

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

Decision Notice

Date: 17 June 2009

Public Authority: Trafford Metropolitan Borough Council
Address: Trafford Town Hall
Talbot Road
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Manchester
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Summary

The complainant requested information about a proposal to redevelop a shopping centre in the centre of a village, Hale Barns, in Cheshire. The council is the freeholder of the property which is held on a long term lease by the developer. The council provided some information to the complainant however it withheld other information under the exemptions in sections 43 (commercial interests), 41 (information held in confidence) and 40 (personal data) of the Act. It also withheld other information under Section 36 of the Act (the effective conduct of public affairs); however after it was directed by the Commissioner to reconsider this information under the Environmental Information Regulations 2004 it amended this to Regulations 12(4)(e) (internal communications), 12(5)(e) (the confidentiality of commercial or industrial information) and 12(5)(f) (confidential information provided on a voluntary basis).

The Commissioner's decision is that the council withheld some of information appropriately under sections 43, 40 and 41 but other information should have been disclosed. Under the Regulations his decision is that some information was appropriately withheld under Regulations 12(4)(e), 12(5)(e), and 12(5)(f) however other information could not be withheld under these Regulations.

The Commissioner's Role

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.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR

shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. The request relates to information about the council's ongoing negotiation with a developer over the developers wish to redevelop a shopping centre in Hale Barns. In an email dated 4 May 2006 the complainant requested the following information:
 - "1. Does the council have an interest in the land for instance as freeholder or head landlord and if so what is the nature of that interest.
 2. If so what is the current income that the council receives as proprietor of that interest.
 3. Should a planning permission be granted for a redevelopment of the land is there any further sum or increased sum either of a capital or income nature that the council has negotiated, discussed or been offered it should receive from Citybranch limited (the developer) either as the owner of an interest in the land or as the council from whom that permission has been obtained?
 4. What financial assistance if any is being provided by the council to the developer to undertake the development on the land and what if any financial payment has been agreed or might be made to the council by the developer as a pre or post condition for planning permission being granted?
 5. In respect of all the above information and generally in any event please provide copies of all minutes of meetings informal or otherwise, copy and original letters, notes, memoranda, made by the council or in the councils possession and received from or sent to the developer and any of the developers agents together with any draft of Heads of Terms of Agreement made between the council and the developer relating to the land and to the planning application."
4. The council responded on 31 May 2006 providing answers to all 5 of the complainant's questions; however it stated that it was also withholding some information on the basis that the exemption in section 43 of the Act applied (prejudice to commercial interests). It stated that disclosure could affect the commercial interests of both it and the current tenants of the area.
5. On 6 June 2006 the complainant wrote back to the council asking it to review the decision to withhold information.

6. After further correspondence between the parties discussing the relative issues of the development proposal the council provided its response to the review on 27 June 2006. The council stated that the information was exempt under section 43, but also decided that sections 36(2)(b)(i)&(ii) applied (prejudice to the effective conduct of public affairs) to information held in respect of the pre-planning documentation it held.

The Investigation

Scope of the case

7. On 5 July 2006 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 whether the information should have been disclosed to him.
8. The complainant raised further issues in a letter to the Commissioner dated 28 August 2006. In that letter he stated that further information had been provided to him by the council, but that many other aspects of his complaint remained. He provided examples of information he felt should have been provided to him. This included minutes and correspondence between specific officers, emails from officers sent or received between specific dates, and information and emails which the council had stated had been lost. It also included some correspondence between specific councillors and officers of the council.

Chronology

9. The Commissioner wrote to the council on 24 August 2007. In that letter he asked the council to send him any information which fell within the scope of the request which had not been provided to the complainant. He also asked for any submission the council wished to make in support of its decision that the information was exempt under the Act.
10. The council responded on 24 September 2008 providing its reasons for claiming the exemptions. It did not however provide a copy of the information at that time. The council stated that due to the volume of information which had been withheld, providing the information to the Commissioner would require a substantial undertaking.
11. On 15 January 2008 the Commissioner wrote to the council asking it to reconsider part of the request under the Regulations. That letter stated that in the Commissioner's view information about the preplanning discussions was likely to fall under the Regulations rather than the Act. The letter also restated the fact that a copy of the information concerned was required. It also stated that in order to have properly assessed the complainants request in the first instance the council should have already found and extracted the information falling within the scope of the request. The council should not therefore have had problems collating the information in order to send it to the Commissioner.

12. The council emailed the Commissioner on 30 January 2008 asking for further time to collate and reconsider the information. This was accepted by the Commissioner in an email dated 6 Feb 2008.
13. On 29 February the Commissioner emailed the council asking it to give a date by which it would be able to send the information. The council responded on 20 March stating that it was still considering the information but that it would submit it shortly. In a telephone conversation of the same day, the Commissioner agreed that due to the problems the council had had in collating the information, the information could be sent in 2 stages, the first within 3 weeks and the second within a further 3 weeks of that.
14. The council submitted the first batch of information (pertaining to the lease negotiations) on 11 April 2008. It also submitted further arguments but agreed that some of the information could now be disclosed given the passage of time since the request had first been made.
15. On 29 April 2008 the council telephoned the Commissioner. It stated that it was waiting for the developer to reconsider whether any of the preplanning information could now be disclosed, but that it would send its submission very shortly. The Commissioner asked the council to send the information in without waiting for a response from the developer, but said that it could submit any comments which the developer wished to make separately.
16. On 8 May 2008 the council provided the remaining information. Again in that letter the council offered to disclose further information to the complainant informally given the passage of time since the request had first been made.
17. On 22 May 2008 the Commissioner contacted the council and asked it to disclose the information it had agreed to disclose to the complainant. The council did this, including further additional information on 18 June 2008.
18. On 19 June 2008 the Commissioner wrote to the complainant asking if he was now content with the level of disclosure and whether he wished to withdraw his request for a decision.
19. On 1 July 2008 an associate of the complainant telephoned the Commissioner stating that the complainant wished the investigation to continue. This was confirmed in a letter dated 5 July 2008 from the complainant himself. In that letter the complainant also asked the Commissioner to consider whether further information might be held by the council and provided a list of questions to ask the council specifically stating the information he had in mind and the areas of the council where this information might be found. The complainant agreed that this letter could be passed to the council for it to consider.
20. On 17 July 2008 the Commissioner wrote to the council providing a copy of the complainant's letter and asking it to consider whether any further information was in fact held.

21. On 25 July 2008 the council wrote to the Commissioner asking for further time to recheck whether further information was held. Specifically the council officer wished to ask specific councillors whether they personally held any further information however these councillors were on holiday at that time. The Commissioner agreed to the extension.
22. On 14 August 2008 the Commissioner wrote to the council asking it to respond to his request.
23. On 15 August 2008 the council responded. It provided a small amount of further information which it had found but stated that this was also exempt in its view. The council also provided a full explanation of the searches it had carried out in response to the complainant's letter.

Analysis

Background Information

24. The information in question is information about the planned redevelopment of a shopping centre in Hale Barns in Cheshire. The council is the freeholder of the centre, which is leased on a long term lease to the developer, Citybranch. Discussions and negotiations have taken place around the redevelopment, both as regards planning for the redevelopment as well as around a renegotiation of the terms of the existing lease and licenses for the area.
25. The lease negotiations halted after planning permission for the redevelopment of the centre was refused by the planning department at the council. Citybranch appealed that decision and negotiations were put on hold until a decision was made on the appeal. The appeal was decided in May 2008. Planning permission was ultimately refused for the plans as they stood at that time. The Commissioner understands that a subsequent planning application has now been lodged and is currently under consideration.
26. The complainant requested all information held by the council relating to the redevelopment. This was prior to the appeal taking place and hence information on the appeal does not fall within the scope of the request.
27. When the council provided the information to the Commissioner it stated that there is a distinction between the information it holds in its capacity as planning authority for the area, and in the information it holds as the owner of the freehold for the area. In support of this it said that its role as the owner of the freehold is an entirely separate and different role to its role as a planning authority when considering the development proposals being put forward by the developer.
28. The Commissioner agrees that this distinction is both sensible and helpful for the consideration of the request. In support of this view, the Commissioner notes that the council was happy to continue to renegotiate Citybranch's terms of lease, whilst also defending its position not to agree planning permission for the

planning application. The Commissioner therefore recognises that it is possible for 2 different departments of the council to have semi-competing interests as regards the redevelopment, albeit that these interests are both tied to the best interests of the community which the council serves.

29. Following the above, in the Commissioner's (and the council's) view, information pertaining to the pre-planning information should be considered under the Regulations, whilst information on the renegotiation of the terms of the lease should be considered under the Act. The Commissioner has therefore considered the information falling within these 2 areas separately for the purposes of making his decision on this request.
30. However, certain information falls within both the preplanning information and the lease re-negotiation material. Primarily this is financial information about the presumed costs and forecasted profits from the development which have been relied upon by the parties when negotiating the lease. The Commissioner has therefore had to consider whether this information is environmental information or whether it should be considered under the Act. His decision is that information held in one particular document in both the preplanning and the lease renegotiation information falls within the scope the Regulations. However individual figures from this document are repeated or discussed independently within the lease renegotiation material. Where this is the case the Commissioner considers that the change in context means that it should be considered under the Act. The Commissioner recognises therefore that financial information which he considers to be environmental information in one part of this notice is also considered under the Act in other parts of this decision notice. In the Commissioner's view, the change in context in the information surrounding the relevant figures changes the nature of that information from environmental information to financial information not falling within the scope of the Regulations. This is explained further below. The Commissioner has also made a decision that information pertaining to compulsory purchase orders (CPO's) should be considered under the Regulations rather than under the Act.
31. After the Information Commissioner contacted the council it offered to disclose some of the relevant documents to the complainant in a letter dated 11 April 2008. The Commissioner understands that it did this because planning permission on the initial development plans had become available through the ongoing appeal by that time, and consultation with the developer ascertained that some information was no longer considered to be as sensitive as it was. The Commissioner therefore wrote to the council asking it to disclose this particular information, which it did on 18 June 2008. In that release the vast majority of the pre-planning information was disclosed to the complainant. Some financial information was however not disclosed and other information remained redacted. Other information was also disclosed which was held relating to the lease negotiations.

Procedural matters

32. The Commissioner notes that the council initially refused the request for the preplanning information because it considered it exempt under sections 43 and

- 36 of the Act. However the Commissioner considered that the preplanning information was environmental information which falls under the scope of the Regulations.
33. The Commissioner decision is that the preplanning information is environmental information falling within Regulation 2(1) of the EIR.
34. Regulation 2(1)(c) provides that –
- “environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements’
35. The factors referred to in (a) include -
- ‘ the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements’
36. The Commissioner is satisfied that the preplanning information falls within the definition of environmental information as provided in Regulation 2(1)(c) (information such as plans programmes environmental agreements and activities affecting or likely to affect the elements and factors referred to in Regulation 2(1)(a) and (b)). The information is draft plans and correspondence about those plans which passed between the developer, its agents and officers of the council about the intended redevelopment of a village centre. Such a redevelopment would clearly affect the state of the elements of the environment such as the land and landscape of the area concerned. The Commissioner is also satisfied that information on the use of CPO’s is also environmental information as it falls within the definition provided in Regulation 2(1)(c). CPO’s in this case involved the council agreeing to purchase leases on properties in The Square on a compulsory basis with a view to reassigning the property rights back to the developer in order to allow it the redevelopment. As such their use is a measure designed to allow the development which will in turn affect the elements of the landscape described in Regulation 2(a).
37. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.
38. The Commissioner notes that the council initially chose to rely upon section 43 in its initial refusal notice, and on sections 43 and 36 in its review of that notice. It

did not choose to rely upon section 41 or section 40 until the Commissioner began to investigate the complaint. This is a breach of section 17(1)(b) of the Act.

Whether information deleted on a council officers computer was 'held' for the purposes of the Act

39. In the complainant's letter of 5 July 2008 he pointed out that he had not received information he had identified as being held on a certain planning officer's computer during February and June 2006. He stated that he had been told by the council that information which was held on the officer's computer had been lost. The complainant specifically requested that the council use forensic techniques to recover this information if that is what was required. The Commissioner therefore asked the council to address this issue.
40. In response, the council explained that the information had been held on an individual officer's local computer drive rather than on a central or shared computer drive. However the council's computers had been upgraded to a new operating system and in doing so this computer's drive had been overwritten by the installation of the new operating system. Thus the council had accidentally overwritten all of the information held on the local drive, which included the information which the complainant had requested. The council recognised that this had occurred, but decided against a forensic recovery of the officer's email archive due to the substantial cost involved in doing so. This was prior to the complainant making his request for information, and so at that time there was no outside impetus to recover the information which the council needed to take into account. The decision not to forensically recover the information was therefore made on an entirely 'business needs' basis. A question therefore arises as to whether the council 'held' the information at the time the request was received.
41. The council states that it would not now be possible to recover the information held on the local drive of the PC. It would have been overwritten by the installation of the new operating system and any subsequent work recorded on the hard drive of the computer.
42. However the council further explained that a trial archiving system was in place at the council at this time, and a large amount of emails from the officer concerned had been archived on this system. The archives for the officer concerned were therefore recalled after the request was received, and approximately 12000 emails were checked for information relevant to this request. The council admits that not all emails may have been saved on this archive system as it was being tested prior to its full implementation during the relevant period. The council does not therefore know whether any further information was contained on the drive which had been overwritten.
43. The council also explained that a back up system was in operation at the council at that time. However this system only recorded emails which were held on the computer at the times when back up information was recorded. This was on a nightly basis. If emails were deleted by the user prior to the back up tape being recorded then they would not have been retained on the back up tape.

44. The council states that it would have needed to reinstall the back up tapes and reconstitute the data for over 3000 users for each day covered by the request if it was to search for any relevant emails on these tapes. It noted that the complainant had requested emails over a period of months. It therefore argues that reconstituting and searching the back up tapes was not viable as each day's tape would have taken approximately 2 days to re-install because of the version of software that was in use at the time. The council further states that as it is not aware of specific dates where relevant emails may be held it would have needed to reinstall the back-up tapes for the entire period in question in order to check them. Even if it were to do so there would be no guarantee that any further emails would have been recorded on the system in any event, because emails prior to the back up taking place would not have been recorded.
45. The council did not therefore consider reconstituting and searching the data from these tapes as a result of the request. It considered that this was not a viable proposition given the time and resources this would require, and because it did not know, in any event, whether any further information was in fact held on those tapes. It also took into account the fact that it had already retrieved and searched through approximately 12000 emails held on the trial archive system.
46. The Commissioner has carefully considered the circumstances of the deletion/overwriting of the information. Public authorities are entitled to delete information that they no longer require – indeed they should do so, in accordance with good records management practice. If information is still said to be held when it has been intentionally and properly deleted, in line with the public authority's disposal schedule, the concept of deletion and disposal becomes meaningless. In such cases a public authority will not consider the information to be held, and will make no use of it.
47. Whether or not the deletion was intentional is critical, however. Where information is accidentally deleted through user error, virus or 'disaster', and the public authority therefore intends anyway to restore it because it continues to require it, this information should be regarded as being held. In this case it is accepted that the council had made a reasonable decision, for business reasons not to recover the information, the Commissioner therefore accepts the information was not held.
48. The Commissioner does not therefore need to consider whether it would have been reasonable for the council to reconstitute and search the back up tapes for the specified period. However, for the absence of doubt, given that the trial archive system had uncovered a large amount of emails which had already been searched for relevant information, and given that a reconstitution of the tapes would have taken a substantial period of the council's time and resources, with no guarantee that further information would in fact have been found in any event, the Commissioner considers that it would not have been reasonable to require the council to reconstitute and search the tapes in question. Again therefore he finds that the council did not 'hold' the information for the purposes of either the Act or the Regulations. The Council were therefore entitled to rely on the exception under Regulation 12(4)(a) of the Regulations as it did not hold the information when the applicant's request was received.

49. This exception is subject to the public interest test; in the circumstances of the case the Commissioner finds that the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner has some difficulty in understanding how the public interest was intended to operate for this exception, but he has taken into account the public interest in placing an unreasonable burden on the Council to attempt to recover the information, and considers that in this case this outweighs the public interest in disclosure, which is detailed later in this notice.

Exemptions

The lease renegotiation material

50. The council exempted information concerning the negotiations for proposed variations to the current lease arrangements and a licence to permit alterations. This was primarily because the renegotiation has yet to be completed and new terms signed. The council states that in the interim period the information is commercially sensitive and has been supplied to the council in confidence. It also argues that some of the information is personal data, in particular information provided by subtenants of properties in the centre who have been approached by the developers about relinquishing their leases. The council therefore claims that the information is exempt under section 43 (commercial interests), section 41 (information provided in confidence) and section 40 (personal data).

Sections 43

51. Section 43 is provided in the annex to this Decision Notice. The relevant section to this request states that information will be exempt if its disclosure “would”, or “would be likely to” prejudice the commercial interests of any party. The Commissioner has considered in the first instance whether disclosure “would be likely to prejudice” the commercial interests of any party as the relevant test. In its refusal notice the council applied the lower test stating that disclosure “could” affect the commercial interests of it, and/or the current tenants of The Square.
52. The council's arguments in support of the application of this exemption are as follows.
- I. The new lease is still under negotiation and its terms are subject to any eventual planning permission which is obtained by the developers, Citybranch.
 - II. The council holds other freeholds of village or town centres and wishes to keep its financial agreements in this case confidential in order that these cannot affect its future negotiations in other, similar deals.
 - III. Citybranch has similar interests within the region and would not wish the terms of the agreement it has made with the council in this instance made known for the same reasons as provided in 2 above.

- IV. Part of the information provided by Citybranch included likely costs to achieve vacant possession from the current subtenants of the properties in the Square. Citybranch would not wish this to be known as it could affect negotiations it has with those tenants when trying to achieve vacant possession of the properties.
- V. Much of the information provided between parties was given in confidence during the course of the negotiations – the argument is that this should not be available to other parties, particularly when both the council and Citybranch will inevitably be involved in future, similar negotiations with other parties.
53. The Commissioner has considered these arguments in turn.
54. I. The Commissioner has considered this argument. The Commissioner firstly notes that there are no other competitors to the lease in this instance. As the developer already owns a long term lease for the area no other parties can approach the council and try to “outbid” the developer for this particular site. The council agrees that this is the case.
55. However lease negotiations were still ongoing at the time of the request and subject to the terms of the eventual planning permission. The fact that final terms have not yet been agreed lends weight to the argument that the information should be exempt under section 43 until such time as the agreement is formally agreed. Until new terms have been signed the figures provided in the draft agreements are of tentative or indicative value only – they represent the state of the negotiations at that time. The figures are subject to change, particularly as market conditions or the circumstances surrounding the redevelopment change. A disclosure of the figures held at the time that the request was made could therefore be misleading. However the Commissioner takes into account the fact that the council could issue a statement alongside any disclosure of this information explaining that the figures are subject to change until the new lease is formalised. He does not therefore consider that this is a strong argument in favour of the exemption applying.
56. As regards the council, there is a small amount of information which includes internal discussions and facts relating to the negotiations which would be commercially prejudicial to it if it is disclosed. The Commissioner recognises that in commercial negotiations each party will be guarded about volunteering sensitive information unless it is in its interests to do so. A disclosure of this sort of information prior to the agreement being signed could potentially destabilise negotiations because the developer would have a much clearer idea of the council's negotiating position than it would otherwise have. It would also prejudice the commercial relationship between the parties. The disclosure of this sort of information would be likely to lead to the council being unable to get the best deal possible, thereby losing rent or terms it could otherwise have obtained. He has therefore found that the internal discussions of the council regarding its aspirations, tactics, legal or financial advice or assessments regarding the lease negotiations should fall within the scope of section 43. His decision is therefore that the disclosure of this information would be likely to prejudice the commercial interests of the council. Section 43 is therefore engaged.

57. II & III. The Commissioner has considered these 2 arguments together. In paragraph 30 the Commissioner explained that some information held in the preplanning material is repeated in the lease negotiation material and that he has therefore considered this under the Regulations. However he also explained that some information is repeated in the lease renegotiation material that he considers falls under the Act rather than under the Regulations.
58. The preplanning information contains a document which provides a financial assessment of various different development options. It forecasts the costs and the likely profit margins of the different options and establishes a case for the option for which planning permission was ultimately sought.
59. Sections of this document are also held in the lease renegotiation information - most notably the complete financial assessment of the intended redevelopment plan. The Commissioner has therefore considered this section of the document along with the preplanning information under Regulation 12(5)(e) below. His view is that this is environmental information. However individual figures from this document are also discussed between council officers and members at various stages during the negotiations. This is primarily information such as potential property values, potential sale prices of the residential properties and the developer's prospective profit margins. Where this is the case these figures are discussed individually and it is clear that the purpose behind the discussions is primarily to provide background information when assessing and negotiating the new terms of the lease. These figures are considered in that context and are therefore considered under the Act rather than under the Regulations.
60. The Commissioner draws a distinction between financial information which the developer provided to the council such as the prospective costs and profits of various aspects of the development, and financial information agreed or discussed between the parties such as the levels of rent discussed in the draft terms of the lease.

Financial terms in the lease.

61. The Commissioner initially wrote to the council and asked how this sort of information would be likely to prejudice commercial interests when each different development will be unique to its own situation. The council replied stating that in its view high street complexes such as this, although very different to each other, do follow along similar lines. It states that rental values, yields etc are used in negotiations on other similar or comparable properties and hence the figures agreed in this development could be used effectively as leverage in other negotiations against either of the parties.
62. The Commissioner reiterates that the terms of lease provided in this information are tentative only. He also notes that many factors will affect the financial viability of a redevelopment and any lease which is in negotiation will take such factors into account. Rent levels must take into account the financial profitability of the scheme to the developer in order that the scheme retains its financial viability and its attractiveness to the developer.

63. The Commissioner also considers that developers or other authorities will have different priorities in different areas and that this will affect the overall rents sought during the negotiations. For instance a council may be willing to accept lower annual rent if the area being considered for redevelopment is currently run-down or depleted. The council will take this into account and may accept a lower rent in order for the development to go ahead. Alternatively, where an area does not particularly require regeneration a council may seek to negotiate higher levels of rent prior to agreeing the development as the benefit to the community in allowing the development to go ahead may be lower. A developer may also be persuaded to accept higher annual rent charges if it is aware that its profits through redevelopment will be substantially higher than they are from the site as it stands.
64. Further to this, the individual circumstances surrounding the development will affect its financial viability. For instance, Hale Barns is an affluent area within easy commuting distance of central Manchester – a relatively high employment area. Therefore the possible rental or purchase values of desirable properties can reflect this and may therefore be set higher than they would be for other areas. All of the above considerations may have a marked effect on the financial viability of such schemes, and hence the likelihood that the developer would agree to pay higher levels of rent to the land owner.
65. The Commissioner also considers that comparative figures can often be obtained from property and commercial property valuers in any event. The figures from this information will serve only as a further comparator able to be used by parties in other negotiations rather than an overriding point allowing leverage to be applied. If such a tactic is applied by a third party then it may be negated by pointing out the differences between the developments.
66. The Commissioner has therefore decided that each individual development will take into account a number of factors which will make it unique compared to other developments which on the face of it may be similar. Additionally he considers that similar figures may in any event be obtained from property valuers and that this information could be used in negotiations in any event.
67. The Commissioner does not therefore accept that a disclosure of this particular information would be likely to prejudice the commercial interests of any party. This argument is not therefore sufficient to engage the exemption for this information.

Financial information provided by the developer

68. The Commissioner has drawn a distinction between the financial terms being discussed between the council and the developer and the financial information which the developer has provided to the council as background information on the intended development. Where the information refers to the potential sublease or sale value of properties, the cost of building those properties or the potential profits *of the developer* the Commissioner considers that disclosure of this type of financial information would be likely to cause prejudice to commercial interests of the developer. This is because this sort of information could be used by third

parties in their negotiations with the developer for rental or purchase terms once the development has been completed. If a potential tenant or a purchaser becomes aware that the developer has valued a particular property at a particular price he is not likely to make an offer above that price if at all possible. Disclosure of this sort of information is therefore likely to prejudice the commercial interests of the developer when negotiating with third parties for the properties it has developed.

69. The Commissioner also notes that the figures provided by the developer to the council include information provided by current tenants of The Square who have provided an indication of their willingness to relinquish their sublease on properties. This is dealt with further in paragraph 71 below, however the arguments considered here are also relevant. The information also contains financial assumptions which the developer is working to when seeking to obtain vacant possession of all of the properties. A disclosure of this information would be likely to destabilise negotiations between the developer and its subtenants. If one party becomes aware that a neighbouring business or resident has indicated that they want a higher price to relinquish their sublease then it may seek a higher value prior to relinquishing its lease on a property. Thus the developer may need to provide additional funds to achieve vacant possession of the premises. The Commissioner therefore considers that this information engages the exemption in section 43 of the Act.
70. In conclusion, the Commissioner has decided that the financial details provided by the developer to the council do engage the exemption. He has further found that disclosure of the internal discussions of the council regarding its aspirations, tactics, legal or financial advice or assessments regarding the lease negotiations would be likely to prejudice the commercial interests of the council. However the Commissioner does not consider that a disclosure of information about the potential lease terms which the council and the developer were working to at the time the request was received would be likely to prejudice the commercial interests of either party.
71. IV. This argument addresses very specific information held by the council relating to the lease renegotiation. The Commissioner accepts this argument is valid and has therefore gone on to consider the public interest test in relation to this information. In addition his decision on section 40 of the Act applies to this same information to a certain degree. This is because information provided by the tenants of the square may be personal information relating to them for the purposes of the Data Protection Act 1998 (the 'DPA'). This is considered further in paragraph 101 below.
72. V. The council's argument in point V is that section 41 of the Act will also be applicable to the information because it was provided in confidence. The Commissioner has therefore considered the application of this exemption separately, below.

Public Interest

73. Following the above the Commissioner must decide if the public interest in maintaining the exemption in section 43 of the Act outweighs the public interest in disclosing the information which he has found does engage the exemption in section 43 of the Act. This amounts to:
- Information held on the costs held by the council that the developer has provided to it as an assumption of the costs of achieving vacant possession.
 - Information held which has been provided to the council by the developer regarding its potential costs, profits and financial assumptions in developing the Square. However the Commissioner considers one document which summarises this information falls within the definition of environmental information. He has therefore considered this document under Regulation 12(5)(e) of the Regulations.
 - Information provided by current tenants of the square relating to their willingness to relinquish their current lease on properties in The Square.
 - Internal discussions within the council regarding tactics, strategies and analysis of the lease proposals for the development.

Public interest in maintaining the exemption

74. The Commissioner considers that the following arguments are relevant:
75. 1. There is a strong public interest in allowing the council to receive information on the assumed figures which the developer is working to in order that it can seek to make an agreement from a fully informed position. If commercially sensitive information is disclosed more widely then developers may be reluctant to share full financial information with councils in the future. If this information is withheld then the council's decision making will be detrimentally affected. As stated above, the levels of rent which are negotiated will often take into account the presumed costs and profits of the developer from the properties. If this is not provided then the council will be negotiating without full knowledge of the likely income to be generated from the development. The Commissioner therefore recognises that this is a strong public interest argument in this information being withheld.
76. However the Commissioner notes that in this case the council could have required the developer to submit this information before it would agree to renegotiate the license for the area. Clearly it holds the upper hand in such relationships as the freeholder of the land in question.
77. 2. There is a strong public interest in allowing private companies to keep information on their assumed costs and profits in redeveloping an area private. Such information may be of use to its direct competitors and to other organisations it may decide to work with in the future. In addition the Commissioner notes that the costs and profits of the developer are not factors which affect the interests of the general public providing the council ensures that

it obtains “best value” from its freehold interests. Best value includes factors such as the benefit to the community of the regeneration of an area in addition to the remuneration levels the council could receive as rent from the lessee. The council may therefore accept lower rent levels if the redevelopment is in the wider interests of the community, and this would still be considered “best value”.

78. 3. There is a strong public interest in allowing the council to retain information on any analysis, strategies or underlying bargaining points in the negotiations free from disclosure until such time as the lease terms have been formally signed between the parties. If this information is disclosed prior to the agreement being formalised the developer would have access to discussions between officers at the council concerning early thoughts, negotiation tactics and base points which the council may be working to when negotiating the lease. The disclosure of such information prior to the agreement being signed could cause an imbalance in the negotiating positions as the developer will have a better idea of the intentions of the council and how it is approaching the negotiations. It could also prejudice the relationship between the parties on some occasions. This could lead to the council being unable to get the best deal possible, thereby losing rent or terms it could otherwise have obtained which would be in the public interest.

Public interest in disclosing the information

79. 1. Disclosure of the information would provide more information to interested parties on the balancing exercise the council went through when deciding to allow the developer to renegotiate the terms of the current lease and licence. Disclosure will therefore allow the general public to fully scrutinise any decisions the council has made as freeholder of the property to allow changes to the terms and conditions of the current lease.
80. 2. A disclosure of the information would make the council more transparent and accountable for its actions when agreeing to allow a tenant to redevelop an area of its land. This would enhance the general public's confidence in the council's decision making and in its financial decision making.
81. However the Commissioner notes that the above factors rest on the general public being able to scrutinise a decision of the council to accept new lease terms. In fact, new terms for the lease have not yet been signed, and therefore the figures are not yet set. A disclosure of the information at this time would only indicate working figures which either party may have been planning to renegotiate at a later stage in the negotiations.

Balancing the public interest

82. From the above, the Commissioner is satisfied that the public interest rests in maintaining the exemption in section 43 of the Act outweighs the public interest in disclosing the information. The Commissioner has provided a schedule as an annex to this Notice which clarifies to the council which information specifically he has found may be exempted under this exemption. This schedule cannot however be provided to the complainant as it contains descriptions of all of the

information held by the council, some of which may identify information which would otherwise be exempt under the Act.

83. The assumed figures of achieving vacant possession are sensitive to the developer and there is less public interest in their disclosure. Such figures are costs assumed by the developer which ultimately affect the short term profitability of the scheme, but will not affect the overall benefit to the community of the redevelopment. The fact that the figures are tentative means that the ability of the public to fully scrutinise the actions of the council in allowing the terms of the lease to be renegotiated is also diminished.
84. The Commissioner is also satisfied that the public interest in disclosing the commercially sensitive figures relating to the costs or the viability of the scheme is not particularly strong. The variables considered by the developer are its own private concern, albeit that the council has some say in the format of the final development through its role as landlord and ultimately through its role as planning authority for the area. Ultimately it is the developer which will seek planning permission and actually pay to redevelop the site however, and in doing so it will make business decisions on its likely costs and profits for each type of development considered. The council is unable to devise its own plans for the developer to take forward. Its central role in the development is to ensure that the best interests of the community are served. The negotiations which the council goes through as regards the lease and the licences should in fact be mostly irrelevant when it comes to decide whether the planning application should be accepted or not. The decision should be based purely on the planning merits of the proposal and on the needs of the community rather than any advantageous terms and conditions which the council might achieve in the renegotiated lease.
85. Of greater importance to the general public is allowing scrutiny of the factors the council considered in deciding to allow the development of the land. This includes whether the overall levels of rent being discussed are appropriate, together with information on any additional benefits which the council may have obtained. Information of this sort, together with information on the planning decision, will demonstrate that the council has acted appropriately in its role as freeholder of the Square. The levels of costs and profits of the developer are not relevant to this.
86. The Commissioner is satisfied that there is a strong public interest in disclosing any information the council holds relating to its stance or strategies in the negotiations. Clearly information which demonstrates that the council thoroughly analysed the proposals and strongly negotiated with a view to obtaining the best deal it could for the local community would show that it was acting in the best interests of the community and provide public confidence in its financial management. However, on the counter side the public interest would ultimately be damaged if the disclosure of this information led in fact to the council obtaining a less favourable deal out of the negotiations.
87. Taking the above arguments into account, the Commissioner is satisfied that the public interest in maintaining the exemption in section 43 is greater than the public interest in disclosing the information. Although there is a public interest in

knowing that the council properly managed its role as freeholder of the land, and sought to get the best deal it could under the circumstances, the fact that the information is only draft at the moment and is still under negotiation compromises the ability to properly scrutinise the council's actions. This undermines the public interest arguments in favour of disclosure at the time the request was received. On the counter side there are strong public interest arguments which remain against the disclosure of this information, most notably the consequential effects of a disclosure of information which is commercially sensitive to the developer.

Section 41

88. The council claimed that the information was also subject to commercial confidentiality. Section 41 of the Act is provided in the legal annex to this Decision Notice.
89. The Commissioner does not accept that all information is held in confidence merely because the parties decide together that that will be the case. Allowing this would essentially allow parties to contract their way out of their obligations under the Act. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.
90. In order for the exemption to be engaged it must be shown that the information was:
 - provided to the authority by another person,
 - that it was imparted in circumstances creating an obligation of confidence,
 - that it has the necessary quality of confidence,
 - in commercial relationships, the Commissioner would generally expect that a detriment would be suffered if the information is disclosed and
 - that a disclosure would be actionable by the confider.

Provided by another person

91. The foremost criterion mentioned above is that the information should be obtained by the council "from any other person". However the Commissioner concludes, following the Information Tribunal's decision in *Derry City Council v ICO (EA/2006/0014)*, that some of the information in this case has in fact been created during negotiations between both parties. Information will therefore not be considered confidential for the purposes of section 41 where the information was not confided to the council "by any other person" but was in fact created through negotiation between it and the developer or its agents.
92. The Commissioner has also considered the Tribunal decision in the *Department for Business, Enterprise and Regulatory Reform (DBERR) v the Friends of the Earth (EA/2007/0072)*. In that case the tribunal drew a distinction between which party provided the information and which party actually "recorded" the information. Accordingly any documents drafted by the council but which records details of information provided to the council under a duty of confidence from the developer will therefore potentially fall within the scope of section 41. This would catch information where, for instance, the developer has provided financial

assumptions to the council and financial figures from this have been discussed between council officers or members.

Obligation of confidence

93. As regards the creation of an understanding or an obligation of confidence, the Commissioner accepts that negotiations such as this will generally be conducted with an understanding and an expectation that information provided by the developer will be held in confidence. This would particularly be the case where a premature disclosure could allow competitors to seek to outbid the developer for the development, or where it would detrimentally affect other business dealings of the confider. The Commissioner notes that this is one of the arguments put forward by the council for the exemption in section 43 applying.
94. In deciding this, the Commissioner has taken into account the fact that both parties would have been aware of the obligation on the council to be open and accountable, and that it was subject to the Act and the Regulations. The Commissioner accepts that confidentiality as regards commercially sensitive information in such negotiations is generally an accepted norm, at the least until the details are finalised. The Commissioner's conclusion is therefore that there would have been an expectation of confidence for some of the information concerned and he has highlighted this in the attached schedule.

The necessary quality of confidence

95. The Commissioner has considered whether the information has the necessary quality of confidence in order for a duty of confidence to apply. This question takes into account such factors as whether the information is trivial or whether it is already in the public domain. The Commissioner is satisfied that information from the lease negotiations is not already in the public domain.
96. He is also satisfied that the information as a whole is not trivial. It is financial information, some of which the Commissioner has already decided is commercially sensitive in his analysis of section 43 above.

Would disclosure be detrimental to the confider?

97. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the interests of the confider for the exemption to be engaged. If no detriment would be suffered he considers that the disclosure would not be actionable and therefore section 41 would not be engaged. The Commissioner does however recognise that where personal confidences are involved then detriment is not necessarily a requirement for a duty of confidence to be considered actionable.
98. The Commissioner addressed the question of whether the information would cause prejudice to the commercial interests of any party in his analysis of section 43 above. His decision was that some information does not fall within the scope of section 43.

99. The Commissioner has therefore considered the information which he has decided does not fall within the scope of the exemption in section 43. In the absence of another reason why this information should be retained in confidence, (such as a likelihood of financial damage if the information is disclosed), it is the Commissioner's view that it would not be detrimental to the developer if the council disclosed this information. Following on from this the Commissioner's decision must be that this particular information does not have the necessary quality of confidence in order for a duty of confidence to apply.
100. The Commissioner's decision is therefore that section 41 does not apply to the information which he has decided does not engage the exemption in section 43 of the Act. The Commissioner does not therefore need to go on to consider the rest of the criteria for section 41 to apply.

Section 40

101. Some information on the council's files covers the views and positions of subtenants about the proposed redevelopment, most notably their intentions should the redevelopment go ahead, and an indication of the costs they would seek before agreeing to vacate the properties they are currently in. This information is also dealt with in paragraphs 71 above. The council states that in its view this is likely to be the personal data of the individuals concerned and would be exempt from disclosure under section 40 of the Act.
102. Section 40 provides an exemption for information which is the personal data of individuals who are not the applicant for the information where disclosure would breach one of the data protection principles. Personal data is defined in the Data Protection Act 1998 (the 'DPA') as data that relate to a living individual who can be identified from that data or from that data and other data which is in the possession of, or likely to come into the possession of the data controller. The first data protection principle of the Data Protection Act requires that the processing of an individual's personal data is both fair and lawful.
103. The Commissioner firstly notes that the owners of the subleases to the properties may in some cases be limited companies. Such companies have a legal personality in their own right, but that legal personality does not fall within the scope of the DPA, which focuses in living individuals. Information pertaining to those companies will not therefore be personal data and the exemption in section 40 of the Act will not be applicable. The Commissioner points out however that he has already addressed this information in paragraph 69 above, and his decision is that this information should be exempt from disclosure under section 43. For the absence of doubt, his decision is that section 43 also applies to this information. However the council also claimed that section 40 is applicable.
104. Some parties which have provided their information to the developer are individuals whose information falls within the definition for personal data provided in the DPA; shop owners and residents of the centre have provided information to the developers when asked informally about the possibility of them vacating the properties they lease. This information has been provided purely on the basis of the approach of the developers for reasons of negotiating the terms of release of

the sub-lease they have on that property. It is unlikely that they would have provided their information with an expectation that that information may subsequently be disclosed to the general public *by the council* because of a request under the Act. They did not provide this information to the council in the first instance and are very likely to have understood their conversation with the developer to have been a private matter between themselves and Citybranch. In this case the Commissioner finds that the data subjects had a legitimate expectation that information they provided would not be disclosed to the public. In this case, where members of the public have expressed views in the expectation of confidentiality the Commissioner finds that disclosure would be unfair, this is also taking into account the distress that may be caused to individuals.

105. In this case, because of the circumstances in which the information was obtained and the expectations of the data subjects the Commissioner's decision is that disclosure by the council would breach the fairness requirement of the First Data Protection Principle. The Commissioner therefore considers that the information is exempt under section 40 of the Act.

The preplanning information

106. The Commissioner considers that the preplanning information falls within the definition of environmental information as provided in Regulation 2(1)(c); (information such as plans programmes environmental agreements and activities affecting or likely to affect the elements and factors referred to in Regulation 2(1)(a) and (b)). Regulation 2(1)(c) is provided in the legal annex to this Notice.
107. Regulation 12(2) requires the public authority to assume a presumption in favour of disclosure. Public authorities should therefore consider information from the initial point of view that it should be disclosed. In line with this it should be noted that the council disclosed the vast majority of the information it held in respect of the preplanning information on 18 June 2008.
108. However the council stated that remainder of the preplanning information was exempt from disclosure under Regulations 12(4)(e) (internal communications), Regulation 12(5)(e) (the confidentiality of commercial or industrial information), and 12(5)(f) (the interests of the person providing the information where that person was not under a legal obligation to do so).

Regulation 12(4)(e)

109. The council states that the information it holds should be exempt from disclosure under Regulations 12(4)(e). This exception applies to internal communications.
110. This exception is a "class" based exception rather than a prejudice-based exception. That is to say, in order for the exception to be engaged the public authority does not need to demonstrate that any specific prejudice or harm would flow from the disclosure of the information in question.
111. The Commissioner has firstly addressed whether the remaining information is in fact internal communications. Information the council has received from, or provided to the developer in the form of discussions and proposals will not be an

internal communication and therefore cannot be exempted from disclosure under Regulation 12(4)(e). Approximately half of the remaining pre-planning information is correspondence with the developer or its agents. This will not therefore fall within the scope of this exception. It is therefore considered further in regard to the other exceptions applied below.

112. The remaining information is made up of memos, correspondence and internal reports pertaining to the redevelopment proposal which have been generated by council staff for the purposes of discussion and deliberation, or advice and assistance between council officers or members. The Commissioner considers that this information is clearly internal communications and that the exception is therefore engaged.
113. Regulation 12(4)(e) is subject to a public interest test. The authority must decide if the public interest in maintaining the exception outweighs the public interest in disclosing the information. If it does not then the information should be disclosed even though the information meets the criteria for the exception. The Commissioner has therefore carried out a public interest test in order to decide if this information should be disclosed.

Public interest

114. Although the scope of the exception in 12(4)(e) is potentially very wide, in practice it is likely to be narrowed by the application of the public interest test.
115. The Commissioner has already outlined that as a class based exception there is no test of prejudice or 'harm' required to engage it. Nevertheless, because this is a qualified exception when carrying out the public interest test it is relevant to consider what specific harm would follow from the disclosure of the particular information in question. A public authority's assessment of the public interest in maintaining the exception should focus on the public interest factors specifically associated with that particular exception, rather than on a more general consideration of the public interest in withholding the information. This exercise requires the public authority to stand back and abnegate its own interests except and insofar as those interests are properly viewed as part of the public interest.

The public interest in maintaining the exception

116. The council argues that many developers engage with the council on their development plans prior to submitting formal applications or entering formal negotiations with the council. These "pre-planning discussions are informal and undertaken on the understanding that they are confidential. The discussions often attempt to resolve major issues prior to a developer spending money drawing together detailed proposals, and are of great benefit to both the authority and the developer. The developer will receive advice and assistance in drawing together a proposal which will fit within council guidelines and which will have, in principle, a notional approval that the type of development proposed could be suitable on the site in question and that it meets planning guidelines as much as it possibly can. This advice and assistance often provides assurance to the developers that their proposal is worthwhile developing further, and provides advice and

- guidelines which can be followed when developing those proposals to the formal application stage.
117. Where the council has been consulted from the outset it may substantially reduce the time the council needs to consider a proposal at the planning application stage, and is likely to lessen the issues it needs to consider because they have been developed with council input from the outset. Such discussions therefore enable the submission of more appropriate applications which can then be progressed more smoothly and quickly through the planning process.
 118. When pre-planning approaches are made by a developer the council may have many different aspects of the proposal which need to be considered. Such consideration does not take place in isolation and often involves many different officers at the council, who will need to discuss the relative merits of the proposal in a free and frank discussion between themselves. The council states that such free and frank discussions are ultimately refined into communications which are then presented as the views of the council as a whole to the developer.
 119. If it was known that such information could ultimately be disclosed it is possible that the internal discussions would become inhibited and the current robust debates which occur would be stultified. This would reduce the effectiveness of the debate and could ultimately affect the council's decision making and the advice it can provide to the developer. This could ultimately cause problems and delays in the planning process, and may reduce the effectiveness of this informal but useful activity.
 120. The Commissioner has also considered arguments which have been voiced in other such cases that a disclosure of this sort of information may lead to officers having meetings and taking more decisions orally, i.e., without retaining a written record of the decision or the thinking which went behind that decision. The Information Tribunal has considered and rejected such arguments before, stating that in its view the recording of such decisions is a matter of effective staff management. The Commissioner therefore rejects any such argument in this instance.
 121. A final argument is that developers who become aware that information of this sort might be disclosed may become less willing to use this process if disclosure would cause harm to their commercial interests. Again the Commissioner considers that a correct decision on a case will allow the exclusion of commercial sensitive information from disclosure if the public interest in protecting it outweighs the public interest for that information to be disclosed. This is not a relevant issue to consider under the internal communications exception.
 122. It is noted that some of the discussions between council officers do discuss financial and commercial information. This is considered further in the Commissioner's consideration of the application of Regulation 12(5)(e) below.

Public interest in disclosing the information

123. The council states that it recognises the strong public interest in disclosing information which shows how its decisions are arrived at. It therefore recognises that the planning process should be as open and transparent as possible, particularly where the community is likely to be affected to a great degree by the proposals being put forward. The disclosure of such information will inform public debate, particularly between those who wish to make submissions in support of, or against a particular proposal. It is noted however that all relevant information from the planning application which was eventually submitted has been supplied to the complainant. It is the discussion and the preliminary views prior to this point which the complainant is seeking to obtain. This would provide a better understanding of the processes which the council went through with the developer, and provide clarity as to the input which the council had on the final proposal which was put forward for planning approval.
124. The internal communications include emails between various officers of the council discussing the relative merits or otherwise of particular proposals. It also includes briefing notes and some correspondence with Councillors. Some of the correspondence discusses financial information which is considered further in the section dealing with Regulation 12(5)(e) below.
125. The Commissioner also notes that some of the information which has been exempted includes draft reports which have been passed between council officers for review and amendment prior to them being sent to councillors for consideration. The final draft of this report was disclosed to the complainant in the council's informal disclosure on 18 June 2008.
126. The Commissioner also notes that the changes to the final document are extremely limited. The draft reports do not show the developer in a bad light, nor would their disclosure be likely to cause harm or friction in the relationship between the council and the developer.
127. The rest of the internal correspondence deals with officers discussing proposals, seeking advice, or considering the council's positioning as regards the development proposal. The council also sought the views of some councillors when providing advice to the developer. Given its position as both the planning authority but also the freeholder of the land, the council needed to ensure that it aided the developer as much as it could to obtain its aims, whilst also not supporting the application generally. This is the dual role mentioned in the background information above. Again there is a public interest in correspondence of this sort being disclosed in order that the public can reassure itself that the council did not allow its position as freeholder of the land to affect its neutral role as planning authority for the area. Clearly it would not be right for the council to advise or support a particular planning application beyond an appropriate level simply because of the financial returns it hoped to gain in return from the redevelopment.
128. Following on from this, some of the correspondence between officers at the council refers to the use of CPO's to obtain vacant possession from the

subtenants of the properties in the centre. From very early on in the discussions the developer needed to be sure that it could obtain vacant possession of the properties in The Square. In order to ensure this it asked the council to agree to support its attempts to negotiate possession by agreeing to use its powers of compulsion to obtain vacant possession if this proved necessary. With this degree of assurance the developer could then move ahead with the development with some degree of surety that it could obtain 100% possession of the properties when it was necessary to do so.

129. The Commissioner considers that there is a strong public interest in this information being disclosed. Essentially the council agreed to use its public powers of compulsion to support the proposal of a private enterprise, which was presumably put forward on the basis of the increased profits the developer could obtain by redeveloping the area. Before the council can use its CPO powers it must make a case that the use of such measures is in the public interest. It is therefore in the public interest for the public to have as much information as possible on how the council agreed to do this; on how it balanced its role to protect or enhance the wider interests of the community by aiding the developer to regenerate the area, balanced against the rights of the sublease owners to have the benefit of quiet enjoyment of their properties undisturbed for the duration of their contractual lease. The use of CPO's would destabilise the level playing field as regards negotiations for terms for relinquishing possession, providing a strong advantage to the developer in the negotiations it had with the subtenants. Ultimately the use of CPO's would cause disruption to the commercial businesses based in the square, and in some cases could exclude them from further trading in the area.

Conclusion of the public interest test

130. Balancing the above, the Commissioner is satisfied that financial information which is repeated in the internal correspondence should be exempt from disclosure following his decision relating to Regulation 12(5)(e) below.
131. However, for the remaining information the Commissioner's view is that the public interest in maintaining the exception in Regulation 12(4)(e) does not outweigh that of disclosing the information in this instance.
132. The changes to the final reports are minimal and will not have an adverse effect on the willingness of council officers to discuss the situation fully or frankly.
133. Additionally, disclosing information on the circumstances surrounding the potential use of the CPO's will add to the public debate about the use of the council's powers of coercion to aid private concerns with development proposals. Ultimately the council agreed in principle to use public powers to intervene and overturn existing, and legally binding contractual arrangements between private concerns. In doing so, the council is making a decision balancing the affect of the quiet enjoyment of the existing sublease holders against the wider interests of the community in encouraging regeneration.

134. There is also a very strong public interest in the public being able to scrutinise the actions of the council in reacting to the preplanning approach in order to demonstrate that it acted properly and appropriately throughout given its other role as the owner of the freehold of the area.

Regulation 12(5)(e)

135. The council also refused the request for information on the basis that Regulation 12(5)(e) applies. This allows commercial or industrial information which is held under either a statutory or a common law duty of confidentiality to remain confidential if that duty is required in order to protect the legitimate economic interests of any party. The relevant parts of the Regulations are provided in the legal annex to this decision.
136. As stated above, the Commissioner has decided that some information held in the lease renegotiation information is environmental information. He has decided that the financial assumptions which are based on different types of development constitute environmental information. Where this information is also held in the lease renegotiation information the Commissioner considers that this still amounts to environmental information and has considered it in this section.
137. The criteria for section 12(5)(e) to be engaged are:
- i) Is the information commercial or industrial in nature?
 - ii) Is the information subject to a duty of confidence which is provided by law?
 - iii) Is confidentiality required to protect a legitimate economic interest?
 - iv) Would that confidentiality which is required to protect a legitimate economic interest be adversely affected by disclosure?
138. The council argues that the information is subject to commercial confidentiality. It states that a disclosure of this information would adversely affect the interests of both the council and the developer because it includes financial assumptions and provisions that if disclosed would affect their negotiating position in future financial transactions. Similarly the council argues that the disclosure of these financial figures could affect the negotiations of the developer with its potential future subtenants.
139. The Commissioner is satisfied that the information is commercial information. It is about a developer wishing to redevelop Hale Barns centre with a view to introducing a supermarket, a number of other outlets and some residential properties.
140. The Commissioner must firstly establish whether there is a duty of confidence which is provided by law. He has considered the nature of preplanning discussions. The idea is generally that a developer will approach the council with its plans at an early stage in their development, and seek the council's guidance and advice when formalising the plans. The central requirement of this approach will be that the council agrees to keep the information and discussions it has with

- the developer in confidence until such time as the developer is prepared to release details of its intentions, or until a planning application is formally made.
141. The Commissioner is therefore satisfied that there would be an expectation by both parties that information provided to the council as part of preplanning discussions would be held under a duty of confidence until such time as the majority of it was disclosed into the public domain as a result of the planning application process or by the actions of the developer. There would be an expectation that some financial information would be retained in confidence beyond this point also. The Commissioner is therefore satisfied that the information was imparted in circumstances which led the parties to believe that an obligation of confidence existed.
 142. The Commissioner is further satisfied that the majority of the financial information was covered by that confidentiality at the time the request was received by the council. As stated above, information on the prospective profits, the likely valuation of intended residential properties and the costs likely to be incurred by the developer in redeveloping the land is all information which would prejudice the commercial interests of the developer if it was disclosed. The Commissioner is therefore satisfied that that information has the necessary quality of confidence.
 143. The Commissioner is therefore satisfied that the information has the necessary quality of confidence to be protected in law, that it is commercial information and that confidentiality is in place to protect the legitimate economic interest of the developer. Further to this, he is satisfied that a disclosure of this information could have an adverse effect upon the commercial interests of the developer. His view is therefore that the financial information engages Regulation 12(5)(e).
 144. However his decision as regards section 43 outlined that other information did not fall within that exemption. The test for this was whether a disclosure of the information “would be likely” to prejudice the commercial interests of a party. The test under Regulation 12(5)(e) is a stronger test, requiring that the public authority shows that an adverse effect would occur if the information is disclosed. Having considered the arguments as regards the preplanning information in detail the Commissioner is satisfied that financial information which has been provided by the developer, (rather than information agreed between the parties) does engage the exception.
 145. However other information, most notably the correspondence relating to the councils actions in guiding the developer, and in discussing the relative merits of the use of CPO’s will not have a detrimental affect on the legitimate economic interests of the parties concerned.
 146. The Commissioner's decision is therefore that information which is not financial in nature which is held within the preplanning information does not fall within the scope of Regulation 12(5)(e) for the same reasons.
 147. The Commissioner must therefore carry out a public interest test to decide whether the public interest in maintaining the exception for the financial information outweighs the public interest in this information being disclosed.

The public interest test

Public interest in maintaining the exemption

148. Many of the public interest arguments put forward for the application of section 43 and Regulation 12(4)(e) are also applicable to the public interest test for the application of Regulation 12(5)(e). The Commissioner will not go over these arguments again. He has however taken these into consideration when making his decision on this exception.
149. The Commissioner understands that a disclosure of sensitive commercial information which has voluntarily been provided to the council, thereby prejudicing the commercial interests of the developer, could persuade developers in general to be reluctant to provide information of this sort in such detail voluntarily in the future. This will affect the decision making of the council, will delay and undermine the preplanning discussions and may make the planning application process slower and less effective in the future.
150. The Commissioner recognises that there is a strong public interest in allowing informal discussions of this sort to continue. If developers decide not to engage in informal discussions regarding potential future planning requirements at an early stage then the risk is that planning applications will be submitted which do not meet council policies or national guidelines to the same degree as they would otherwise. In addition, more planning applications could be turned down, resulting in delay, uncertainty and extra costs to developers which have spent time and resources preparing a planning application which does not meet with council requirements.

Public interest in disclosing the information

151. On the side of disclosing the information is that planning matters should be as open and transparent as possible. There is a public interest in allowing interested parties to see how the council has affected an application in the pre-planning stages, what suggestions it might have made and what input it has had into the final design of the project. It might also show any limitations which the developer or the council were working to, which might give interested parties a better understanding of why the final plans took the form they did.
152. The viability and the likely profits different schemes might generate for the developer affects the overall rent levels which the council might seek in consideration. It also may have an effect on the scope the council had to request amendments to the plans for the betterment of the community, such as the levels of affordable housing which should be provided through the scheme and the overall size of the development. Clearly the redevelopment would affect the local community to a very large degree and the council should be as transparent as possible in the input it had on the development wherever possible.
153. Disclosure would also provide further public confidence that the council did not allow its role as freeholder of the area to affect its view on the planning discussions - that it did not support plans which might overdevelop the area

purely on the basis of the returns such a development might generate for the council.

154. The Commissioner recognises that developers which withhold sensitive information in their preplanning discussions with the council could not in general expect to receive the same quality of advice which developers which did submit such information would. Preplanning discussions are of great benefit to both the council and the developer in smoothing the path of the formal planning application process. Developers will not cease to use this option if they are sure that sensitive information will be protected under the Act.

Balancing the public interest arguments

155. On balance the Commissioner is satisfied that the public interest in disclosing the financial figures relating to the viability of the scheme does not outweigh the public interest in withholding the information.
156. The Commissioner has ascertained that a disclosure of sensitive commercial information which has been provided as part of a preplanning discussion would adversely effect the developer's commercial interests. A result of such a disclosure would not be in the interests of the community if developers subsequently withhold important or sensitive information from the council in future preplanning discussions. Decisions made by the council would not be as effective or informed, and the best interests of the community may suffer as a result. Delays in the planning process where developers do not engage with the council for fear of disclosure could affect the regeneration of areas and thus the communities living within those areas. If developers cannot rely on the fact that the sensitive information they provide to a council in preplanning discussions will remain confidential there is a tangible risk that such information will be withheld or that that information will only be provided in oral form in the future.
157. The Commissioner is therefore satisfied that the financial information of the developer which has been provided by it to the council in this case can be withheld under Regulation 12(5)(e).
158. In saying this, he is satisfied that the public interest in withholding information which is not commercially sensitive does not override the public interest in disclosing it under this exception. He is therefore satisfied that the costs to the council of developing the area, or the likely returns it will receive from allowing the redevelopment of this area (such as the intended rental terms in the lease), should be disclosed. This information is directly relevant to taxpayers in the community, and provides the public with a means to question the council further about its actions in the preplanning discussions with the developer.

12(5)(f)

159. The Commissioner has considered the application of Regulation 12(5)(f) to the information. Regulation 12(5)(f) applies to information where disclosure would have an adverse effect upon

- the interests of a person who voluntarily provided the information to the authority,
 - where that authority is not entitled to disclose that information, and
 - where the provider has not consented to the authority disclosing it.
160. Pre-planning information is provided to authorities on an informal basis by the developer when it first contacts the council to discuss proposals. It is generally done with an expectation that that information will be retained in confidence, at least during the early stages of the proposal, and that it will not be disclosed to other parties during that period (if at all). Clearly in many circumstances an early proposal or discussion on a matter will be commercially sensitive as disclosure would provide an indication of preliminary plans to competitors at a stage where they can take steps to prevent or counter it.
161. The wording of the exception excludes the Commissioner from considering the interests of the council as eligible to be considered under Regulation 12(5)(f). It is therefore only the developer's interests which must be considered.
162. Disclosure must have an actual adverse effect on the interests of the developer rather than be "likely" to have an adverse effect. This exception is therefore narrower than the commercial interest's exemption in section 43 of the Act which only requires that prejudice "would", or "would be likely" to occur.
163. The Commissioner has noted that the arguments put forward above are relevant to this. He has decided that the disclosure of some information would not be likely to prejudice the commercial interests of the developer in this instance because there is no opportunity for other competitors to become involved in the redevelopment of this area and because the figures agreed would not specifically be relevant to other developments to any great degree.
164. However he has also decided that some information may be excluded from disclosure as Regulation 12(5)(e) applies to it, and the public interest rests in maintaining that exception. In respect of this particular information the Commissioner considers that it remains exempt under Regulation 12(5)(f) because it would be detrimental to the developer if those figures were disclosed. However he has decided that other information would not be detrimental to the interests of the developer if it is disclosed. Again his decision is that the same arguments are applicable under Regulation 12(5)(f) in that disclosure would not have an adverse effect upon the interests of the person who voluntarily provided that information - in this case the developer
165. The Commissioner notes that at the time the request was made, plans and details about the final proposal had already been submitted and that the planning file was available to the complainant. Therefore some information on the proposal was already in the public domain.
166. Given the exclusion of the information he has identified as being commercially sensitive, the Commissioner does not consider that there are further grounds for him to consider that a disclosure of the remaining information would have had an

adverse affect on the interests of the developer for the purposes of Regulation 12(5)(f).

167. Accordingly the Commissioners' decision is that Regulation 12(5)(f) applied to the financial information which he identified as being exempt under the exception in Regulation 12(5)(e), however the remaining information does not engage the exemption.
168. Further to this his view is that the public interest tests which he carried out for the exceptions in Regulation 12(4)(e) and 12(5)(e) are relevant, and that in this exception the public interest in maintaining the exception for financial information voluntarily provided by the developer to the council outweighs that in disclosing the information.

The Decision

169. The Commissioner has attached a schedule to the authority's copy of this Decision Notice which highlights his decision as regards specific information which has been withheld. This is for the purposes of providing clarity to the authority for the purposes of complying with this Notice.
170. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The council correctly applied section 43 to sections of the lease negotiation information which are commercially sensitive as highlighted above.
 - It was correctly applied section 40 to the personal data of subtenants of the developer who provided their information as a result of the developer's approaches.
 - The Commissioner correctly applied section 41 to information it held which it received from the developer under a duty of confidence and which would be detrimental to the developer to disclose. This is the same information which the Commissioner has decided falls within the exemption in section 43 of the Act.
171. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The council applied the exemption in section 43 to information which would not have prejudiced the commercial interests of any party to disclose.
 - Further to this the council withheld information under section 43 however the public interest in withholding the information did not override the public interest in disclosing the information.

- Section 41 did not apply to information which was also not exempt under section 43
- The council did not issue an adequate refusal or review notice for the purposes of section 17(1)(b).
- The council breached Section 1(1) (b) of the Act in that it did not communicate to the complainant all of the information he was entitled to under the Act in response to his request.
- The council breached Section 10(1) in that it did not provide information requested by the complainant which he was entitled to receive within the 20 working day period prescribed in section 10 (1) of the Act.

172. Similarly, the Commissioner has decided that the following elements of the request were not dealt with in accordance with the Regulations:

- The council breached Regulation 14(3) in that it did not specify the exception it was relying upon when refusing the complainant's request for information for pre-planning information.
- The council did not correctly apply Regulation 12(4)(e) to the information which is not commercially sensitive to either it or to the developer.
- The council did not correctly apply Regulation 12(5)(e) to some of the preplanning information it withheld.
- The council did not correctly apply Regulation 12(5)(f) to some of the information in the preplanning information.
- The council breached the requirement of Regulation 5(1) in that it did not make available environmental information not subject to a relevant exception on request. It also breached Regulation 5(2) in that it did not provide that information within the 20 day time period prescribed by that Regulation.

Steps Required

173. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose all of the information which the Commissioner has decided is not exempt under either the Regulations or the Act. To this purpose he has attached a schedule to this Notice which clarifies which information should be disclosed.

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

Other matters

175. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
176. The Commissioner notes that the council did not initially consider all of the information which fell within the scope of the request. When the Commissioner first contacted the council for the information it was apparent that the council had not specifically considered the information falling within the scope of the request but had made assumptions based upon the “type” of information which had been requested.
177. In response to the Commissioner stating his concerns over this the council admitted that it had been at fault, but in mitigation stated that this had changed as the council had now gained experience in dealing with requests under the Act and the Regulations.

Failure to comply

178. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

179. 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.
Website: 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 17th day of June 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act

Personal information.

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act

- 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Information provided in confidence.

41. - (1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Commercial interests.

43. - (1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Exceptions to the duty to disclose environmental information

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.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with Regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (e) the request involves the disclosure of internal communications.

(5) 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;
- (f) the interests of the person who provided the information where that person -
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure;

Data Protection Act 1998

Section 1(1)

“personal data” means data which relate to a living individual who can be identified—

- a) from those data, or
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

The First Data Protection Principle

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2 of the DPA 1998

At least one of the following conditions must be met in the case of all processing of personal data (except where a relevant exemption applies):-

- The data subject has given their consent to the processing
- The processing is **necessary**:
 - for the performance of a contract to which the data subject is a party, or
 - for the taking of steps at the request of the data subject with a view to entering into a contract.
- The processing is **necessary** to comply with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- The processing is **necessary** in order to protect the vital interests of the data subject.
- The processing is **necessary** -
 - for the administration of justice
 - for the exercise of any functions conferred by or under any enactment;
 - for the exercise of any functions of the Crown, a Minister of the Crown or a government department;
 - for the exercise of any other functions of a public nature exercised in the public interest.
- The processing is **necessary** for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed,

except where the processing is unwarranted in any particular case because of prejudice to the rights and freedoms or legitimate interests of the data subject.