

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

### Decision Notice

Date: 26 October 2009

**Public Authority:** Maldon District Council  
**Address:** Princes Road  
Maldon  
Essex  
CM9 5DL

**Complainant:** Jeremy Tyler obo Property and Land Information Limited  
**Address:** 20 Thistle Close  
Basildon  
Essex  
SS15 5GX

### Summary

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The complainant made a request to inspect the building control information in relation to two named addresses. The Council agreed to provide the information requested but only on the provision of a fee based on the property search regulations. The Council argued that it was allowed to charge for the information under regulation 8(1) as the information was not in a public register and could not be inspected without further collation by the Council. The Commissioner has investigated and found that the request is a request to inspect environmental information but that the Council cannot charge for the information by virtue of regulation 8(2)(b). The Council must make the information available for inspection in accordance with regulation 5(1) within 35 calendar days of this notice.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

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.

## Background

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In reaching a decision in respect of this complaint, the Commissioner has relied upon a decision he reached in two earlier, similar complaints (reference FER0236058 and FER0240911), in which he ordered disclosure of the requested information. The Decision Notice in case FER0236058 is appended to this notice, and is available online at the following link:

[http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer\\_0236058.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer_0236058.pdf)

## The Request

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2. The complainant made the following request for information via email to Maldon District Council on 28 January 2009:

*"I would like to make arrangements to inspect the building control records in situ as soon as possible for the following land or buildings:*

*Address of Properties:*

*..... [Address 1 redacted].....*

*..... [Address 2 redacted].....*

3. The Council responded via email on 28 January 2009 in which it stated:

*"Building control information is not on public deposit and therefore if you would like to find out building control information we require a £42 research fee per property. This will enable us to carry out research into the property and reply to questions 1.1(f), 1.1(g), 1.1(h), 3.7, 3.8 and 3.13 of the CON29R form. We require £20 for the retrieval and copy of each approval notice and completion certificate."*

In this response the Council did not state which exception they were refusing the information under, nor do they inform the complainant of his right to make representations under regulation 11.

4. The complainant submitted his representations via email on 28 January 2009 stating:

*"In my opinion, the information I have requested comes under the definition of environmental information and as such is governed by the Directive 2003/4/EC of the European Parliament and of The Council of 28<sup>th</sup> January*

*2003 and 2004 No.3391 Freedom of Information Environmental Protection.  
The Environmental Information Regulations 2004 on public access to  
Environmental information and repealing Council Directive 90/313/EEC*

*Both of these directives state that you must make this information available to any one requesting access and this must be given free of charge. You may make a reasonable charge for providing the information in a printed format; however, I wish to view the data."*

5. The Council responded via email on 29 January 2009 stating:

*"The Local Authorities (England) (Charges for Property Searches) Regulations 2008 allows us to impose a charge for granting access to property records if it makes or proposes to make an internal recharge for internal transactions.*

*As the regulations have only recently come into force, we are still undertaking a general costings exercise. However, our charge of £42 is based on costings pre-regulations, and has not been increased for several years and we believe is in accordance with the principles of Regulations 6 and 7.*

*The £42 research fee charge applies whether you would like us to retrieve the relevant information for you from the files, or whether you would like to view a copy of the files. We are not able to provide you with the original files as we are bound by the Data Protection Act"*

The Council again did not state which exception or regulation they were using to refuse the request, nor did they advise the complainant of his right to complain to the Commissioner.

6. There was then a chain of correspondence between both parties with the complainant going through the Council's 3 stage complaint system. In letters from the Council dated 5 March 2009, 20 March 2009 and 7 April 2009 the Council continued to refuse the complaints request on the basis that in their opinion EIR did not apply to Building Control records, the letter of 7 April provided contact details to enable the complainant to contact the Information Commissioners Office.

## The Investigation

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### Scope of the case

7. On 22 March 2009 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:

- The requested information has been incorrectly withheld under the Environmental Information Regulations 2004
- The Council were charging excessive fees to view the information requested.

## Chronology

8. On 3 August 2009, the Commissioner wrote to the Council supplying them with copies of the two decision notices - FER0236058 and FER0240911 (issued on 27 July 2009) and asked the council to reconsider their refusal of the complainant's request in light of the Commissioner's findings. He asked Maldon District Council to explain why the disputed information in this case was different from that considered in the two Decision Notices on the same subject matter listed above and why this would warrant a different conclusion in this case.
9. The Council responded to the Commissioner in a letter dated 5 August 2009 refusing to reconsider their refusal on the basis that, in their view, the requested information was not environmental.

## Analysis

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### Substantive Procedural Matters

10. The Commissioner has first considered whether the request made by the complainant is a request to inspect environmental information as defined by the EIR.
11. The Commissioner considers that information in relation to building control records falls within the regulation 2(1)(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 measure designed to protect those elements". The Council has explained that to provide the requested information it would need to search within its property database. The Commissioner considers that in order to obtain the information requested by the complainant it is necessary to inspect environmental information as outlined by the Council. The information which is inspected is clearly a measure or plan on an activity (i.e. building plan) affecting or likely to affect one or some of the elements referred to in regulation 2(1)(a).

### Procedural Requirements

#### Regulation 5, Regulation 6 and Regulation 8

12. The Commissioner concludes that the information in the present case is information commonly provided in the form of yes/no answers on the CON29R form and is sufficiently similar to case FER0236058 to justify the same conclusion being reached in it.

## Regulation 14 – Refusal to disclose information

13. Under the Regulations, the authority is obliged by regulation 14 to inform the applicant within 20 working days if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner. The full texts of all relevant regulations are included in the legal annex to this notice.
14. It is not necessary for the authority to indicate that it is sending an official 'refusal notice'. It simply has to refuse the request in writing. Following the complainant's request dated 28 January 2009, the authority wrote refusing to supply the information in an email dated 28 January 2009. This letter therefore, constitutes the authority's refusal notice, within the 20 working day time limit.
15. However, the authority failed to state clearly the regulation or exception it was relying upon, simply referring to a fee for each property search as per The Local Authorities (England) (Charges for Property Searches) Regulations 2008. It also failed to inform the complainant of their rights of appeal.
16. The complainant made representations to the authority in an email dated 28 January 2009. The authority responded via email on 29 January 2009. The review was therefore, sent within the 40 working days allowed under regulation 11. The authority's response however, re-iterated the authority's response of 28 January 2009.

## The Decision

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17. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR. The Council breached the requirements of regulation 5(1) and 6(1) as it failed to make the requested information available for inspection on request.
18. Maldon District Council issued an inadequate refusal notice. The refusal notice did not specify the exception being relied upon which breaches the requirements of Regulation 14(3)(a), did not detail the public interest test considerations which breaches the requirements of 14(3)(b), and did not inform the complainant of their appeal rights which breaches the requirements of 14(5)(a) and 14(5)(b).

## Steps Required

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19. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

Allow the complainant to inspect the information requested.

20. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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21. 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.

### **Other matters**

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22. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
23. Maldon District Council did not inform the complainant of their right to contact the Commissioner following his complaint to them. The authority's confusion and its consequential failure to inform the complainant of their rights at the appropriate time, contributed to making the complainant's request a lengthier and more inconvenient process than was necessary under the EIR.
24. Maldon District Council should also reemphasise to its staff the importance of identifying the correct access regime for information requests.
25. The Commissioner would also point out to Maldon District Council that guidance is available on the ICO website to assist in handling information requests under both the Act and the Regulations and the ICO's Good Practice Team would be happy to provide more detailed advice if requested.

## Right of Appeal

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27. 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@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 served.

Dated the 26<sup>th</sup> day of October 2009

Signed .....

Gerrard Tracey  
Assistant Commissioner

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