



**FREEDOM OF INFORMATION ACT 2000 (SECTION 50)  
ENVIRONMENTAL INFORMATION REGULATIONS 2004**

**DECISION NOTICE**

**Dated: 19 July 2006**

**Name of Public Authority:** Mid Devon District Council  
**Address of Public Authority:** Phoenix House  
Phoenix Lane  
Tiverton  
Devon  
EX16 6PP

**Information Requested:**

"...all materials [held] relating to [the Complainant's] planning application, any site visits undertaken by [the Public Authority], and any letters of complaint and the associated letters from [the Public Authority]."

**Summary Decision and Action Required**

Following the intervention of the Commissioner, the Public Authority has now disclosed a large tranche of the requested information to the Complainant. This decision relates to the remaining tranche of the requested information:

- a) complaints correspondence;
- b) legal advice; and
- c) site photographs taken as part of the Public Authority's investigation.

The Commissioner's decision in this matter as follows:

- a) The Public Authority has legitimately withheld the identity of the complainants but the Commissioner disagrees with its basis for doing so;
- b) The Public Authority has legitimately withheld the legal advice but the Commissioner disagrees with its basis for doing so; and
- c) The Public Authority has contravened the requirements of the Environmental Information Regulations 2004 ("EIR" or the "Regulations") in withholding the site photographs

He requires the Public Authority to disclose the site photographs within 35 days of the date of service of this Notice.

The Commissioner has also decided that the Public Authority's initial response to the Complainant's information request did not comply with its obligations under EIR Regulation 14 (3)(b) in that it did not provide an explanation of the public interest arguments it had considered in responding to this request.

## 1. Duty of the Commissioner

- 1.1 Under section 50(1) of the Freedom of Information Act (the “Act” or “FOIA”), as modified by Regulation 18 of the Regulations, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Parts 2 and 3 of the Regulations and to issue a Decision Notice to both the complainant and the public authority.

## 2. The Complaint

- 2.1 In an email dated 31 January 2005, the Complainant submitted the following request to the Public Authority:

*“I would like to exercise my rights under the Freedom of Information Act 2000 to see all materials you hold relating to my planning application, any site visits undertaken by yourselves, and any letters of complaint and the associated letters from yourselves.”*

This request was made at the end of an email which covered a number of points related to planning matters.

- 2.2 The Public Authority sent a refusal notice on 25 February 2005 explaining that the information requested was contained in two files, a Planning Application file and a Planning Enforcement file. However, it believed that all the information in question was exempt information for the following reasons:

### Planning Application File:

The Public Authority stated that this is a public document available for inspection at its offices and as such, the Public Authority considered it exempt under FOIA Section 21(2)(a) – Information “*reasonably accessible to the applicant by other means even though it is accessible only on payment*”.

### Planning Enforcement File:

The Public Authority considered this to be exempt under FOIA Section 30(1)(b) – Information held “*at any time by the public authority for the purposes of any investigation which is conducted by the public authority and in the circumstances which may lead to a decision by the authority to institute criminal proceedings which the authority has the power to conduct*”

- 2.3 It should be noted that at this stage, neither party was aware that a request for information relating to planning files was more likely to be covered by the requirements of the Regulations rather than the requirements of the Act.

- 2.4 In any event, the Commissioner considers that this initial response does not satisfy either the Public Authority's procedural obligations under either FOIA Section 17 (3) FOIA or EIR Regulation 14 (3)(b). Both those provisions require the Public Authority to state (where applicable) its reasons for claiming that the public interest favoured maintaining the FOIA exemption or EIR exception that had been cited. Under FOIA Section 17(3) a public authority is permitted to provide its public interest consideration under a separate notice within such time as is reasonable in the circumstances. The Public Authority in this case gave no indication that it intended to provide such a notice as part of its refusal. There is no equivalent provision under EIR.
- 2.5 The Complainant appealed the Public Authority's refusal on 7 March 2005 and received a response on 28 March 2005. That response upheld the view expressed in the Public Authority's refusal notice and explained in more detail the Public Authority's public interest considerations in favour of maintaining the Section 30 exemption. In summary, it argued that the planning system operated in the public interest and that enforcement within that system ensured that a developer carried out proposed development in accordance with planning permission. This process ensured that development is controlled and the environment is protected. It also argued that the public interest was best served by maintaining complainant confidentiality to ensure public confidence. Disclosure of confidential complaints would, it argued, jeopardise the future of obtaining information from confidential sources and that the resulting cessation would be likely to lead to less control of development and to potential damage to the environment.
- 2.6 The Complainant was dissatisfied with this response and submitted a complaint to the Commissioner on 6 April 2005. This complaint focussed on the Public Authority's failure to provide him with the information contained in the Planning Enforcement File to which FOIA Section 30(1)(b) had been applied.

### **3. Review of the Case**

- 3.1 The Commissioner contacted the Public Authority and asked for a copy of the Planning Enforcement File. The Commissioner advised the Public Authority that if, in his view, the requested information was caught by the Regulations, he would give the Public Authority the opportunity to revisit its response to the Complainant. He advised the Complainant of this course of action.
- 3.2 The Commissioner reviewed the requested information and concluded that it was environmental information caught by the scope of the Regulations. This is because it satisfies the EIR definition of environmental information. That definition is found in Regulation 2 and it states that environmental information is:

" ... 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;..."

In this case, the Commissioner believes the requested information satisfies the definition in (c) above.

3.3 The Commissioner gave the Public Authority an opportunity to revisit its response and consider the application of the Regulations.

3.4 The Public Authority reconsidered its position. After some delay in responding to the Commissioner, it advised that it was now in a position to release a significant tranche of the Planning Enforcement File due to what it described as "*progress on the case since the original request was received*". It went on to explain that it would be redacting or withholding parts of the file and cited the following reasons for doing so:

a) Complaints correspondence (including identity of complainants):

**Regulation 12(5)(f) – Adverse effect on interests of person voluntarily supplying information**

The Public Authority argued that disclosure would undermine public confidence in the confidential nature of complaints. Cessation in information flow from the public would be likely to lead to less control of development and an increase in the potential for damage to the environment.

b) Internal legal advice:

**Regulation 12(4)(e) – The request involves the disclosure of internal communications**

The Public Authority argued that the public interest is best served by maintaining a confidential advice process and ensuring that officers of the authority are provided with 'private thinking space' to enable free expression of ideas.

c) Site photographs taken in the course of its investigations:

**Regulation 12(5)(g) – Adverse effect on the protection of the environment**

The Public Authority argued that it wanted to retain the confidentiality of photographic evidence so that further changes to the site cannot be influenced by the existence or lack of photographic proof of the state of particular areas on the site at the time the photographs were taken. It further argued that the public interest favoured maintaining the exception to ensure the protection of the environment.

- 3.5 On advice from the Commissioner, the Public Authority voluntarily released to the Complainant that information which it no longer considered to be excepted from its EIR duty to disclose requested information. The Commissioner also required the Public Authority to explain its position to the Complainant with regard to the information that it continued to withhold.
- 3.6 In correspondence with the Commissioner, the Complainant agreed to withdraw his complaint with respect to the tranche of information that he had now received.
- 3.7 Dealing first with the procedural elements of this case and as indicated in 2.4 above, the Public Authority did not explain its public interest arguments in its initial refusal dated 25 February 2005. In failing to do so, the Commissioner believes that the Public Authority did not comply with its obligations under EIR Regulation 14(3)(b).

Regulation 14(3) states that

[If a request for environmental information is refused] *the refusal shall specify the reasons not to disclose the information requested, including -*

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

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

While the Public Authority did outline its public interest considerations in later correspondence, this is not sufficient to satisfy the requirements of Regulation 14(3)(b) which clearly obliges a public authority to set out its considerations in its refusal notice and not in later correspondence.

- 3.8 Turning to the substantive issues, the Commissioner then considered the Public Authority's and the Complainant's arguments in relation to the information that continued to be withheld.

**3.9 Regulation 12(5)(f) – Adverse effect on interests of person voluntarily supplying information**

In the Commissioner's view, much of the information contained in the

complaint correspondence to which this exception relates has already been released to the Complainant. The Public Authority has already made the Complainant aware of its concerns about the development of the site, those concerns arising, in the most part, from complaints to the Public Authority. Those concerns have also been discussed in public at meetings of the Public Authority's Planning Committee. Minutes of the relevant meetings are available on the Public Authority's website. However, the Public Authority has not disclosed the names of those who submitted complaints to the Public Authority about development of the site (the "Planning Complainants"). The Complainant asserts that he knows the identity of the Planning Complainants due to a number of incidents which are alleged to have taken place involving certain local residents. With his initial complaint, he had provided the Commissioner a copy of a letter received from a solicitor acting on behalf of certain local residents.

- 3.10 The Commissioner believes that Regulation 13 is more appropriate than Regulation 12 (5)(g) in this case in relation to the identity of the Planning Complainants. Regulation 13 states

*"(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.*

*(2) The first condition is -*

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -*
  - (i) any of the data protection principles; or*
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and*
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*

*(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it."*

- 3.11 In the Commissioner's view the disclosure of the Planning Complainants' identities would contravene the first data protection

principle of the Data Protection Act 1998 (“DPA98”). This principle requires the fair and lawful processing of personal data and also requires that a DPA98 Schedule 2 condition for processing is satisfied. The full list of Schedule 2 conditions can be accessed via the Office of Public Sector Information website

<http://www.opsi.gov.uk/acts/acts1998/80029--n.htm#sch2>

- 3.12 The Commissioner is satisfied that
- a) the names of the Planning Complainants; and
  - b) the fact that they have submitted complaints to the Public Authority about development of the site would constitute the Planning Complainants’ personal data.
- 3.13 When considering whether the processing of, (in this case, the disclosure of) personal data would be fair and lawful, the Commissioner has taken into consideration the reasonable expectations of the data subjects, i.e, the Planning Complainants and any specific objection to disclosure that they might have raised. The Commissioner is satisfied that at the time complaints were submitted, there was a reasonable expectation that the Planning Complainants’ identities would not be disclosed. The Commissioner is also satisfied that specific objections to disclosure were raised in this case.
- 3.14 Specific objection may not necessarily be a barrier to disclosure. For example, there may be a statutory obligation to disclose personal data despite an individual’s objection. It should be noted that if information is exempted from the EIR duty to disclose requested information, the EIR statutory obligation to disclose requested information is disapplied. No other statutory obligation to disclose has been identified in this case.
- 3.15 As outlined in 3.11 above, there are two components to the first data protection principle. The first is the requirement to process fairly and lawfully and this has been covered in 3.14-3.15 above. The second component is the requirement to satisfy one of the DPA98 Schedule 2 conditions for processing. Processing is only considered to be compliant with the first data protection principle where both components are met. If the first component is not met, it is not necessary to consider the second component and vice versa. As has already been explained in 3.14-3.15 above, the Commissioner does consider that the first component has been met. However, for completeness, the Commissioner does not consider that a DPA98 Schedule 2 condition for processing (the second component) could be satisfied in this case either.
- 3.16 **Regulation 12 (5)(g) - Summary**  
The Commissioner is satisfied that the Public Authority has already provided to the Complainant most of the information contained in the Planning Complainants’ letters. The Commissioner believes that the Public Authority acted correctly in withholding remainder of that information, the Planning Complainants’ identities. However, in the

Commissioner's view, it should have applied Regulation 13 as outlined above rather than Regulation 12(5)(g).

**3.17 Regulation 12(4)(e) – The request involves the disclosure of internal communications**

The Commissioner has read the information in question and is satisfied that it is an internal communication. The Commissioner notes that the internal communication is legal advice which has been provided by Council Legal Services. Such information would normally attract legal professional privilege.

3.18 In the Commissioner's view, this information is also the personal data of the applicant. By virtue of Regulation 5(3), it cannot be environmental information caught by the scope of the Regulations. Regulation 5(3) states:

*"To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) [the EIR right of access] shall not apply to those personal data"*

3.19 In such a scenario the DPA98 right of subject access is engaged. However, this right is also subject to certain exemptions. Where a DPA98 exemption applies to personal data, that applicant is not entitled to access that personal data under DPA98.

3.20 It is the Commissioner's view that the Complainant is unlikely to be entitled to this discrete piece of information under DPA98 because it is information "*in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings.*" (DPA98 Schedule 7(10) (Legal Professional Privilege Exemption)).

3.21 If a person other than the Complainant sought access to this information, either on his behalf or as an entirely unrelated access request, it is also likely to be excepted from the EIR duty to disclose requested information. The applicable Regulation in this scenario is 13(3) and this is reproduced in 3.10 above. However, it should be noted that Regulation 13(3) includes a public interest test which requires the public authority to consider whether "*in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.*"

3.22 It is the Commissioner's view that the public interest in not disclosing this discrete piece of information would outweigh the public interest in disclosing it. In reaching this view, the Commissioner has taken account of the fact that the information in question attracts legal professional privilege. The Information Tribunal has recently adjudicated on a case involving consideration of the public interest test in relation to information which attracts legal professional privilege. In Christopher Bellamy -vs- The Information Commissioner and the Secretary of State for Trade and Industry (Appeal No: EA/2005/0023), the Tribunal commented as follows:

*“there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.”* (Paragraph 35)

- 3.23 The Commissioner recognises that there are the public interest factors favouring disclosure. There is a public interest in transparency to promote accountability in decision making. Transparency also promotes a better understanding of how public money is spent and how resources are allocated. However, in this case and with regard to this particular piece of legal advice, the Commissioner considers that those factors would be outweighed by the in-built public interest in protecting lawyer-client confidentiality. The Commissioner considers that lawyer-client confidentiality applies in this case regardless of the fact that the provider of legal advice and the recipient of that advice are departments within the same public authority. This information was also received in 2005 and could not, therefore, in the Commissioner’s view, be regarded as stale.
- 3.24 **Regulation 12(5)(g) – Adverse effect on the protection of the environment**  
As explained in 3.4 above, this exception has been applied to a series of site photographs on the Planning Enforcement File which were taken as part of the Public Authority’s investigation.
- 3.25 The Public Authority argued that although its Planning Working Group had decided that no further action was required at this time it believed that development of this site was ongoing. It believed that extensive photographic evidence of the site was a deterrent to unauthorised development. Where the limits of that evidence are widely known, the Public Authority argued that the deterrent effect is reduced and it is possible that unauthorised development could take place.
- 3.26 The Commissioner read the minutes of the meeting at which the Planning Working Group made the decision referred to above. [http://www.middevon.gov.uk/media/pdf/a/5/Agenda\\_item\\_4\\_6\\_.pdf](http://www.middevon.gov.uk/media/pdf/a/5/Agenda_item_4_6_.pdf)  
This meeting followed a site visit by the Members of the Planning Working Group. The Commissioner noted that the Public Authority’s Head of Planning had made three recommendations to the Members of the Planning Working Group. Those recommendations were as follows:

**“Recommendation:**

*Members delegate their authority to the Head of Planning in order to:*

- 1. Take no further action in relation to the alleged breaches referring to the profile of the ponds including depth and steepness of the sides, the formation of the hillside water feature, ground levels in the flood plain, landscaping scheme and the erection of the standing stone as a result of advice contained within Planning Policy Guidance Note Number 18 (PPG18), this advice relates to the enforcement of planning control.*
- 2. Take no further action at this time in relation to the alleged breach referring to the deposit of material resulting from the excavation of the ponds, but that the owners be given a further period up to the end of October 2005 for the material to be spread and incorporated into the field.*
- 3. Take no further action as a change of use land to garden has not yet taken place, but that Officers monitor this area in terms of any further works and its ongoing use and revisit.”*

The Commissioner notes that the third recommendation refers to the possibility of further works on part of the site.

- 3.27 The Commissioner also notes from the minutes that Members of the Planning Working Group agreed to the first two recommendations but not to the third recommendation. Their decision with regard to the third recommendation was as follows:

*“Recommendation 3 of the Head of Planning not agreed. Whilst a change of use of land to garden has taken place without planning permission, take no further action as a result of advice contained within Planning Policy Guidance Note No. 18 relating the enforcement of planning control.”*

The Commissioner also noted that this was a unanimous decision.

- 3.28 The Commissioner read the Planning Policy Guidance Note No. 18 referred to in the decision.  
<http://www.planningportal.gov.uk/england/government/en/1021020428094.html>. The online introduction to this Note outlines the general principles contained in the note as follows: *“Trivial or technical breaches causing no harm should not attract enforcement action, it says, but negotiations over remedial action should not delay enforcement where it is appropriate.”*
- 3.29 In the Commissioner’s view, based on the decision of the Planning Working Group, it is not inevitable that further monitoring will be required at this site. He acknowledges the Public Authority’s point that releasing the photographs could undermine the deterrent effect that the Public Authority seeks to achieve in order to protect the environment. However, he does not consider that the assertion of a possibility is

sufficient to engage the exception. The exception is only engaged where disclosure “*would adversely affect the protection of the environment*”. In the Commissioner’s view, the Public Authority has explained what might occur if the photographs were to be released. However, it has not demonstrated that the protection of the environment **would** be adversely affected by disclosure of the site photographs.

**4. The Commissioner’s Decision and Action Required**

- 4.1 In failing to provide an explanation of public interest considerations, the Public Authority contravened the requirements of Regulation 14(3)(b) of the Regulations.
- 4.2 The Public Authority has legitimately withheld Planning Complainants’ names and a sheet of legal advice on the Planning Enforcement file although it did not cite the Regulations appropriate to its refusal.
- 4.3 The Public Authority is required to disclose the site photographs that it took during the course of its investigations and which it placed on its Planning Enforcement File ENF/49/2004/00215.
- 4.4 **The Commissioner requires these photographs to be disclosed with 35 days of the date of service of this Notice.**
- 4.5 Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

**Right of appeal**

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the “Tribunal”). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: <a href="mailto:informationtribunal@dca.gsi.gov.uk">informationtribunal@dca.gsi.gov.uk</a>
Leicester	
LE1 6ZX	

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

Dated the 19<sup>th</sup> day of July 2006

Signed: .....

Graham Smith  
Deputy Information Commissioner

Reference: FER0070849

Information Commissioner  
Wycliffe House  
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Cheshire SK9 5AF