

## Environmental Information Regulations 2004 (EIR)

### Decision Notice

**Date:** 15 September 2011

**Public Authority:** Malvern Hills District Council  
**Address:** Council House  
Avenue Road  
Malvern  
Worcestershire  
WR14 3AF

#### Decision (including any steps)

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1. The complainant has requested information concerning plans for the development of an area of land. Malvern Hills District Council (MHDC) refused to disclose this information under exceptions from the obligation to disclose in the Environmental Information Regulations (EIR).
2. The Commissioner's decision is that MHDC has applied an exception correctly in relation to some of the information. In relation to other information that MHDC had previously indicated it no longer believed to be exempt, the Commissioner concludes that this information should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose to the complainant all of the information that MHDC had indicated to the Commissioner's office it was willing to disclose in the schedule provided with its letter of 23 June 2011.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 1 November 2010 the complainant wrote to Malvern Hills District Council (MHDC) and requested the following information.
  - What contact the Council has had with Gleeson and / or other developers in relation to the land at Elms Farm?
  - What advice may have been provided to Gleeson and / or other developers, if any?
  - What pre-application discussions the Council may have had with Gleeson or any other developer?
6. MHDC responded on 15 November 2010. It considered the information to be environmental in accordance with the definition given in the Environmental Information Regulations 2004 (EIR) and so the request was considered under the EIR. MHDC refused to disclose the information requested as it considered it to be exempt under Regulation 12(3) (personal data) and Regulation 12(5)(e) (commercial confidentiality).
7. Following an internal review MHDC wrote to the complainant on 8 April 2011. It upheld the refusal to disclose the information, and now also cited the exception from the EIR provided by Regulation 12(5)(f) (adverse effect on the interests of the information provider).

## Scope of the case

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8. On 9 May 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant indicated that he did not agree that the information he had requested was subject to the exceptions cited.

## Reasons for decision

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9. The Commissioner has focused first on Regulation 12(5)(f). This states that environmental information is exempt if it was provided to the public authority by a third party and the following conditions are met:
  - the information was provided voluntarily;
  - there is no other legal requirement aside from the EIR to disclose this information;

- the third party who provided this information has not consented to the disclosure of this information;
  - disclosure of this information would adversely affect the interests of the third party that provided the information.
10. This exception is also subject to the balance of the public interests, which means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.
11. The first step when considering if this exception does apply is to address whether the information in question is environmental information in accordance with the definition given in Regulation 2. If this information is environmental then it was correct for MHDC to consider the request under the EIR.
12. Environmental information is defined within regulation 2(1) of the EIR as follows:

*“any information in written, visual, aural, electronic or any other material form on –*

*(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...*

*(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.*

13. The complainant requested information concerning possible development of a specified area of land. The Commissioner believes that any information relating to this matter would be environmental information by virtue of Regulation 2(1)(c). A decision as to whether development should, or should not, take place would be a plan that would affect the state of the land or landscape as noted in Regulation 2(1)(a). Therefore the Commissioner considers the requested information in this case to be environmental as it relates to information on an activity which would be likely to affect the land or landscape.

14. The next step is to consider whether Regulation 12(5)(f) is engaged as a result of the information in question meeting the criteria described in that exception, the first of which is that the information was supplied to MHDC by a third party.
15. The Commissioner accepts that all of the information in question was provided to MHDC by a third party, specifically the companies seeking to develop the land referred to in the complainant's request. As to whether this information was provided voluntarily, the view of the Commissioner is that the nature of this information and the circumstances in which it was provided mean it is clear that it was supplied voluntarily; clearly the third parties were not obliged to enter into negotiations to develop this land. On the issue of whether there is, or could be any other legal requirement to disclose this information, the Commissioner is aware of no evidence that suggests that any such requirement does exist.
16. Turning to the issue of whether there has been consent to disclose from the providers of the information, MHDC supplied to the Commissioner's office a copy of a letter sent to it by the representatives of the third parties. This letter was a response to a letter from MHDC which sought the views of the information providers about disclosure and shows that not only has consent not been given, the information providers actively object to disclosure.
17. The final step for this exception to apply is that disclosure must result in an adverse effect to the interests of the providers of the information. The argument advanced by the information providers on this point was that disclosure would adversely affect their commercial interests. This was on the basis that it would disrupt their negotiations for the use of this land, possibly jeopardising the prospects for agreement to development, and would involve the disclosure of information that could be of use to competitors.
18. Having viewed the content of the information, the Commissioner accepts that this does include considerable detail about the process entered into between MHDC and the information providers, including information gathered by the third parties about this land and detail about the intended uses for this land. Of particular note is the level of detail within this information, and the strong objection to disclosure expressed by the third parties. The response of the third parties to being notified of the complainant's request included seeking legal advice. This advice was that the information in question had been supplied to MHDC in confidence.
19. The approach of the Commissioner to 'adverse affect' as it is used in the EIR is that the threshold for this to apply is a high one. However,

on the basis of the representations set out above the Commissioner concludes that disclosure would result in an adverse effect upon the commercial interests of the information providers. This means that the Commissioner has found that all the conditions for this exception to be engaged are met in relation to this information and so his overall conclusion is that the exception to disclosure provided by Regulation 12(5)(f) does apply.

20. Having found that the exception is engaged it is necessary to go on to consider the balance of the public interests. To reach a conclusion here the Commissioner has taken into account general arguments, such as the public interest in improving the openness of MHDC and the presumption in favour of disclosure within the EIR, as well as arguments relating to the specific information in question here.
21. Covering first the arguments in favour of disclosure of the information, there is a strong public interest in disclosure, particularly on the part of local people in the area of the planning as was recognised by MHDC. This public interest is on the grounds of improving public knowledge and understanding about the plans for the area specified in the request and the process undertaken by MHDC in relation to these. Disclosure would also contribute to public debate about these plans. The view of the Commissioner is that this is a valid factor in favour of disclosure of considerable weight.
22. In general the Commissioner would expect there to be a strong public interest in the disclosure of information about planning decisions. These decisions have a significant impact upon the environment and hence on the quality of people's lives. Making planning decisions is a significant responsibility for MHDC and the arguments against disclosure must be of very significant weight for it to not be considered in the public interest to disclose information relating to this responsibility.
23. Turning to the arguments in favour of maintenance of the exception, the view of the Commissioner is that the central argument here relates to the ability of MHDC to conduct the planning process. If other organisations involved in this process took disclosure in this case as an indication that information that they supply to MHDC may not remain confidential, this may result in these organisations being reluctant to enter into the planning process with MHDC. This could harm the ability of MHDC to conduct the planning process; an outcome that would not be in the public interest. The Commissioner considers this to be a valid public interest factor in favour of disclosure of very significant weight.
24. The Commissioner also recognises that there are channels through which interested parties, including local residents, are informed of

planning processes and can comment on and influence this process. The Commissioner recognises a public interest in preserving the integrity of the means by which planning processes can be scrutinised and challenged and considers this a valid factor in favour of maintenance of the exception of some weight.

25. The Commissioner has recognised valid public interests in disclosure, the central factor being that disclosure would contribute to public knowledge and understanding of and debate about the planning process. However, the Commissioner has also found that there is a strong public interest in favour of maintaining the exception on the grounds of avoiding harm to the planning process. Having also noted that there are means to enable interested parties to make their contributions to the planning process, his view is that this tips the balance in favour of maintenance of the exception. His conclusion is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in disclosure.
26. The Commissioner has also reached a separate conclusion in relation to other information that MHDC had previously indicated during the Commissioner's investigation could be disclosed. The Commissioner contacted MHDC in connection with that information and asked it to disclose this to the complainant. MHDC indicated that it did not wish to disclose this information until the Commissioner had reached his decision in relation to the remainder of the information.
27. The conclusion of the Commissioner in relation to this part of the information is that this information is not subject to any exception. This conclusion is based on the indication from MHDC that it no longer believed this information to be covered by any exception. MHDC should also note that in any case where it believes information that was previously withheld can be disclosed, it should ensure that this information is disclosed at the earliest opportunity, rather than delaying this until a Decision Notice is issued. It should also note that, where a public authority has indicated that it is now willing to disclose information, the Commissioner will not in general carry out a detailed analysis in relation to this information, but will expect the public authority to proactively disclose that information.

## Right of appeal

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28. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

29. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
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