



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL  
REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Information Tribunal Appeal Number: EA/2010/0045**

**Information Commissioner's Ref: FER0196026**

**Heard 19<sup>TH</sup> and 20<sup>th</sup> July at Field House**

**Decision Promulgated**

**And then on the papers 22 July and 2<sup>nd</sup> September 2010**

**5 October 2010**

**BEFORE**

**Fiona Henderson**

**And**

**Roger Creedon**

**And**

**Jean Nelson**

**BETWEEN:**

**BATH AND NORTH EAST SOMERSET COUNCIL**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Representation:**

For the Appellant: Anya Proops

For the Respondent: Gerry Facenna

**Subject matter:**

Environmental Information Regulations

R.12(5)(e) confidential information

R 12(1)(b) Public Interest test

## **Cases**

*Varec v Belgium 2008 2 CMLR 24*

*Auroux v Commune de Roanne – Case C-220/05*

*South Gloucestershire v IC EA/2006/0032*

*Bristol City Council v IC EA/2010/0012*

## **Decision**

The Tribunal allows the appeal in part for the reasons set out below and directs that

1. Bath and North East Somerset Council are ordered to disclose a redacted version of the disputed information (as set out in the open table attached and amplified in the confidential schedules) within 28 days.
2. Confidential Schedule 1 to this Decision (which refers directly to the information which the Tribunal orders should be disclosed) is to remain confidential until information so ordered has been disclosed.
3. Confidential Schedule 2 to this Decision (which deals with confidential information which the Tribunal orders should be redacted) is to remain confidential.

**First Tier Tribunal (Information Rights) Appeal Number:**

**EA/2010/0045**

**SUBSTITUTED DECISION NOTICE**

**Dated: 5 October 2010**

**Public authority: Bath and North East Somerset Council.**

**Address of Public Authority: The Guildhall, High Street, Bath, BA1 5AW.**

**Name of Complainant: Mr R Berg.**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, and the closed schedules the substituted decision is that:

1. The failure to identify and consider the 4 annexes to Mr Williamson's report constitutes an additional breach of regulation 14 EIR for failure to provide a refusal notice relating to this information within the time and in the terms provided for by regulation 14.
2. Regulation 12(5)(e) EIR is engaged in relation to all the disputed information.
3. In relation to the Crest Business Models the public interest lies in withholding this information,
4. In relation to the viability reports and their annexes and associated emails these should be disclosed with redactions (as set out in the open table attached and amplified in the confidential schedules). The redactions being made because the public interest lies in withholding that part of the information.
5. The failure to disclose redacted versions of the viability reports and their annexes and associated emails constitutes a breach of regulation 5(1) EIR.

**Steps Required**

Within 28 days of the date of this substituted decision notice Bath and North East Somerset Council are ordered to disclose:

- a redacted version of the viability reports their annexes and associated emails (redacted in accordance with the open table as amplified in the confidential schedules).

## **Reasons for Decision**

### **Introduction**

1. The Bath Western Riverside Scheme (BWR) concerns the development of brownfield former industrial land within Bath city centre including a former crane factory and the city's gas works. The site is approximately 70 acres in size and is situated within a UNESCO world heritage site. The development of this land has hitherto been problematic because of:
  - land contamination and the costs associated with remediation,
  - a lack of major infrastructure,
  - the number of land owners,
2. At the date of the request Crest Nicholson Plc (Crest) owned a large proportion of this land, and Bath and North East Somerset Council (B&NES) owned a small proportion of the land namely a waste disposal site. The rest was owned by private concerns or utility companies. In 2005 the Council gave its official approval to work with Crest as a development partner for the BWR scheme. At the time of the request the development had a capital value in excess of £500m. It was expected that around £28m of affordable housing funding (from the Council and the Housing Corporation) and an additional £34m of public funds would be used to support the development.
3. A co-operation agreement was signed between the Council and Crest in January 2007.

### **The request for information**

4. The original request was made on 23<sup>rd</sup> October 2007 for 10 categories of information relating to the BWR, on 5<sup>th</sup> November 2007 this was refused by the Council who relied upon regulation 12(4)(b) EIRs<sup>1</sup> and section 12 FOIA<sup>2</sup>. The Council invited the requestor

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<sup>1</sup> the request for information is manifestly unreasonable;

<sup>2</sup> the cost of complying with the request would exceed the appropriate limit

to refine his request and this was done on 2 separate occasions<sup>3</sup> until on 27<sup>th</sup> December 2007 that which was being asked for was disclosure of:

*“the latest financial model and viability assessments”* (the disputed information).

5. The Council’s internal reviews and the Commissioner upheld the refusal of the initial request and the first 2 refinements for the reasons already cited. That decision is not challenged upon appeal.
6. The Council refused the request<sup>4</sup> for the disputed information in a letter dated 21<sup>st</sup> February 2008 relying upon regulations 12(5)(e)<sup>5</sup> and 12(5)(f)<sup>6</sup> EIRs.

### **The complaint to the Information Commissioner**

7. The Decision Notice was dated 26<sup>th</sup> January 2010 and found that regulation 12(5)(e) EIRs was engaged but that the balance of public interest lay in disclosure. The Commissioner found that regulation 12(5)(f) was not engaged (this finding is not the subject of appeal). Additional procedural breaches were identified which are also not the subject of this appeal.

### **The appeal to the Tribunal**

8. By notice of appeal dated 22<sup>nd</sup> February 2010 the Council appealed upon the following grounds:

*The Commissioner erred in his approach to the public interest test in this case. In particular he erred:*

- (1) Because he misjudged the relevant considerations which applied in respect of the public interest in favour of the disclosure; and/or*
- (2) Because his analysis of the public interest in favour of maintaining the exception was fundamentally flawed.*

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<sup>3</sup> Some information was released in relation to the second refinement in November 2007

<sup>4</sup> Since this request was the last refinement of an earlier refined request it was only explicitly considered as part of the review of that earlier refined request.

<sup>5</sup> the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest;

<sup>6</sup> No legal obligation for the public authority to supply the information

## Evidence

9. The Tribunal heard evidence in open and closed session from Mr Jeremy Smalley (Divisional Director for Development and Regeneration for B&NES) and Mr Chris Tinker (Group Board Director and Regeneration Chairman Crest Nicholson Plc). The Tribunal has viewed a large volume of documentary evidence pertaining to the scheme and the planning process. The Tribunal has also viewed closed material including the withheld disputed material and the co-operation agreement (the majority of the terms of which are not in the public domain.) The Tribunal considers that it is necessary to provide 2 separate closed schedules to this decision. Schedule 1 deals with information that the Tribunal orders should be disclosed. This schedule is to be promulgated once the information so ordered has been disclosed. Schedule 2 deals with information which is to remain confidential,
10. The Tribunal took into consideration all the material before it and summarizes the evidence relevant to the background of the case here, and deals with the specifics within the analysis set out below.
11. B&NES occupies a role as the relevant planning authority which requires it to have regard to the relevant statutory provisions. In this context they may enter a planning agreement with the developer under section 106 of the Town and Country Planning Act 1990. This would be to ensure that the development was acceptable in planning terms.
12. The Council also has a corporate function wherein it will try to enter a dialogue with the developer with a view to potentially entering into a development agreement with the developer. This might include:
  - Considering the use of compulsory purchase orders to assist with site assembly,
  - Jointly procuring delivery of infrastructure works with the developer,
  - Setting out co-operation provisions between developers.
13. In January 2003 the Council acting in its corporate capacity tendered for a master development partner to develop both the Eastern and Western sectors of the Bath Riverside area. Crest tendered, but were not appointed. Grosvenor Estates (who did not own any of the land) were appointed. In 2004 Crest were brought in as a residential

development partner, having purchased 46% of the land in the western sector and agreed to purchase additional land. Grosvenor withdrew in 2005 and Crest were appointed as the major development partner in their stead without there being another tender competition.

14. In January 2007 the Council acting in its corporate capacity signed a co-operation agreement with Crest with a view to exploring whether it could enter into a future development agreement. The Council's case is that this did not amount to the awarding of any contract by the Council and neither party was obliged under the co-operation agreement to enter into any development agreement in the future or at all. At the relevant time the Council had not entered into a section 106 agreement or a development agreement in relation to the BWR.
15. Pursuant to the co-operation agreement Crest had agreed to work on an "open book" basis, this enabled the Council to look at all the underlying financial assumptions which the developer was making in respect of the scheme. This was to assist the Council to better understand the commercial realities of developing the BWR .
16. The "corporate" side of the Council were advising the "planning" side in terms of whether, in their view, the scheme was viable. Additionally in agreeing the heads of a potential s106 agreement Crest were negotiating individually with Council departments e.g. education and transport in order to ensure that the scheme addressed their needs and requirements.
17. As part of the open book process Crest provided copies of their detailed financial models of the scheme. Mr Tinker's evidence was that this showed in minute detail Crest's approach, methods and commercially sensitive information e.g:
  - The actual percentages in terms of interest, professional fees, management fees, development fees etc. negotiated by Crest,
  - The actual figures of construction and how these were achieved,
  - The cash flow in terms of what was paid when and to whom,

- The anticipated land values, remediation values, relocation values, and assumptions used in achieving these figures. This would reveal Crest's negotiating position.
18. This was a private development on predominantly private land. In order to try to ensure comprehensivity a Supplementary Planning Document (SPD) had been drawn up. This required a mix of approximately 2000 homes on the site. Bath has a particular problem with a high wages to house price ratio of 8:1 (owing to lack of housing stock). The local plan envisaged a building height average of 4 storeys. This scheme would have met 50% of the Council's new dwellings provisions for the next 10 years. The SPD aimed for a figure of 30% of the dwellings to be affordable.
19. The scheme at the relevant time proposed 25% affordable housing. The first version of the proposal had had higher buildings and more houses but a similar number of dwellings. In response to a change in the area designated as at risk from flood, and public concern as to the proposed heights of buildings, an amended version was under consideration wherein some building heights had been reduced although the average building height proposed was still 6 storeys. This compromise had been reached by reducing the number of houses and the mix and size of affordable housing.
20. Mr Tinker's evidence was that the principle driving factor for the height of the buildings was the number of dwellings required under the SPD, and that even if money were no object, logistical and spatial issues meant that the footprint of the land available for building (once flood plain and open space requirements were accounted for) was too small to build 2000 dwellings without the use of some high buildings. Mr Smalley's evidence was that a major consideration was the design aesthetic, there was a desire to achieve variety in height and a scheme worthy of its location. Both witnesses accepted that financial viability was a consideration but they did not agree with the dominating emphasis that seemed to have been put upon the link between height, design and financial viability contained in e.g. the development report and planning application.
21. As at February 2008 the value of the scheme was around £500m. The development period was due to last 15-20 years. The public investment was largely in terms of



affordable housing. English Partnership (EP) were going to provide net £34million<sup>7</sup>, and Housing Corporation (HC) and the Council approximately an additional £28 million. None of this money was going to be paid directly to Crest. EP would purchase some of the land to be developed by the scheme which would be resold to Crest. The money from the Council and HC would be paid to the Responsible Social Landlord (RSL) who was wholly independent of the Council and who would acquire the affordable housing from Crest and then manage it. This money would be protected from risk typically by staged payments (one payment when the first “golden” brick was laid and a final payment upon satisfactory completion). However, even the golden brick payment would be protected e.g. either by Crest or the RSL providing a bond. It was accepted that 100% of the risk of the development would be borne by Crest.

22. In addition to an application for outline planning permission for the whole of the Western BWR area (OPA1), Crest at all times pursued in tandem a second application with the Council (OPA2) for outline planning permission to develop their own land within the Western BWR only. This would have been in the context of compliance with the SPD but under the cascade provisions (wherein the proportion of social housing is reduced based upon financial viability) it was likely that only 12-15% of the dwellings would be affordable housing. This planning application would not have required any public funding but would not have provided the benefits of the comprehensive scheme e.g. the parkland, river front development, primary school and the remediation of the contaminated land.
23. Whilst the Council had in the past refused fragmented planning applications, the Tribunal was satisfied that if Crest withdrew from the comprehensive scheme it would be very difficult for the Council to pursue it because:
- They did not have the funds to purchase compulsorily all the land,
  - They did not have the expertise to develop the land,
  - They would have to find a new development partner in the context that earlier schemes had foundered and starting again would take time.

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<sup>7</sup>This includes £46 million which would be spent on purchase of land for development within the BWR scheme of which £26 million would be recouped upon the re-sale of the land

- The housing need and economic regeneration requirements of the region were such that if a deliverable scheme for part of the land that was largely compliant with the SPD were presented it would be increasingly difficult for the Council to refuse it.

### **Preliminary Matters**

#### The Disputed Information:

24. Both parties agree that the disputed information is environmental information and that the Environmental Information Regulations (EIRs) apply. The disputed information comprises the detailed financial models created by Crest containing a snapshot of Crest's views of the financial viability of the BWRS and supplied to the Council pursuant to the open book procedure and two independent viability assessments obtained by the Council which analysed these figures<sup>8</sup>. As at February 2008 Crest had not seen these viability assessments. The Tribunal is satisfied that all the information falls within the category of cost-benefit and other economic analyses and assumptions used within the framework of measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the soil, land, landscape and natural sites as well as measures or activities designed to protect those elements (pursuant to regulations 2(1)(a),(c) and (e) of the EIRs).

#### The date of the request

25. Although the request for the disputed information was encompassed in the original request dated 23<sup>rd</sup> October 2007, it is not in dispute that the relevant time is the period when the Council was actively considering and responding to the final refinement of the request namely 27<sup>th</sup> December 2007-21<sup>st</sup> February 2008.

#### Scope of the request

26. During his investigation, the Commissioner asked for a copy of the disputed information which he received in paper format. He did not receive an "unlocked" electronic version which would have enabled him to review the formulae and equations used to design the model. The request for the disputed information stated that the request was confined to

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<sup>8</sup> One by DTZ and the other by Paul Williamson an accountant and adviser to the council.

*“the latest financial model and the latest viability assessments.”*, which the requester was confident could be “emailed”. The request was framed in the context of :

*“I wish to be able to establish the chief financial implications of these proposals and, in particular, the balance of risk and reward between the private sector and the taxpayer...”*

27. It was accepted that the Commissioner had only ordered the disclosure of a paper version of the model (even if that could have been conveyed in PDF format electronically to comply with the requestor’s preference under regulation 6(1) EIRs).

28. All parties observed that:

- Neither the public authority or the Commissioner had considered whether the request was for the unlocked electronic version which would display the mechanisms of the model,
- The information which the Commissioner had ordered be disclosed (which was the subject of the appeal) was therefore a paper copy of the disputed information.
- There was no reference to an unlocked version and hence the mechanics or the formulae in the Commissioner’s Decision Notice. This was particularly notable in terms of the absence of this consideration when weighing the public interest test in the Decision Notice.
- The information requestor had not appealed the Decision on the basis that the disputed information had been wrongly identified.

29. The Tribunal was not invited to (and does not) go behind this definition of the scope of the request in this respect, although it was accepted that in a future case clarification should be sought from a requestor upon this point under regulation 9(2)(a) EIRs.

30. During the hearing it became apparent that one of the viability assessments (that of Mr Williamson) had 4 appendices attached. It was accepted by the Council that this formed part of the disputed information but, in error, these were not considered by the Council and never sent to the Commissioner. The Tribunal accepts that this was an administrative oversight and notes that the headings of the appendices were very similar to documents already identified. The oral hearing was adjourned to a paper hearing to

enable these documents to be considered and additional submissions made upon this additional material. Both Mr Tinker and Mr Smalley submitted additional witness statements to deal with these documents. The arguments and analysis set out below applies to these additional documents as well as the disputed information originally identified.

31. The failure to identify and consider the 4 appendices constitutes an additional breach of regulation 14 EIR for failure to provide refusal notice relating to this material within the time and in the terms provided for by regulation 14.

### **Legal submissions and analysis**

32. Regulation 12(5) provides:

*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -*

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;*

33. There is no dispute between the parties that the exemption is engaged. There was some dispute as to whether the specific terms of the co-operation agreement applied and it was accepted by the Council that clause 3.6 of the agreement which was cited to the Commissioner during the investigation did not apply to the disputed information but B&NES argued that it might be covered by the terms of clause 4.13<sup>9</sup> although they did not rest their case upon this provision.

34. The Tribunal does not consider it necessary to determine whether this clause applied as it is agreed that the information was commercially sensitive and there was a common law duty and/or an implied term to the co-operation agreement that the disputed information was received in confidence between the parties.

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<sup>9</sup> The specific contents of this clause is discussed in the closed schedule

35. The evidence of Mr Tinker, was that Crest had not realized that they were disclosing the information to the Council itself and had understood that it was being provided to their professional advisors only. In his addendum statement he acknowledges that clause 12.2 of the agreement provides for Crest to operate under open book principles and to share “*all financial and other related information...*”. He argues that it does not expressly stipulate that detailed business plans should be shared and asserts that the clause concentrates more on drawings, specifications etc.
36. The Tribunal does not agree with Mr Tinker’s assessment of Clause 12.2<sup>10</sup> which provides:  
“ *The preferred developer agrees to operate under open book principles in respect of matters governed by this agreement, meaning that it will disclose to the Council all financial and other relevant information relating to the project (including such documents, plans, drawings and specifications and any other information as the Council shall reasonably require at any time and from time to time...*”. The Tribunal notes that there is no provision within the contract for this information to be provided to the Council’s advisors specifically but not the Council.
37. Mr Tinker states that it was the acknowledged practice of the parties that the detailed business plans would not be issued direct to the Council but only to DTZ. Whilst the Council may not have been requesting the information directly of Crest, the Tribunal has been shown no prohibition upon the Council being provided with the information by their advisors. Additionally the Tribunal notes that within the contract (if not this clause) disclosure under e.g. FOIA has been contemplated. Further, the Tribunal has considered the milestones in terms of the type of information sharing that was contemplated and is satisfied that the information was properly provided to the Council and that no issue arises as to the information being held by them improperly.
38. Whilst it is not in dispute that all the information is engaged by the exemption, the extent to which each part of the disputed information was commercially sensitive is taken into consideration when weighing the balance of the public interest test.

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<sup>10</sup> This clause having been partially quoted in Mr Tinker’s supplementary witness statement, the Tribunal deals with discussion of this clause in the open decision.

## **Public interest test**

39. The public interest test is provided for in regulation 12.

*- (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -*

*(a) an exception to disclosure applies under paragraphs (4) or (5); and*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

*(2) A public authority shall apply a presumption in favour of disclosure.*

40. The applicability of the exemption means that disclosure of the disputed information would under the general law, have involved a breach of confidence by the Council, however, despite this, pursuant to reg. 12(2) EIRs there is a presumption that it should be disclosed to the information requester unless the public interest in maintaining the confidentiality outweighed the public interest in disclosure.

### **In favour of disclosure:**

#### **Transparency and accountability.**

41. The Tribunal accepts that disclosure would promote the accountability and transparency by the Council for the decisions it takes. It would place an obligation on the Council to provide reasoned explanations for decisions and actions and allow the public to understand the decisions made by the Council:

- a) It was a major development that was important for the region:
- It was important that the scheme was viable i.e. if it was half built or unfinished this would have negative socio-economic ramifications for the region.
  - The cost of the scheme would bring a large amount of money into the area,
  - The region needs more housing and more affordable housing,
  - The area needs to be renovated and remediated.

- It is currently an eyesore in a World Heritage Site (WHS) and it is important that the new scheme is suitable for a WHS.
  - The development and regeneration of the area would provide jobs and formed part of the scheme for regional economic regeneration.
  - There has already been a long delay in progressing the development.
- b) There would be consequences if the scheme started but failed mid-project because it was not viable which included:
- The region would not have the positives that the scheme was hoped to bring in terms of economic regeneration, housing, infrastructure etc.
  - It would be more difficult to develop,
  - The city might be left with a “White elephant” of buildings not fulfilling their intended potential,
  - The development might progress in a piecemeal fashion, which could have negative aesthetic and productivity consequences.

#### Value for money

42. The Tribunal accepts that it is in the public interest that the public are reassured that value for money is achieved in relation to the use of public funds. This reassurance is particularly important in this case in the context that the recent development of the Spa undertaken by B&NES generated a lot of negative publicity, having gone over budget and over schedule and ended up in litigation.

43. The Tribunal notes that it is in the public interest that the public be in a position to weigh relative development benefits and the balance of public against private risk. The evidence before the Tribunal was that this was a scheme with considerable public benefit where the majority of money came from Crest and all the financial risk was borne by Crest. However, it is clear from the refined information request and the Planning Officer’s report to the Development Control Committee that the public perception was that the Council bore some of the financial risk. The Tribunal is satisfied that disclosure of this information is not the only way to clarify this misconception, and that there are other ways to provide transparency which are less damaging to commercial sensitivities.

44. Whilst the public interest lies in ensuring constructive use of public funds (i.e. would public money be better spent elsewhere?), in this scheme the public funding is applied to the affordable housing and the supporting infrastructure. The Tribunal is satisfied that there is already a high degree of transparency e.g. the Housing Corporation (HC) grant is calculated by way of a formula. However the Tribunal does consider that there is a greater public interest in disclosure of the parts of the disputed information which relate to the use of public funds, than in the development of private land with private money.
45. £5million had already been spent on BWR by B&NES. There is a public interest in the public being able to assess whether this is money well spent. In evaluating this element, the Tribunal accepts that most of this was prior to involvement of Crest who since they had become preferred development partner had shouldered the development costs (the Council continued to fund e.g its consultants).
46. The Tribunal accepts that there is a strong public interest in establishing whether any s. 106 agreement under the Town and Country Planning Act 1990 is the “best deal” that the Council could get. This information in broad terms is largely already in the public domain e.g. the document “*Comparison of Offers December 2006 v November 2007*” the Tribunal is satisfied that with redaction of some material it is possible to disclose more information.
47. The Crest scheme was a departure from the SPD. The Tribunal accepts that the design of the site would have to take into consideration various factors of which aesthetics, the footprint and financial viability would all play a part; however we are satisfied that the financial viability of the scheme would have a material effect upon the appearance of the development and the extent to which the SPD could be departed from and that scrutiny of the figures might enable the public to respond to the case that there was no viable alternative to the proposal. Whilst it is accepted that the proposed height and size of buildings depended in part upon aesthetics and the available land footprint, the Tribunal is satisfied that the financial considerations of the scheme were material and that there was a strong public interest in the public being able to ascertain whether there were any alternatives to the departure from the scheme.



48. Whilst the Commissioner argued that the Capital cost of the scheme heightened the public interest in disclosure (DN 102) since this cost was not borne by the Public, the Tribunal is satisfied that this reduces the significance of this point.

49. Lack of tender/ EU infringement proceedings.

- In the Decision Notice (para 116) the Information Commissioner took into consideration the fact that EC Infringement proceedings had been commenced. Article 226 EC grants the Commission the powers to investigate and bring before the European Court of Justice any EU Member State that it considers ‘*has failed to fulfil an obligation under this Treaty.*’ The Commission may initiate an investigation of its own volition or following on from receipt of a complaint. The fact of the infringement proceedings was used by the Information Commissioner as an example of a reason why the case was unusual and that disclosure in this case was unlikely to set a precedent. B&NES argues that as the infringement proceedings were not commenced until after the relevant time its inclusion in the balance of the public interest was wrong in fact and law.

50. The Information Commissioner accepts that the reference to the infringement proceedings was a bad example to give, as those facts had not arisen at the relevant time, and to the extent that the Decision Notice suggest that the fact of infringement proceedings should have been taken into consideration, this was wrong. The Commissioner now argues that in light of the case of *Auroux v Commune de Roanne – Case C-220/05* (which gives a broad definition of a public works contract) the Council should have taken into consideration the **risk** of infringement proceedings. This is because such proceedings would have serious ramifications for the viability of the project in terms of delay and a reluctance to progress the scheme due to uncertainty and that in consequence greater transparency was required to mitigate that risk.

51. It is beyond the jurisdiction of this Tribunal to determine whether at the relevant time the Council was at risk of being **found** to have infringed EC public procurement rules (the Council relies upon the fact that they had entered a co-operation agreement and not a development agreement or a contract for public works in support of their contention that

there was no infringement.) However, the Tribunal is satisfied on the facts before it that at the relevant time there was a risk that the Council would be **investigated** for an infringement (even if ultimately the infringement was not made out) and that on the facts before it at the relevant time the Council was aware of that risk of investigation:

- There had been a tendering process in 2003 to find a preferred development partner,
- When Crest became the preferred development partner in 2005 this was without a tendering process,
- The Council was aware that there was public concern (the requestor of the disputed information in his request noted that “*there was no tender involved*”.)

52. In considering how much weight to give this in the public interest balance test the Tribunal is satisfied that:

- Whilst it is in the public interest that EC Procurement provisions are complied with, the infringement process itself provides an extra layer of scrutiny to ensure that this is the case.
- There was already sufficient information available to enable a complaint to be made to the Commission.
- Disclosure of the disputed information would not inform public debate in relation to whether in fact the Council had breached Directive 2004/18/EC.

53. One of the public interests in there being a tendering process (if applicable) is to ensure that the Council is getting good value for money. In the circumstances of this case whilst no public money was **at risk**, public money was being used to provide affordable housing and supportive infrastructure. If there is sufficient transparency to reassure the public that they are getting good value for money, that reduces the risk that they will seek to trigger an investigation for an infringement to try to ensure a tendering process takes place.

- The Council had adopted an open book procedure with the developer and undertaken professional scrutiny of the financial models
- These facts were already in the public domain.

54. The evidence was that information of this detail would not have been requested by B&NES for the tender to choose a preferred developer, and it was not disputed that following the principles set out in *Varec v Belgium 2008 2 CMLR 24* (in particular H8-H10) that information of this detail (even if it had been requested) would not be expected to be made public as part of a tender process.
55. The Commissioner strayed in argument into the public interest advantages of a tendering process in terms of: fair competition, variety of designs and approaches etc. The disputed information would not have assisted in demonstrating that a tender was appropriate or necessary. However addressing public confidence in the scheme which might be compromised in the absence of a tender process is a factor that the Tribunal takes into consideration.

### Scrutiny

56. It was accepted by both parties that public scrutiny of this scheme is in the public interest. However, the Council argue and the Tribunal accepts that significant public scrutiny is already possible in light of the information already available publicly:
- Council committee papers,
  - Supplementary planning guidance
  - Planning applications
  - Environmental statements
  - Transport assessments
  - High level financial information relating to the BWR e.g *Comparison of Offers- December 2006 v November 2007*.
  - Crest conducted a large scale public consultation relating to the development between 2004 and 2007 following which amendments were made to the scheme.
57. Additionally there is the statutory planning process – which provides a process during which the public are enabled to voice objections and concerns. Whilst it was accepted that the public are not given access to the underlying information (beyond that disclosed above) it is a mandatory form of public scrutiny upon Crest, the Council and the development.

58. There is also democratic representation on both the corporate and planning side of the Council. Additionally democratically accountable sectional interests are scrutinized independently by way of e.g. the transport and education subcommittees who negotiated directly with Crest to ensure that their needs would be met within the proposal.

59. The Tribunal does note however, that the Council performs two roles in this scheme. It is the regulator in control of the planning, but is also the beneficiary in terms of the development that might be provided. Although it is in the public domain that there was scrutiny through advisors, the commercial side is informing the planning side and the public do need reassurance that they are not too close. Therefore the quality of the advice received and whether it appears to have been acted upon is material to the question of the degree of scrutiny possible.

#### “Uniqueness” of the Scheme

60. It was inferred in the Decision Notice (DN 102 and 105) that the scheme was of wider public concern because of certain unusual features e.g:

- The Development could impact on Bath as a UNESCO World Heritage Site
- The Development is of immense significance in a housing and architectural context.
- It is a major development opportunity the effects of which will be felt by the people of Bath for many years to come.

61. Whilst the Tribunal accepts that this is a large, and important development, which engages with the question of Bath’s status as a World Heritage City reliant on tourism wherein the reason for its listing is its design aesthetic; the Tribunal can envisage similar equivalents e.g. a site of particular ecological, historical or archaeological importance. In assessing the weight to be given to the wider importance of the scheme when considering the balance of public interest, the Tribunal notes that:

- There was to be UNESCO scrutiny (this eventually took the form of an inspection and report).
- There was scrutiny from heritage and other expert organizations such as English Heritage (and modifications were made to the proposal based upon their contributions).

62. The Tribunal heard that the Secretary of State has the power to direct that any planning application be determined centrally (the “call-in power”). The guidance indicates that the current policy was to call in cases selectively only if planning issues of “*more than local importance*” are involved. The types of cases included those which in the Secretary of State’s opinion:

- *May conflict with national policies on important matters,*
- *Could have significant effects beyond their immediate locality,*
- *Give rise to substantial regional or national controversy,*
- *Raise significant architectural and urban design issues...”.*

This case was not called in.

### **In favour of withholding the material**

#### Maintaining trust and preserving the free flow of information to the public authority

63. The Commissioner accepted that there was some (but not very weighty) public benefit in maintaining trust, preserving confidentiality, and retaining the free flow of information to the public authority where this is necessary for the public authority to perform its functions serving the public (para 110 DN). The Commissioner relied upon *Bristol City Council v IC EA/2010/0012* (a case where disclosure of a viability assessment was ordered) in support of his contention that disclosure in this case would not have a significant “chilling effect” upon the industry. Mr Tinker’s evidence was that the earlier case had not caused any great waves in the industry.

64. The Tribunal considers that *Bristol City* can be distinguished upon its facts in that it related to a viability assessment designed to show that a hypothetical scheme was **not** viable. The figures were generic and it stated that the costs reflected “*general pricing levels within the construction industry at a particular date*”. They could not therefore be said to be specific to a particular company and thus truly sensitive.

65. The Tribunal is satisfied that the open book process benefits the Council and the wider public because it:

- provides insights into the assumptions and methodologies of Crest,

- puts the Council into the strongest position to negotiate the proposed development in the public interest.
- Since there was no tender the open book process provides transparency as to financial viability of the proposals .

66. Disclosure at the relevant time even if Crest did not withdraw would be likely to end the open book process in this scheme or cause Crest to seek to avoid providing commercially sensitive material in future. This would be detrimental to the public interest and would be likely to have “stymied the scheme”.

67. From the evidence of Mr Tinker the Tribunal is satisfied that the development industry was slow to understand the consequences of EIR and its impact upon their information notwithstanding the references to FOIA in the terms of the co-operation agreement. The fact of the request has already changed the practice of Crest who subsequently in relation to this and all similar schemes now ensure that detailed information such as the financial models is only provided to professional experts consulted by the public authority under explicit terms of confidence and NOT to the Council itself. The Council were now only receiving the assessment of the detailed figures and not the figures themselves.

68. To vary the SPD an “open book” procedure is likely to be necessary, equally EP had specified that their provision of a grant would be likely to depend upon an open book process. Mr Tinker’s evidence was that there was a more limited version of an open book procedure where, whilst figures were provided, the assumptions and values upon which they were based would not be provided. He categorized this as equivalent to a negotiation with the district surveyor to agree the value of land pursuant to a s.106 agreement. His categorical evidence was that if the Council had disclosed this information Crest would have reverted to this restricted version of open book in relation to this scheme.

69. Whilst there is a potential inconsistency between the current state of events and Mr Tinker’s assertion of what would have happened had the Council disclosed the information, the Tribunal is satisfied that this is reconcilable. The current position reflects a greater awareness to the risks of disclosure pursuant to EIR, but the change to

the more limited form of open book had the Council disclosed would reflect an acknowledgment that on the facts of this case the Council had considered that the public interest lay in disclosure and that there was a risk that it might happen again.

70. An open book procedure is voluntary and many developers will not proceed on this basis. The Tribunal accepts that disclosure of this information would provide a further disincentive to developers of future schemes for proceeding on this basis. B&NES relies upon the facts of *South Gloucestershire Council v IC EA/2009/0032* in support of their assertion that developers do refuse to enter open book processes with local authorities.
71. It was argued that disclosure would damage B&NES's reputation as a safe and reliable partner in respect of future development projects which would in turn compromise the Council's ability to participate in such projects. However, the EIR affects all Councils and this is already a factor Developers will take into consideration when dealing with a public authority. The Tribunal is satisfied there is no specific future disadvantage to B&NES (as compared to other Councils) in disclosing this information. Equally, there is no disadvantage vis a vis the private sector because of the unique role of a Council as planning authority; Companies are unable to undertake developments on this scale without the co-operation of a Council and therefore finding an acceptable level of detail to place in the public domain is likely to remain a two-way process.

#### Commercial Prejudice to Crest

72. B&NES argue that the Commissioner gave no weight to the public interest in not prejudicing Crest's commercial fortunes. The Tribunal accepts that this is an important consideration which takes on considerable weight in light of the nature of the disputed information in this case namely the business models of Crest in relation to this scheme which would have been commercially sensitive both at the relevant time and in relation to future schemes.
73. The Tribunal accepts that disclosure of the detailed business models would have reduced Crest's negotiating position, and handed competitors a material advantage in relation to:

- Competitors would have a set of figures to apply to future scenarios, it would be more easy to undercut at tender with a fully fleshed model to work from,
- Landowners (particularly those with whom they dealt frequently) would have an understanding of their assumptions, baseline and fall back positions.

74. In February 2008 Crest was in active discussions with its owners and banks regarding a comprehensive restructuring of its finances which was affected later in 2008. Throughout this period, the scale and nature of BWR made the project's business plans and commercial information particularly sensitive. It was their evidence that the figures in the financial model were market sensitive. The Tribunal accepts the evidence that this was the largest of Crest's projects and was expected to make a significant contribution to Crest Group profits. Any information that would have been perceived to weaken the prospects of the success of the scheme (such as reducing their negotiating position, or handing competitors a material advantage) would have affected market confidence negatively. Additionally whilst they would have been engaged in a due diligence process during the financial restructuring, the figures would not have been presented in this way. These figures would never have found their way into the public domain, in that the figures would be presented differently in accounts. Whilst a figure for gross profit and a percentage and a phasing structure had been placed in the public domain, as part of the High Level of information disclosed by the Council, this was a generic figure and did not detail how the figure was derived, or when it would be paid.

#### Commercial Impact Upon the Scheme

75. A substantial proportion of the land to be developed was not owned by Crest but other occupiers and would have to be acquired. Mr Tinker gave persuasive evidence using the negotiations relating to the Gas works by way of illustration. These would include figures for:

- The cost of the land,
- The Cost of dismantling the gas towers,
- The cost of the remediation of the land
- The cost of relocation.



Crest would be hoping to achieve the lowest value for the land, and might be hoping that the owners would contribute to the cost of remediation, and pay for the whole of the removal of the gas towers. If they could see in the financial model that e.g. Crest was prepared to pay a specific percentage of the remediation and contribute to the dismantling of the gas towers that would be their starting position.

76. It was Mr Tinker's evidence that Crest negotiated with e.g. particular utility companies on a regular basis and these figures would compromise future negotiations in this scheme ( and others see paragraph 72 above) by providing a blue print for future negotiations showing Crest's probable base line and fall back positions. Whilst the figures were being revised almost weekly and prices fluctuated the revelation of the proportions would be extremely damaging.

77. The Tribunal was satisfied that the revelation of this information would have damaged Crest in their negotiations to obtain this land.

- If it led to Compulsory purchase by its nature this often was more expensive,
- It was time consuming,
- It would prevent Crest and hence the project from obtaining the best price.

78. It would be exploitable by other developers who wanted to obtain a competitive edge over Crest in this scheme. (A competitor who can see what Crest was prepared to pay would be able to improve that offer in order to buy the land with a view to involving themselves in the development of the scheme to disadvantage of Crest).

#### B&NES's commercial considerations

79. The Tribunal was satisfied that disclosure of the information would have a negative effect on the Council's commercial position.

- If Crest pulled out they would find it difficult to develop their own land, (they could not afford to fund the whole scheme, other schemes had already failed,)
- They would be hampered in future negotiations with Crest in this project, (through lack of open book procedure, and because Crest would know the contents of their advisor's assessment of their model).

- They had already spent £5million on this scheme, and starting again with a new developer would increase the expense.

80. B&NES argued that their reputation (as a responsible recipient of confidential information) would be damaged in the market place. For the reasons set out at paragraph 70 above, the Tribunal does not consider this realistic.

81. Crest are not a direct party to an EIR request, the only way they can prevent disclosure is through litigation. This would incur a potential cost for B&NES and add uncertainty to the progress of the scheme. Such litigation might disincline e.g. the Homes and Communities agency from providing funding (this would have been an important stream of public funding and could have jeopardized the scheme by creating a funding shortfall). The Tribunal considers this a likely consequence of litigation. HC have various schemes which they prioritize, the delay and uncertainty inherent in litigation would reduce the viability of the scheme and reduce the desirability in investment.

82. The Commissioner argued that there was no real prospect of Crest pulling out because:

- they owned so much land within the proposed development site,
- had contractual options to acquire further land, and
- work of this nature was highly lucrative.
- Crest had already invested £22m in developing the proposal.

However, the evidence was that even if Crest did not withdraw, the disclosure of the baseline figures would mean that it was unlikely that Crest would be able to acquire the remaining land, remediate the land or sell the units at a viable price. Crest's evidence was that in these circumstances they would opt for the development of the land that they already owned rather than the complete scheme. This would result in the reduction of the socio-economic benefits e.g. infrastructure, affordable housing and job creation.

### **Applicability to the Disputed Information**

83. The question of redaction was never considered by the Council in responding to the request and pursuant to Regulation 12 EIR it should have been:

*(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.*

84. In evidence both Mr Smalley and Mr Tinker gave evidence as to whether in their view it would be possible to redact any parts of the disputed information so as to reduce the commercial sensitivity of any disclosure.

#### Crest Business Models

85. The Tribunal accepts the evidence that the detailed business models could not be reasonably redacted.<sup>11</sup> They were very detailed and contained thousands of figures which were interlinked. The headings, dates and figures all demonstrated Crest's method and approach which in itself was commercially sensitive. We are satisfied that the public interest arguments in preserving the confidentiality of the business models outweigh the public interest in disclosure.

#### Consultant's reports and emails

86. Mr Tinker's evidence was that (whilst he disagreed with some of the viability reports' conclusions and questioned the value of what would remain after any redaction) as long as the commercially sensitive parts of the information such as specific figures and percentages were removed there was no objection on commercial grounds to the rest of the report being disclosed. Mr Smalley objected to disclosure of the reports (even in redacted form) on the basis that at the relevant time it would have hindered the Council in its own negotiations with Crest in that it signalled areas where the Council might be able to negotiate a better structure e.g trying to alter the date when profits were drawn down by Crest or encouraging them to use a historical interest rate. During questioning he accepted that the negotiations were so frequent (fortnightly) that the points raised in the report would already have been tackled with Crest at the relevant time and so the element of surprise would have already passed.

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<sup>11</sup> Save in relation to some of the generic s106 figures see para 89 below

87. The Tribunal was satisfied that the viability reports and certain of their annexes were capable of redaction. The detailed figures taken from the Crest business models could be redacted and the headings were not necessarily indicative of Crest's approach in that they may have been chosen as an analysis tool by the Council's advisors. The Tribunal acknowledges that insofar as the viability reports express an opinion, that is information which would not necessarily be known to Crest and consideration was given to what extent if any the Council's negotiating position would have been compromised by disclosure of those opinions.

88. The Tribunal is satisfied that the public interest in disclosure of the redacted assessments outweighs that in maintaining the exemption. We see benefit in the public being reassured that the Council had sought independent professional advice on the Crest proposals and being able to assess for themselves the quality of the advice. Disclosure of the redacted version would assist understanding of:

- The nature of the proposals
- the issues facing the Council,
- the assumptions made in the assessment (even if it does not provide the specific negotiation figures).
- the viability of the project

Where high level information has been provided in another context it is retained in the viability assessment to assist with the comprehension. The Tribunal is satisfied that the redacted report is neither meaningless nor misleading.

89. Mr Tinker's evidence was that some of the s106 figures were disclosable. Whilst these figures appear specific they are in fact generic in that "phase 1" in this context does not specify the period of time or the relevant parcel of land. In this way they differ in context from the form in which they are presented in the model.

### Conclusion and remedy

90. For the reasons set out above the Tribunal allows the appeal in part and orders the disclosure within 28 days of a redacted version of the disputed information as set out in the open table as amplified in confidential schedule 1.

91. The Tribunal also finds that there was an additional breach of regulation 14 EIR for failure to provide a refusal notice within the time and in the terms provided for by regulation 14 in relation to the annexes to David Williamson's report.
92. There was also an additional breach of regulation 5 (1) EIR for failure to disclose redacted versions of the 4 annexes to Mr Williamson's report.
93. Our decision is unanimous.

Signed

Fiona Henderson

Tribunal Judge

Dated this 5<sup>th</sup> day of October 2010



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL  
REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Information Tribunal Appeal Number: EA/2010/0045**

**Information Commissioner's Ref: FER0196026**

**Heard 19<sup>TH</sup> and 20<sup>th</sup> July at Field House and then**

**Decision Promulgated**

**on the papers 22<sup>nd</sup> July and 2<sup>nd</sup> September 2010**

**5 October 2010**

**BEFORE**

**Fiona Henderson**

**And**

**Roger Creedon**

**And**

**Jean Nelson**

**BETWEEN:**

**BATH AND NORTH EAST SOMERSET COUNCIL**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Table of Disclosure / Redactions**

1. This table sets out (but does not quote from) items within the closed bundle that the Tribunal orders should be disclosed/redacted. If it is necessary directly to quote from the schedules this is done in the confidential schedules. Where the closed material is not paginated, the page reference to the document in the closed bundle is given to enable the correct document to be identified.

**Table of information to be disclosed/redacted**

Document	Information to Be disclosed/redacted	Reason
Crest Nicholson Regeneration Ltd Financial Model-Counter Offer November 2007; as supplied to DTZ Consultants to the Council A01-A24CB	Withhold whole of the document	For the reasons set out in the open decision. <sup>1</sup>
BWR – Model Audit and Critique of Sales Value Assumptions, DTZ November 2007 A25-A87 CB	<p>Disclose save for redactions below:</p> <p>P7 redact 4 bullet points</p> <p>P8 Disclose student accommodation figure</p> <p>p9 Redact actual figure spent by Crest on management costs</p> <p>p 9 and 10 Under</p>	<p>This details the way premiums are applied and could hamper the sales of the properties or assist rival firms to price more competitively.</p> <p>See Closed Schedule 1</p> <p>This is the actual figure spent by Crest. It is commercially sensitive showing how much they are prepared to spend and also the price at which they were able to achieve this.</p> <p>Disclosure would be damaging as this shows</p>

<sup>1</sup> NB see comments on DPA1 (A96) below

	<p>heading “Professional fees” redact the percentage figures and actual figures.</p> <p>P10 top 2 paragraphs</p> <p>p10 redact percentage figure for the contingency provision</p> <p>P10 Land acquisition costs. Redact the figures.</p> <p>Costs on acquisition p11 Disclose percentage figures.</p> <p>Sales and Marketing Costs p11 Redact the percentage figures</p>	<p>the actual cost achieved. It would hamper future negotiations with professionals, it would assist competitors to achieve similar figures and hence reduce Crest’s competitiveness on this front.</p> <p>Whilst Mr Tinker objected to the disclosure of this on the grounds that he disagreed with DTZ’s opinion, the Tribunal was satisfied it was not misleading to disclose the text of these paragraphs. If necessary Crest could explain their view, and it was in the public interest that the public were able to assess the quality of the advice that B&amp;NES were given.</p> <p>This is commercially sensitive in relation to future bids. This would hamper Crest in negotiations if contractors knew the exact percentage “available” for contingencies.</p> <p>These figures do not appear elsewhere in the published figures. It is commercially sensitive. It would hamper Crest in its negotiation for land in this scheme. See closed schedule 1</p> <p>These are either a legal requirement or a standard percentage and therefore not sensitive.</p> <p>These are more sensitive because, whilst they are assumed, they are derived from actual negotiations with different competing companies. Disclosure would undermine Crest’s future negotiating position and reduce its commercial advantage against competitors.</p>
	<p>P11 Development Management fee Redact paragraph</p> <p>Interest Costs p 11-12 Redact the percentage figures and explanation of how this is achieved <sup>2</sup>in</p>	<p>See Closed schedule 2</p> <p>The interest rates negotiated by Crest are commercially sensitive. It would assist competitors to know what rate they needed to obtain to undercut Crest, or would enable them to use this information to obtain similar rates</p>

<sup>2</sup> See closed schedule 2



	<p>the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> paragraphs.</p> <p>Disclose the figures and percentages within the 2<sup>nd</sup> paragraph</p> <p>P12 Developers profit Redact actual percentages and savings figures. Disclose “testing” percentage.</p> <p>Build and Sales Inflation p12 &amp;13 Disclose</p> <p>P14 Commercial Overview of Model Approach Redact: break down of costs within tables. Disclose: the total costs, s106 social figure, s106 physical figure, common infrastructure figure, total interest figure. coloured bands (but not the figures they contain unless detailed above) and the colour key.</p> <p>P 14 Build costs – disclose paragraph in full</p>	<p>which would reduce their competitive advantage. See closed schedule 2.</p> <p>There is little sensitivity to the figures in the second paragraph. It is strongly in the public interest that the public know how much total interest will be paid and whether the method used by Crest is sound and fair. It provides a total interest payment (but is not commercially sensitive.)</p> <p>See closed schedule 2. Providing the actual figures “saved” using the “testing” percentage would enable back calculation to the redacted figures. The text and “testing” percentage should be disclosed to enable the public to assess the thoroughness of the critique and to assist opponents to e.g. the height of the scheme to advance arguments as to ways that costs could be cut which might facilitate changes to the layout.</p> <p>There was no objection to the disclosure of these figures which do not provide the actual cost of build and amount to an assessment of the risks involved in undertaking the scheme.</p> <p>The breakdown of the redacted figures shows the commercially sensitive figures at which items are achieved. With some of these figures redacted there remains a public interest in knowing the total cost/revenue split and what items were considered by DTZ in making their analysis as well as the broadbrush proportions of the individual figures discernable from the colour banding.</p> <p>The figures itemized for disclosure are not commercially sensitive some e.g. interest payment were in the public domain.</p> <p>There was no objection to the disclosure of this percentage it was sufficiently broad not to be commercially sensitive.</p>
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	<p>P 14-15 Professional fees and contingency – profit redact percentages and figures</p> <p>P15 Common infrastructure/physical s 106, Social s 106 Disclose</p> <p>Acquisition costs - Compensation Redact percentages</p> <p>P 15 Interest payments – disclose figure but not percentage</p> <p>P 15 English Partnerships figures (bullet points 8 &amp; 11) Disclose</p> <p>P16-19 Analysis by Phase</p> <p>Redact break down of costs within tables.</p> <p>Tables: Disclose the total costs/Revenues, the coloured bands (but not the figures they contain) and the colour key</p> <p>Text: Disclose the total costs/revenue but redact all figures and percentages from the rest of the text.</p> <p>P20 Conclusions: student</p>	<p>These figures are commercially sensitive and not otherwise in the public domain.</p> <p>This is in the public domain</p> <p>This is commercially sensitive</p> <p>The Tribunal orders that the total figure be disclosed, but not the percentage. See above and the closed schedule 2</p> <p>These figures are already in the public domain and whilst Crest might wish that they had not been disclosed they are no longer commercially sensitive if disclosed in this context.</p> <p>The breakdown of the figures shows the commercially sensitive figures at which items are achieved. With these figures redacted there remains a public interest in knowing the total cost/revenue split and what items were considered by DTZ in making their analysis as well as the broadbrush proportions of the individual figures discernable from the colour banding. The figures relating to individual items within each stage are not disclosed. Although month by month figures will be disclosed (A89y and A89z below) disclosure of these figures would enable the stages to be given a time frame which would be commercially sensitive in terms of other information disclosed. The public interest in disclosure of these figures for e.g. s106 is reduced by the disclosure of the monthly figures.</p> <p>For the reasons set out in relation to page 8 above the Tribunal is satisfied that this figure is</p>
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	<p>accommodation value. Disclose</p> <p>P21 The percentages and how they are achieved should be redacted, the figures in bullet points 5 and 7 should be redacted.</p> <p>The marked up, rainbow highlighted version of the Crest Model which accompanies the DTZ report should be redacted in its entirety (A46-A87)</p>	<p>already in the public domain in this context.</p> <p>For the reasons already set out above and see closed schedules.</p> <p>It is in the public interest that, the fact that this method of analysis of the model has been done and the broad conclusions reached, are in the public domain. This has happened through disclosure of the redacted report. For the reasons set out above in relation to the original copy of the Crest model, the Tribunal is satisfied that the public interest lies in withholding this information.</p>
<p>Review of BWR Crest Financial Model Offer, Paul Williamson November 2007 (A88 – A89 CB)</p>	<p>Disclose</p>	<p>The information and timings are not sensitive</p>
<p><sup>3</sup>Detailed Nov 07 Final v Dec 06 Comparisons A89a-A89h</p>	<p>Disclose A89a-c,</p> <p>Redact A89 e, g, h</p>	<p>This attachment is a summary analysis of the financial model and includes some extracts from the financial model.</p> <p>This deals with the extent of the public benefits to arise from the development and Crest accept that this is less commercially sensitive.</p> <p>See Closed schedule 2. This provides summaries and analysis of the Crest sensitive business plan information.</p> <p>This information is being redacted because of</p>

<sup>3</sup> The following 4 items were the appendices to Paul Williamson's report which were not before the Commissioner

<sup>4</sup> Where a figure appears on a schedule which has been disclosed elsewhere, if it would appear on its own and out of context in a schedule, (all surrounding and contextual figures being redacted) it is not redisclosed in isolation as to do so would provoke speculation as to what the redacted items might be which is not in the public interest.

	<p>Disclose top ½ of p A89d (see closed schedules 1 &amp;2) Redact the remainder of the page.<sup>4</sup></p> <p>A 89f disclose</p>	<p>its commercial sensitivity to Crest. The Tribunal does not accept that disclosure would jeopardise the Council’s negotiating position with Crest because:</p> <ul style="list-style-type: none"> <li>• this information derived from the Crest model and which therefore is already known to them.</li> <li>• These pages do not provide an opinion as to the validity of the Crest model.</li> <li>• Whilst the phasing of payments was still the basis of negotiation, the proposals in this document are derived from the Crest model.</li> </ul> <p>Mr Tinker argues that the whole of page A89d should be redacted, but the Tribunal is satisfied that the figures that it has ordered should be disclosed are information which would be disclosable through the planning process, and are an important factor in enabling the public to determine if the plan is desirable and/or viable.</p> <p>There appears to be some confusion as to whether B&amp;NES consider that disclosure of A89f would harm their commercial position. In Mr Smalley’s supplementary statement they assert that it would because the Council and HC contributions to the affordable housing were not secured and were the subject of ongoing negotiations. However, the Tribunal notes that this document in fact appears in the open bundle and Mr Smalley says that the Council accepts that this was not exempt under 12(5)(e) EIRs because at the relevant time most of it was disclosed as part of the planning application. For the avoidance of doubt the Tribunal has considered the Council’s objections and is satisfied that disclosure would not have a material effect on their negotiation position. See closed schedule 1</p>
<p>Planning SPD and S106 Nov 07 Final v Dec 06 A89j- A89</p>	<p>A89j and k disclose including the land</p>	<p>This is a summary table of the SDP Cash Contributions as at December 2006 and November 2007</p> <p>Crest only object to disclosure of the land price which was already in the public domain at the</p>

	price	relevant time. A89k was already in the public domain and neither the Council or Crest object to the disclosure of the rest of the document.
Presentation by Paul Williamson to B&NES Nov 06 Final v Dec 06 A89l-A89x	<p>Pages A89m and n redact</p> <p>A89q comment (see closed schedule 2) Redact.</p> <p>Disclose the rest</p>	<p>This is a commentary on the comparison between the 2006 and 2007 financial models.</p> <p>These pages deal with confidential information. The public interest lies in withholding disclosure to protect the commercial interests of Crest.</p> <p>This is a comment upon the figures and contains the advice being received by the Council. Since negotiations were not concluded disclosure would “show the Council’s hand” and hamper their negotiating position.</p> <p>In relation to the rest of the pages A89 l-x not dealt with above, Crest accept that they deal with the cost of various infrastructure and s 106 benefits and are less sensitive. The Council argue that parts refer to topics of negotiation which are not yet concluded.</p> <p>However, the Tribunal notes that the document does not express a view but summarizes and juxtaposes the December 06 v November 07 models highlighting areas of change. The headings are so broad that a strategy or approach cannot be derived from this document.</p> <p>This is all information already known to Crest. The Tribunal is not satisfied that there is any material prejudice to the Council’s commercial position through disclosure.</p>
SPD s106 timings for Clive Winstanley A89y and A89z	A89y and A89z Disclose in full including Land price	<p>This is a cashflow of the Section 106 Contributions.</p> <p>Crest only object to disclosure of the land price which was already in the public domain at the relevant time.</p> <p>B&amp;NES argue that it would have been premature to disclose all this information as this was indicative information that had yet to be confirmed as part of the separate and on-</p>

		going S106 negotiations between Crest and the local planning authority. There is no basis for concluding that disclosure would have hampered negotiations as the information was known to both parties. Any public misconception arising out of disclosure of indicative figures could be remedied by explanation. It is in the public interest that the public have sufficient information to enable them to participate in the debate upon the cost and delivery of the public benefits and infrastructure.
<p>A90-A102 Email from Paul Williamson enclosing</p> <ol style="list-style-type: none"> <li>1. Review of BWR Crest S 106 offer letter 16 November 2007 – DPA</li> <li>2. Review of BWR Crest s106 offer letter 12 November 2007 – OPA</li> </ol>	<p>A90 Redact Paul Williamson’s email address</p> <p>Disclose save for the redactions identified below</p> <p>A 93 River walls , Estate management and Adoption costs. Redact the figures</p> <p>DPA1 (A96) Redact the figures for the River Wall Repairs and any associated totals: A96. A99 and A100</p>	<p>This is personal data and is not material to the information request</p> <p>The Tribunal is satisfied that there is a stronger public interest in the public having a detailed understanding of the “public” element of the proposals e.g. the use of public money and s106 provisions, than the private commercial part of the scheme.</p> <p>The figures given in relation to affordable housing have been disclosed above.</p> <p>There was no objection to disclosure of the sums relating to landscape public realm and art (A93)</p> <p>These are assumed costs provided by B&amp;NES pre-tender. Disclosure would hamper B&amp;NES in the tender process as they would indicate the sum B&amp;NES was prepared to pay and might act as a starting price for negotiations when B&amp;NES would hope to achieve a lower price.</p> <p>The river wall repair figures should be redacted for the reasons set out above.</p> <p>Although the remainder of these figures have been taken directly from the Crest Financial Model, it is a discrete extract. It does not define Phase 1 or the other phases. No other figures can be derived from them. They relate to public money and the public infrastructure etc and as such the public interest in disclosure is high. Although they have been taken from the model,</p>

	<p>A100 and A101, the Land deal figure disclose</p> <p>A 101-2 SPD and section 106 timing analysis Redact river wall costs AND Improvements to the river total AND Final total of that table AND year totals for years in which there is a river wall payment.</p>	<p>under EIR the request is for information and not a copy of a document. Since it is explained that this information comes from the Crest model, there is no need to serve a redacted version of the relevant Crest model to re-show this information.</p> <p>This is despite Crest's objection to the disclosure of this figure on the grounds that it is commercially sensitive. This is a repetition of material already disclosed.</p> <p>These figures are pre-tender assumptions and would hamper B&amp;NES in achieving the best value tender price. The figures can be derived from the totals hence the necessity for their redaction.</p>
<p>A103-A107 Email from Paul Williamson enclosing</p> <p>1.Quick Review of Crest Model 14/11/07</p> <p>2.SP and Section 106 Comparison 8</p>	<p>Redact Paul Williamson email and telephone number</p> <p>A103 Redact sentence set out in closed schedule 2</p> <p>Disclose the rest of the email</p> <p>Attachment A105 disclose</p> <p>A106 disclose including the waste figure</p> <p>A107 Redact river wall repairs AND</p>	<p>Personal data</p> <p>This sentence could constitute the Council's bargaining position and has been redacted to preserve their ability to negotiate.</p> <p>There is no objection on the grounds of commercial sensitivity. The interest rate given relates to the Council and not Crest. The public interest is strong in relation to the detail of the S106 works. The waste figure is in the public domain already.</p> <p>For the reasons set out above</p> <p>For the reasons set out above</p> <p>For the reasons set out above</p>

Nov 2007 v 14 Nov 2007	Final total of that table AND year totals for years in which there is a river wall payment	
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Dated this 5<sup>th</sup> October 2010

Fiona Henderson

Tribunal Judge