, the Commissioner recognises that the JLC requires a degree of private space in order to consider all issues before it and this would seem to go some way towards addressing the Council's fears that the process would be likely to breakdown without that reasonable opportunity. The

Commissioner also notes that the Council has only stated that the breakdown of the JLC would have been “likely” but not “more probable than not”. Further, in correspondence supplied to the Commissioner, the Trust appears only to have raised general concerns about the time-scale envisaged for resolving the enquiries and the resources this would need rather than any concerns that it would not be able to continue the process if the minutes were disclosed. Although the Commissioner recognises that the Trust may eventually conclude that the discussions with the Council may be better concluded through other means, the Commissioner considers that on the face of the evidence presented, the Trust would continue to have a very strong interest in continuing to meet with the Council following disclosure of the minutes.

48. Points made by the Council about the cost of litigation being at public expense have not been considered as relevant to the adverse effect test because the adverse effect must be caused to the interests of the third party and not the public authority.
49. Finally, the Council submitted an argument that to release the minutes would have set a precedent in the dealings of the Trust with other public authorities and the Council in dealing with third parties, and this would have harmed the Trust's ability to carry out similar negotiations. The Commissioner has considered this argument as part of the public interest test because of its general nature.
50. Having considered all the points advanced, the Commissioner is satisfied that where the JLC had discussed issues within the minutes which had not been resolved at the time of the complainant's requests, release of the requested information would have adversely affected the interests of the Trust.
51. Turning now to the information in question, the Commissioner examined each of the minutes and considered the Council's explanation of what issues within the minutes were unresolved at the time of the complainant's requests. It is not appropriate for the Commissioner to discuss all these issues in detail in this Decision Notice but he has provided below a general overview of the nature of his considerations.
52. The Commissioner has considered all of the minutes requested and has taken the view that all of the minutes contain a combination of discussions on matters which appear to have been resolved at the time of the complainant's requests, and matters which remained unresolved.
53. To give an example of the above, the Commissioner noted that the minutes of the meeting on 15 May 2006 (requested by the complainant on 24 May 2006) include information concerning the agreement of a “communications protocol” regarding how the discussions should proceed. The Commissioner's view is that this information could have been disclosed to the complainant at the time of his request on 24 May 2006 without adverse effect to the interests of the Trust. This is because it appears that the parties reached a measure of agreement at this meeting on this particular issue.
54. By contrast, in the minutes of the meeting on 25 October 2006 (requested by the complainant on 19 November 2006), there are discussions relating to specific

sources of evidence under consideration and discussions concerning enquiries from the public about highway rights which remained unresolved at the time of the complainant's request. The Commissioner believes that such information could not have been disclosed to the complainant at the time of his request without resulting in adverse effect to the Trust's interests.

55. The Commissioner's overall view however is that there was a significant amount of information within all of the minutes which could have been disclosed at the time of the complainant's requests because the issues discussed had been resolved by the JLC.

Public Interest Test

56. As the exception under 12(5)(f) is qualified, the Commissioner also considered whether the Council was correct to withhold the information which would have adversely affected the interests of the Trust in accordance with the public interest test under regulation 12(1)(b).
57. The Commissioner recognises that there is a specific presumption in favour of disclosure of environmental information provided by regulation 12(2) of the EIR. He also acknowledges that there is a public interest in the Council's discussions with a third party being transparent and accountable. The Council has explained that the surface of any publicly maintainable highway is vested in the Council as Highway Authority and the nature of its meetings with the Trust, though co-operative, was necessary because the Trust disagreed with some of the Council's assertions. In view of these considerations, it is important that members of the public have reassurance that the Council has taken appropriate action to investigate and assert highway rights.
58. Further, although the JLC agreed to issue joint decision letters giving some explanation for the decisions reached, disclosure of the minutes would have allowed members of the public to understand more about how the decisions were made and may have assisted individuals in challenging those decisions further. Disclosure would also have furthered the understanding of and participation in environmental issues directly affecting the local area and the Council's role as a Highway Authority.
59. On the other hand, it is clear that there is an inherent public interest in the mediation process between the Council and the Trust working effectively and efficiently. It is clearly in the public interest for the Council to have a degree of private space in which to discuss issues and reach decisions with third parties and for third parties to have access to public authorities to discuss issues of legitimate concern without facing immediate public scrutiny and interference. In this case, the opportunity to discuss enquiries in private has contributed towards the development of a co-operative relationship between the Council and the Trust that has promoted the informal resolution of a number of contentious matters of public interest. This will have saved both time and public money by avoiding potentially lengthy and costly court proceedings. It is also apparent that the Trust did not have a clear expectation of disclosure. If faced with the prospect of immediate disclosure of the content of their discussions with the Council, when

there was not a strong prior expectation of such disclosure, third parties might be discouraged from becoming involved in similar discussions in the future.

60. Having considered all the circumstances of the case, the Commissioner believes that the public interest in withholding the information which would have adversely affected the interests of the Trust at the time the requests were received outweighed the public interest in disclosing the information. At the time of the requests, a number of issues concerning the enquiries by the public were still not decided upon, or were being considered by the JLC. In the Commissioner's opinion, the greater public interest lay in not disclosing the minutes of the ongoing discussions on matters which remained unresolved.

The Decision

61. The Commissioner's decision is that the public authority correctly applied the exception under 12(5)(f) and the public interest test to information within the minutes which concerned matters which had yet to be resolved by the JLC. With the progression of the discussions however, the Commissioner considers that there was a significant amount of information which could have been disclosed at the time of the complainant's requests which dealt with issues which had been resolved by the JLC. In view of this, the Commissioner found that the exception had been incorrectly applied to this information. The Council therefore breached regulation 5(1) of the EIR that environmental information should be made available upon request.
62. The Commissioner also found that, in relation to request 2, the Council breached regulation 14(2) of the EIR because it failed to inform the complainant that it considered that an exception applied until after the 20 working day deadline had expired.

Steps Required

63. The Commissioner requires the Council to disclose to the complainant all the information within the minutes requested concerning issues which had been resolved by the JLC at the time of the complainant's requests, subject to the Council having appropriate regard to any personal data contained within the minutes.
64. The public authority must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Other Matters

65. The Commissioner is aware that many, if not all of the matters that were being considered by the JLC have now been resolved due to the passage of time. Although this cannot form part of the Commissioner's decision, the Council may now wish to consider whether it may now provide all of the information requested to the complainant subject to their having appropriate regard to the third party personal data contained within the minutes.

Right of Appeal

66. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of October 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Regulation 2 of the EIR - Interpretation

Regulation 2(1) In these Regulations –

“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 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and 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.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

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 disclose applies under paragraphs (4) or (5); and
- (b) in all 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(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or

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.