

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 21 December 2010**

**Public Authority:** Mid Sussex District Council  
**Address:** Oaklands Road  
Haywards Heath  
West Sussex  
RH16 1SS

### **Summary**

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The complainant requested information regarding three separate planning applications and the associated planning enforcement files. The public authority initially refused to disclose some of the requested information; however during the Commissioner's investigation the public authority decided, that given the passage of time it would be appropriate to release the requested information. The complainant considers that the public authority holds further information. Therefore the Commissioner has considered if further information is held. He has concluded that on the balance of probabilities the public authority does not hold any further information and does not require the public authority to take any further action.

### **The Commissioner's Role**

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

## The Request

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2. On 7 February 2010 the complainant submitted the following request:

CD/06/02564/FUL

*".....information relating to or in connection with:*

- *Visits to the land by MSDC officials and their agents at any time;*
- *Satisfaction or failure to satisfy conditions under the grant of permission notice dated 17 January 2007;*
- *Agricultural need for development."*

CD/06/01828/FUL

*".....information relating to or in connection with:*

- *Visits to the land by MSDC officials and their agents at any time;*
- *Agricultural need for development."*

CD/00/00054/FUL

*".....information relating to or in connection with:*

- *Visits to the land by MSDC officials and their agents at any time;*
- *Satisfaction or failure to satisfy conditions under the grant of permission notice, dated 9 June 2000;*
- *Agricultural need for development."*

Green portakabin, currently located on land at junction of B2115 and Cleavers Lane to its West

*"All information relating to the above, to the extent not disclosed pursuant to the information already requested elsewhere in this letter."*

3. Mid Sussex District Council (MSDC) provided a response to the complainant on 19 February 2010 (within 20 working days) in which it stated that he had been provided with all information held other than that contained within the enforcement files which MSDC refused to disclose on the basis of the exemptions contained in the Freedom of Information Act at section 40 – personal information and section 41 – information provided in confidence.
4. The complainant requested an internal review of the public authority's decision on 21 February 2010.

5. On 16 March 2010 MSDC wrote to the complainant with the details of the result of the internal review it had carried out. MSDC stated that the request should have been considered under EIR and as such MSDC advised the complainant that the information he had requested was exempt from disclosure by virtue of the exceptions contained at regulation 12(4)(e) – internal communications, and 12(5)(f) – information voluntarily supplied.

## **The Investigation**

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### **Scope of the case**

6. On 29 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - MSDC had not provided all of the information requested
7. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

8. The Commissioner wrote to MSDC on 1 July 2010 asking it for further arguments in support of its refusal under regulations 12(4)(e) and 12(5)(f).
9. In a letter dated 21 July 2010 MSDC informed the Commissioner that it had reviewed the withheld information and given the passage of time it was now happy to disclose the information. MSDC provided the complainant with the information on 4 August 2010.
10. The Commissioner wrote to the complainant on 10 August 2010 asking him if the information which had been provided to him by MSDC now satisfied his request.
11. On 27 August 2010 the complainant responded to the Commissioner in which he stated that he was not satisfied that all of the requested information had been provided and that he wished for a formal conclusion to the complaint.

## Analysis

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### Substantive Procedural Matters

#### *Is the information environmental?*

12. The Commissioner has first considered whether the request made by the complainant is a request for environmental information as defined by the EIR.
13. The Commissioner considers that the information, where held, falls within the Regulation 2(1)(c)<sup>1</sup>: '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 designed to protect those elements.'
14. In this case all the information, where held, would consist of information contained within a planning enforcement file. The Commissioner believes this amounts to a measure (a programme and activity) that is likely to affect the land and landscape [2(1)(a)]. The Commissioner is satisfied that the information would all be environmental information in this instance.

#### *Is further relevant recorded information held?*

#### Regulation 5(1)

15. Regulation 5(1) imposes an obligation on a public authority to make the recorded information that it holds available on request (subject to issuing an appropriate refusal notice when it can rely on an exception).
16. In order to determine its position under the Regulations it is important as a first step for it to determine what relevant recorded information it holds that is covered by the scope of the request for information.
17. During the course of the Commissioner's investigation the MSDC stated that it had reconsidered the recorded information that it held given the passage of time and that it no longer wished to rely on any exceptions to withhold the information. This information was subsequently provided to the complainant on 4 August 2010.

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<sup>1</sup> A full copy of all the provisions cited in this Decision Notice can be found in the legal annex that is attached to the bottom of the Notice.

18. The remainder of the substance of the Commissioner's investigation is to determine on the balance of probabilities whether further recorded information, beyond that already provided to the complainant, was held that is covered by the scope of his investigation.
19. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the time of the request for information. This is the only information that a public authority is obliged to provide. The time of the request was 7 February 2010 in this case.
20. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal (the 'Tribunal') in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.
21. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, the scope of the searches it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
22. There has been considerable correspondence between the complainant and the Council concerning the above planning applications. The correspondence stretches over a number of years and continues until the present day.

#### *The nature of the searches conducted*

23. MSDC has told the Commissioner that the searches it undertook involved asking Building Control to check all their records relating to the requests above. It confirmed that both the paper and electronic files were checked. The searches were limited to Building Control as this is the only place within the Council that planning enforcement files are kept.

24. With respect to its search of electronic files, MSDC has told the Commissioner it searched only networked resources as no data is stored on the hard drives of local computers.
25. The searches were conducted using the following search terms:  
[Redacted], [Redacted], and the planning applications numbers.
26. With regard to the paper files MSDC informed the Commissioner that *"depending on the date of the information it will be held as either an electronic or as a paper record. Data was transferred to our electronic systems but a cut off date was applied and anything prior to 2000 is held as a paper copy only. The earliest date of these planning applications is 2000."*
27. During his investigation, the Commissioner asked the MSDC whether there was any evidence that it had ever held any additional related to the information requested. In response, MSDC said  
*"To Building Control's knowledge no data has been deleted or destroyed"*.
28. With regards to its record retention and disposal procedure, MSDC stated that it used the Retention guidelines provided by The Records Management Society of Great Britain.
29. The Commissioner has considered the circumstances of this case in detail. He is satisfied that, based on the response from the Council, and on the balance of probabilities there is no further relevant recorded information that falls within the scope of the request.

## **The Decision**

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30. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR.

## **Steps Required**

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31. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 21<sup>st</sup> day of December 2010**

**Signed .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Regulation 2 - Interpretation

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

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

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

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

“the Commissioner” means the Information Commissioner;

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

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and



- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.