

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 26 January 2017

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

**Decision (including any steps ordered)**

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1. The complainants requested information on the sale or potential sale of a strip of land for development, together with other correspondence relating to the sale and copies of emails from a councillor.
2. The Commissioner's decision is that on a balance of probabilities the council was correct to state that no further information is held falling within the scope of the request. He has also decided that the council did not comply with Regulation 5(2) (time for compliance) in respect of part (v) of the request.
  - The Commissioner does not require the council to take any steps.

## Request and response

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3. On 11 February 2016, the complainants wrote to the council and requested information in the following terms:

*"We are requesting these under the Freedom of Information Act. In particular, we wish to be provided with:*

- i. *copies of the missing emails;*
- ii. *the minutes of all council meetings discussing these two applications (and especially the Southern Area Development Management Committee meeting on 19<sup>th</sup> February 2014);*
- iii. *all the correspondence on these two applications between MHDC and the County Council Highways Department;*
- iv. *any material relating to the deletion of the "recommend refuse" document from the website;*
- v. *all information relating to the sale /potential sale of the "ransom strip" at the end of Charlock Road, Malvern; and*
- vi. *any other relevant correspondence."*

4. The council responded on 2 March 2016 and:

- i. *asked the complainants to clarify what emails they were referring to.*
- ii. *provided a link to the relevant minutes.*
- iii. *provided relevant correspondence to the complainants however the complainants wrote back stating that there was evidence that further correspondence was held within the information provided.*
- iv. *Said that the information had been 'unpublished' rather than deleted, but did not provide any information relating to the request (i.e. any correspondence on why the information had been removed from the website).*
- v. *Applied section 43 to relevant information on the sale/potential sale of the 'ransom strip' at the end of Charlock Road.*
- vi. *As per point iii.*

5. Following an internal review the council wrote to the complainants on 30 March 2016. It clarified that no emails, that no further correspondence is held, and upheld its initial decision as regards the remainder of the requests.

## Scope of the case

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6. The complainants contacted the Commissioner on 4 June 2016 to complain about the way their request for information had been handled.
7. Whilst the complainant's have wider ranging complaints about the actions of the council and individuals working for it the Commissioner has no powers to consider these aspects of the complaint further. The complaint which the Commissioner is able to consider is whether the council holds relevant information which has not been disclosed to them.
8. The Commissioner therefore considers that the complaint is that the council is holding information which the complainants consider should have been disclosed to them. They also complained about the council's application of section 43 to the information falling within part (v) of the request. During the course of the Commissioner's investigation however the council reconsidered its position and agreed to the disclosure of this information to the complainants.
9. Effectively therefore the only remaining issue is whether further information is held by the council which falls within the scope of parts (i), (iii), (iv) and (v) of the complaint.

## Reasons for decision

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### Regulation 5

10. Amongst other things, Regulation 5 provides that:

*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(2)*

*Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.*

11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following

the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
13. The Commissioner therefore asked the council to confirm what searches it has carried out for the information and to explain why it considers that relevant information is not held.

(i) The councillor's emails

14. The emails in question in part (i) of the request are responses to emails sent by the complainant's to a councillor relating to her position on the sale of the 'ransom strip'; a parcel of land owned by the council. The complainant's have not received responses to their emails, however the councillor has stated to them previously that she replied to 'all of the emails'. Effectively it appears that the complainant's dispute that the councillor has responded to all of their emails and they have made the request to demonstrate that that is the case.
15. In response to this part of the request the council provided a submission from the relevant councillor. She provided a copy of the emails which she holds and confirmed that to the best of her knowledge she had sent no other emails to the complainants. She confirmed that she had previously written to the complainants stating that she had replied to 'all' their emails, but that in fact she may not have received two of their previous emails, and/or may otherwise have chosen not to respond to them. She confirmed that the emails provided to the complainant's were the only ones she actually holds.
16. She said however that it was possible that the complainant's had been part of a group of local residents, the Poolbrook Residents Action Group. If so, she had sent and received some emails from this group and the complainant's may have been referring to these, however this was not

clear from the request. In any event, the councillor said that no further emails would be held. She said that following a previous security issue she now deletes her emails every few weeks.

(iii), (iv) & (v) Further correspondence

17. The council confirmed that although the relevant case officer had left the authority his file had been checked for emails by the ICT section and no further information other than that already disclosed had been located.
18. It identified one further email which has not been published on the planning file (available from the council's website). This document was an email from the highways engineer. The council confirmed however that a copy of this has been disclosed to the complainants in response to their request.
19. Part (iv) of the request relates to any correspondence held by the council regarding the removal of a recommendation to refuse the planning application by the highways authority which had previously been published on the council planning website. The complainant's question why a completed and published recommendation would have been reconsidered by a busy Highways Authority without a request to do so by the council or other parties.
20. The council said that no correspondence exists regarding the removal of this document from the website other than a copy of the original recommendation, (which has already been disclosed to the complainants). It clarified that the document was removed following a telephone conversation between the council and highway authority officers as it had been superseded, and no correspondence relating to this is therefore held.
21. The complainant's also received a reply from a further FOI request to Worcestershire County Council regarding this. An officer of the Highways Authority stated that she had taken over the case from the previous officer and having reviewed the case decided that the wrong approach had been taken. The decision was therefore reviewed and this is what led to the change in recommendations which the complainant's refer to.
22. The Commissioner specifically wrote to the council to ask if further details were held regarding the potential sale of the ransom strip. The Council confirmed however that only 2 documents were held, which were a conveyance document and a plan of the area. It initially applied section 43 to this information, then reconsidered it under the EIR to be exempt under Regulation 12(5)(e). Upon further reconsideration however, although the council considered that the information had little to do with the reasons for the request in the first instance it agreed to disclose these documents to the complainants. It confirmed that no further information is held in respect of the prospective sale of the land.

23. The Commissioner notes however that this agreement means that the disclosure will have occurred outside of the 20 working days for responding to a request. The Commissioner therefore considers that in this respect the council failed to comply with Regulation 5(2).

### Conclusions

24. The council said that it had carried out extensive searches to locate relevant information. It is clear from the council's submissions to the Commissioner that it has asked the relevant individuals whether they hold information or are aware of where it may be, carried out electronic searches for information and also investigated the processes leading up to the decision to remove the Highway Authority recommendation from the council's website. It has reconsidered its position and dropped its initial reliance upon an exemption as regards the conveyance and the plan, and agreed for this information to be disclosed to the complainants. The evidence suggests therefore that extensive searches for additional information have been carried out by the council in respect of the requested information.
25. The Commissioner's role in respect of requests where an authority states that no further information is held is to make a judgement based upon a balance of probabilities. In carrying out this role he seeks assurances from the council and evidence that it has carried out relevant searches for information. In this case, given the above, the Commissioner must conclude that on a balance of probabilities no further information is held falling within the scope of the complainant's requests.

## **Right of appeal**

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26. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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** .....

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