

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

### **Decision Notice**

**Date: 8 August 2011**

**Public Authority:** The Governing Body of the Queen's College  
**Address:** High Street  
Oxford  
OX1 4AW

### **Summary**

---

The complainant made two sets of requests to the Queen's College (the "public authority") for information principally relating to the proposed sale of land at Keresley, which formed part of larger plans for a residential development. The public authority responded by stating that, for most parts of the request, it did not hold recorded information. Where any information did exist, though, the public authority claimed that this was commercially sensitive and so would not be released. As part of his investigation, the Commissioner has asked the public authority to clarify the particular access-regime it was considering the requests under and to identify the specific exemption or exception that it was relying on in order to withhold requested information. The Commissioner has determined that the public authority correctly cited regulation 12(4)(d) of the Environmental Information Regulations 2004 (EIR) to some of the requested information. However, the Commissioner has found that the public authority failed to support its application of regulations 12(4)(b) and 12(5)(e) of the EIR and sections 21 and 43 of the Freedom of Information Act 2000 (the "Act") to other parts of the information it holds. He therefore requires the disclosure of this information. Furthermore, the Commissioner considers that the public authority breached regulations 5 and 14 of the EIR and sections 1 and 17 of the Act.

### **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.

The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

---

2. The complainant is seeking information relating to a planned development at Keresley and the proposal of the Queen's College (the "public authority") to sell land for this purpose. In accordance with a Core Strategy of Coventry City Council, the development was to include a large area of land in Keresley being released from the greenbelt for the creation of 3500 houses. This development would create a large conurbation by linking a number of established settlements.<sup>1</sup>

## The Request

---

3. On 1 February 2010 the complainant made the following request to the public authority:

*I would like to request, under the Environmental Information Regulations,*

- a. *"copies of any correspondence, emails, meeting notes, or other records of communication between Queens College Oxford and Coventry Council regarding the possible sale and/or redevelopment of land in Keresley since 2004."*
- b. *"copies of correspondence, minutes, emails, phone notes, and communication on this subject between Queens College and Pegasus Planning."*
- c. *"Minutes of any internal meetings at Queens, or within the University, held to discuss and progress this project."*

---

<sup>1</sup> <http://www.kereslevillages.org.uk/greenbelt.php>

- d. *"Copies of any contracts between Queens College Pegasus Planning, and any other parties relevant to the sale and development of the land at Keresley, Coventry."*
  - e. *"I would also like a copy, in the original and in modern translation, of the deed of bequest (or other legal title) of the land held in Keresley by the College, to Queens College and any annexes or addenda or covenants associated with it."*
4. The public authority responded on 2 February 2010 by claiming that it did not hold any information covered by the scope of the request, although part e of the request was not specifically addressed. In subsequent correspondence with the complainant, the public authority justified the lack of recorded information by explaining that its involvement was simply as one of the landowners; it "did not initiate the development process and [is] not driving it."
5. Following further correspondence, the complainant submitted a further request for information on 15 February 2011:
  - f. *"Can I please repeat my request under the EIR for relevant correspondence or minutes or notes or other relevant documents dated from (sic). This is to include any correspondence, contracts, agreements, notes, minutes, emails, between your agents and Coventry Council as this will fall under the definition of Environmental Information held by yourselves i.e. where it is held on your behalf."*
  - g. *"Can I please see, as previously stated, a modern translation of the original bequest/gift of the land to Queens and any covenants upon it."*
  - h. *"Can I also please see any general environmental, investment, and land management policies at Queens College. This is a new request, which will date from today."*
6. The public authority responded to the second request on 22 February 2010. It advised the complainant that, in the main, it did not hold any information covered by the scope of the request. The public authority did, however, note that the "only vaguely pertinent correspondence which exists is between the college and our agents. None of it is relevant to the EIR and as the contents are commercially sensitive I cannot release it to you."
7. Referring to item g of the request, the public authority directed the complainant to the Land Registry for a modern description of the land. With regards to part h of the request, the public authority asserted that all its policies were in the public domain but clarified this statement by asserting that "none of it will be of any use to you."

8. As part of subsequent correspondence between the parties, the public authority wrote to the complainant again on 31 March 2010. It informed the complainant that its negotiations regarding the proposed Keresley development had entered a new phase. On this basis, the public authority explained that the complainant would be refused access to the Deed of Bequest requested at e and g. In any event, the College advised that the deed of bequest was in medieval Latin, estimating that it would cost in the region of £15,000 to £20,000 to provide an authoritative interpretation.
9. At the behest of the complainant, the public authority carried out an internal review of its handling of the requests, the findings of which were provided on 22 April 2011. This upheld the way in which the public authority had originally dealt with the requests.

## The Investigation

---

### Scope of the case

10. On 12 July 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled.
11. During the Commissioner's investigation the complainant agreed that any information held with respect to item g of the request would be also be covered by part e. The Commissioner has therefore removed part g from the scope of his investigation.
12. The Commissioner is also aware of the similarities between part a and part f of the request. However, the complainant has informed the Commissioner that the intention behind making part f of the request was to widen the scope of the information covered so that it included information held by agents working on behalf of the public authority.
13. The Commissioner has therefore considered the following issues as part of his investigation:

*- Is information held by the public authority for the purposes of the EIR?*

- Part a
- Part b
- Part c
- Part d: with respect to information relating to Pegasus
- Part h

*- Should environmental information held by the public authority be disclosed under the EIR?*

- Part d: information covered by regulation 12(4)(d)
- Part e: no exception under the EIR applied
- Part f: information covered variously by regulations 12(4)(b), 12(4)(d) and 12(5)(e)

*- Should non-environmental information held by the public authority be disclosed under the Act?*

- Part d: information covered by section 43

14. The Commissioner considers these elements in the analysis section below.

### **Chronology**

15. Between 27 September 2010 and 10 June 2011 the Commissioner asked for, and was provided with, submissions from the public authority to substantiate its position with respect to the requests.
16. As part of his investigative functions, the Commissioner also requested the public authority to provide copies of the withheld information relevant to the case. The public authority, however, has failed to supply all this information despite repeated reminders. The Commissioner has decided that he is able to reach a decision without sight of all of the information and informed the public authority that if it did not supply the information he would proceed on the basis of the material already available to him.

### **Analysis**

---

17. The legal provisions relevant to this determination are set out in the Legal Annex appended to the Decision Notice.

### **Is any of the requested information, if held, “environmental”?**

18. “Environmental Information” is defined at regulation 2 of the EIR. In order to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) – (f) of the EIR; constituting “information on” any of the subjects covered by those six sub-sections.

19. As rehearsed in previous decisions, the Commissioner considers that the phrase “any information...on” should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
20. Taking this approach, the Commissioner has concluded that all the requested information, with the exception of one piece of information covered by part d of the request, would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR.
21. In making this finding, the Commissioner notes that he has not seen all of the withheld information relating to some of the requests or, for other requests, the public authority claims it does not hold information. However, the Commissioner is satisfied on the balance of probabilities that the information, if and where held, would be on a measure likely to affect the elements and factors referred to in regulation 2(1)(a) and (b), most notably the land and landscape elements.
22. With regards to parts a, b, c, d and f of the request, the Commissioner has taken the view that any information held would record how the public authority intended to proceed with the sale of land at Keresley for development; a development that because of the construction involved would inevitably affect the environment.
23. In the case of part e, the Commissioner considers it likely that a Deed of Bequest would place specifications on the transfer of the land in question to the public authority. As such, the Deed would represent an environmental agreement affecting the land. Finally, in relation to part h, the Commissioner is satisfied that any policies held of the type described would necessarily affect how the public authority should manage the land that forms part of its property portfolio.

### **Regulation 5 – Duty to make environmental information available**

24. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Notwithstanding the information considered later in the Notice, which may in some cases fall under the scope of more than one request, the public authority has suggested that it does not hold any or all of the information asked for at the following parts of the request:
  - a, b, c, d and h

25. A claim that information is not held is covered by an exception under regulation 12(4)(a) of the EIR and therefore requires a formal refusal notice.
26. Where there is any contention about whether or not information is held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in *Linda Bromley & Others and the Information Commissioner v the Environment Agency (EA/2006/0072)*.
27. In that case the Tribunal indicated that the test to be applied was not one of certainty but rather is the civil standard of the balance of probabilities. Therefore, a decision will "take into account the scope, quality, thoroughness and results of the searches" carried out by the public authority as well as considering, where appropriate, any other reasons offered by the authority to explain why the information is not held.
28. The Commissioner has been informed by the public authority that it has been in discussion with its estates bursar in order to determine what information was held at the time of the request. The public authority stressed that the estates bursar had been closely involved with the issue and could reasonably assert that no information is held, from his knowledge. The public authority therefore made the case that it was not necessary for further searches to be conducted. The Commissioner accepts the explanation of the public authority that this individual would be well placed to provide a clear assessment of the information held by the authority.
29. To put this matter in context, the public authority explained that it does not hold recorded information with respect to the requests identified above because:

*"The College's involvement in land transactions is entirely peripheral to its role as an academic institution. As such, the vast majority of formalities that might be present in a commercial organisation involved in land holding or indeed within a public authority such as a Council or a government department are simply not present at the College. As was confirmed...the vast majority of its dealings, both internally and externally, were verbal. Whilst this may seem unusual for a government agency it is not uncommon in the business world that, until contracts are signed, interactions are between the individuals progressing a particular deal."*



30. In relation to parts a and c of the requests, the Commissioner is satisfied, on the balance of probabilities, that the explanations provided by the public authority support its contention that it does not hold recorded information. Similarly, regarding part h, the Commissioner sees no reason for the public authority to hold the policies of the nature described if, as has been suggested, land transactions only form a minor part of the public authority's activities. In this regard, the Commissioner notes that the requested policies do not sit with the other policies already available on the public authority's website.<sup>2</sup>
31. Turning to part d, the Commissioner observes that the request can be divided into contractual information relating to (i) Pegasus and (ii) any other parties. With reference to (ii), the Commissioner considers below the Fee Proposal information covered by this strand of the request. Regarding (i), the public authority has clarified that Pegasus Planning Group, a planning and development consultancy, was:
- "responsible for contributing to the strategic and tactical aspects of the planning process to bring the site at Keresley forward for development in the most appropriate manner."*
32. The public authority has confirmed that it had not entered into a contract with Pegasus Planning Group, a planning and development consultancy, at the time the request was made. That a contract had not been signed also helps explain, in the Commissioner's view, why the public authority does not hold copies of communications with Pegasus that would be covered at part b of the request; the relationship between the parties only presumably being on an informal footing at the time the request was made.
33. Nevertheless, the Commissioner has been informed by the complainant that records on the planning file associated with the development, which is held by Coventry City Council, imply that Pegasus was working on behalf of the public authority. In response, the public authority verified that it had contributed towards the fees of Pegasus, which may account for the link between the parties on the planning file. It has though denied that Pegasus was ever instructed by, or employed on behalf of, the public authority.
34. Accepting that the public authority had agreed to invest in the activities of Pegasus would, the Commissioner acknowledges, enhance the complainant's expectation that the public authority holds records of its discussions with Pegasus. However, in the absence of any evidence to

---

<sup>2</sup> <http://www.queens.ox.ac.uk/foi/freedom-of-information-act-2000-publication-scheme>



the contrary, the Commissioner has concluded on the balance of probabilities that no further information is held. He does though retain some reservations about the lack of recorded information produced that documents how, and why, decisions of a financial nature were reached by the public authority.

35. Regulation 12(1)(b) requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. It is clearly difficult for the Commissioner to do this given his conclusion that the public authority does not hold information to which the public interest could apply. However, he has concluded that the public interest favours maintaining the exception.

### **Withheld information considered under the EIR**

#### **Part e of the request – Deed of Bequest**

36. The complainant requested:

- A copy of the original Deed of Bequest of the land owned by the public authority;
- A modern translation of the Deed of Bequest.

37. The public authority has explained that the land in question was the subject of a bequest in 1529 and is in medieval Latin. It has also informed the Commissioner that the Deed of Bequest contains nothing different to the Land Registry record relating to the use and sale of the land, although it will contain more information not retained on this record.

38. The public authority has advised the Commissioner that it does not hold a translation of the Deed because it would be “insufficient for modern purposes because of the considerable changes in the law in the intervening period.” The public authority has suggested that in practice, however, it has always had members who can read medieval Latin if the need arose.

39. With respect to the original Deed of Bequest, the public authority has dealt with the request under the provisions of the Act and not the EIR because it considers the Deed is not information on the state of the elements of the environment.

40. The public authority has further stated that, under the Act, the requested information would be covered by the exemption set out at section 21. Broadly speaking, this section provides that a public authority is not required to communicate information to an applicant

where that same information is “reasonably accessible” by other means.

41. In the absence of a translation, the Commissioner has not been able to consider the contents of the Deed in detail. The Commissioner still, however, disagrees with the public authority in that he considers that a Deed of Bequest, by its very nature, will likely affect the land in question by transferring the ownership of the land to a specific party. As stated at paragraph 23, the Commissioner has therefore taken the view that the information would be covered by regulation 2(1)(c) of the EIR.
42. Whilst there is not a comparable exception under regulation 12 in the EIR to section 21 of the Act, the Commissioner has found that the arguments provided by the public authority do not support withholding the requested information on the basis of regulation 6 of the EIR, which states:

*6.—(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—*

*(a) it is reasonable for it to make the information available in another form or format; or*

*(b) the information is already publicly available and easily accessible to the applicant in another form or format.*
43. Regulation 6 is relevant as the complainant has asked for the information in the form of a copy. The Commissioner is not, in any event, persuaded that the Deed of Bequest would be subject to Regulation 6. This is because the public authority has failed to identify how the Deed of Bequest is publicly available and easily accessible to the applicant.
44. To support its application of section 21, the public authority notified the Commissioner that the Deed is contained in a published work and can therefore be regarded as being in the public domain. It has though not indicated where the published work can be accessed, arguing that it should not be expected to carry out research in response to a request. In contrast, the Commissioner considers that Regulation 6 is underpinned by the condition that information is “easily” accessible – a condition that the public authority has not demonstrated to have been met.

45. For the purposes of this notice, however, the Commissioner has concluded that the information is covered by the provisions of the EIR and that, in the absence of a relevant exception being claimed, a copy of the Deed of Bequest should be disclosed.

**Part f of the request– relevant information including that held by agents**

46. During the course of his investigation, the Commissioner has been made aware of the existence of relevant records held by the public authority that were not specifically identified to the complainant. The public authority has refused to provide this information to the complainant. This information can be categorised as follows:

- i) A drafted agreement withheld under regulation 12(4)(d) and 12(5)(e) of the EIR.
- ii) Information withheld under regulation 12(5)(e) – proposals, strategic advice and recommendations
- iii) Information withheld under regulation 12(4)(b) – documents available on the planning file managed by Coventry City Council.

47. The Commissioner addresses each of these categories in turn.

**Regulation 12(4)(d)**

*Category i) information*

48. The exception under regulation 12(4)(d) specifies that a public authority may refuse to disclose information if it relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
49. The public authority has argued that, at the time the request was made, the content of the drafted agreement was not settled; the public authority not having disposed of its interest in the land. The public authority has therefore contended that there was a reasonable prospect that the contents of the document would be subject to change as developments around the interest in the land progressed.
50. The Commissioner accepts that at the time of the request the document was only held in draft form. He is therefore satisfied that regulation 12(4)(d) is engaged. As regulation 12(4)(d) is a qualified exception, the Commissioner has gone on to consider the application of the public interest test to the Category i) information.

51. The Commissioner recognises that there will always be a significant public interest in ensuring transparency with respect to plans to develop land, not least because of the impact that such a development will have on local inhabitants. In this case, the Commissioner understands that there is considerable local opposition to the development of the land at Keresley, which would lend further weight to the argument that any information relevant to the development, including the proposed sale of land for this purpose, should be placed in the public domain.
52. However, in accordance with the exception, the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into. There is a public interest inherent in regulation 12(4)(d) in favour of ensuring that a public authority does not have to expend resources on justifying information contained in a draft document that may, ultimately, be subject to change.
53. The Commissioner has previously observed that once a final version of a document is completed, the level of prejudice relating to the sensitivity of the information included in a draft is likely to diminish. In this instance though the public authority has informed the Commissioner that the draft document was "live", in that an agreed form of the document had not been ratified. This would, in the Commissioner's view, add considerable weight to the public authority's argument that the disclosure of the document would be prejudicial at the time the request was made.
54. It is predominantly for this reason that the Commissioner has concluded that the public interest favours maintaining the exception. In reaching this determination, however, the Commissioner has also factored in the nature of the information itself. The Commissioner considers that the disclosure of the document would not necessarily serve to instruct the public about the proposed development itself or the relative merits of the development. This again would lessen the strength of the public interest arguments for transparency. Similarly, the Commissioner is not persuaded that any general arguments for accountability would outweigh the public interest in maintaining the exception.
55. As the Commissioner has found that regulation 12(4)(d) is engaged and the public interest favours maintaining the exception, he has not gone on to consider whether regulation 12(5)(e) would similarly apply.

## **Regulation 12(5)(e)**

### *Category ii) information*

56. The public authority has argued that information containing proposals, strategic advice and recommendations would be subject to the exception contained at regulation 12(5)(e) of the EIR.
57. Information is exempt under regulation 12(5)(e) if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
58. In deciding whether this exception applied, the Commissioner considered the following:
  - Is the disputed information commercial or industrial in nature?
  - Is the disputed information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
59. These four conditions would have to be met for regulation 12(5)(e) to be engaged.
60. In order for the Commissioner to ascertain whether withheld information engages any exceptions cited by a public authority, he usually asks for a copy of the information to be provided to him.
61. The Commissioner considers that the public authority was given ample time to provide the withheld information so that any arguments raised for the application of 12(5)(e) could be properly tested. He has therefore concluded it was reasonable for him, in the circumstances of the case, to make a decision on the basis of the information available.
62. Having analysed these arguments, the Commissioner is not persuaded that the public authority has explained, to any meaningful extent, the confidential status of the information or the nature and likelihood of the adverse effect that would arise through disclosure. Such considerations, the Commissioner believes, would need to at least broadly encompass the questions outlined at paragraph 58 above if they are to have any substance.
63. Significantly, in previous decisions the Commissioner has recognised that the threshold to justify non-disclosure because of adverse effect

under regulation 12(5)(e) is a high one. It is not enough that disclosure should simply have an effect, the effect must be 'adverse'. In addition, it is necessary to show that disclosure 'would' have an adverse effect.

64. In this case the public authority has only cursorily examined the nature of the commercial sensitivity attached to the information, saying for example that the information is subject to regulation 12(5)(e) because:

*"The College engages professionals to provide it with advice. The College pays for that advice because the advice has a value in the context of the proposed transaction. Such advice is commercially sensitive (Regulation 12(5)(e) because, to the extent that it is reasonable to presume that the College will act upon the advice that it has paid for and been provided with it discloses the position from which the College is negotiated."*

65. The public authority has also referred to the expectation of Bidwells that the information would not be disclosed but, again, only in brief terms. Bidwells is the property consultant engaged by the public authority with regards to the sale of the land.
66. The Commissioner understands that the public authority has concerns about releasing the information in question. However, his decision on whether an exception is engaged is informed by the strength of the submissions provided by the public authority. Furthermore, the Commissioner is mindful that in general the strength of the arguments for withholding information must outweigh the EIR's explicit presumption in favour of disclosure, set out by regulation 12(2).
67. In this instance the Commissioner considers that the public authority's arguments do not engage all the conditions set out at paragraph 58. In particular, the Commissioner has concluded that the public authority failed to demonstrate a causal relationship between disclosure and the adverse affect being claimed. As such, the public authority did not provide adequate arguments showing that the fourth point set out at paragraph 58 had been met.
68. Instead, it is the view of the Commissioner that the public authority's arguments for the application of regulation 12(5)(e) are vague and do not go beyond largely generic submissions for withholding information under the exception; arguments, in short, that are not of sufficient detail and depth to show how an adverse effect 'would' occur. This is despite the public authority being afforded, in the Commissioner's view, a number of opportunities to provide full arguments to support its position that the identified information should be withheld.

69. For this reason, the Commissioner has decided that he has no other option but to find that regulation 12(5)(e) is not engaged.

**Regulation 12(4)(b)**

*Category iii) information*

70. In a letter to the public authority, Bidwells confirmed that it holds planning information which is also available on the associated planning file held by Coventry City Council.
71. It is unclear whether the public authority itself holds a copy of this information. In any event, regulation 3(2) of the EIR provides that information is held by a public authority if it is held by another person on behalf of the authority. In this instance the public authority engaged Bidwells in respect of the proposed land transaction at Keresley. The Commissioner therefore considers that any information of the nature described that was in possession of Bidwells at the time of the request would be held on behalf of the public authority and therefore subject to the request.
72. The public authority is of the view that it should not be required to disclose this information on the basis that such a request could be considered manifestly unreasonable under regulation 12(4)(b) of the EIR.
73. In his guidance "An introduction to the EIR exceptions"<sup>3</sup>, the Commissioner made the following points with regards to regulation 12(4)(b):
- "The word 'manifestly' means that a request should be obviously or clearly unreasonable. There should be no doubt as to whether the request was unreasonable. Volume and complexity alone may not be sufficient to make a request manifestly unreasonable. The fact that a request would be considered vexatious under the Freedom of Information Act 2000 (the "FOIA") does not, in itself, make a request under the EIR manifestly unreasonable."*
74. The main thrust of the public authority's argument would appear to be that, because the information requested is available elsewhere, the request can necessarily be considered as manifestly unreasonable for the purposes of regulation 12(4)(b).

---

<sup>3</sup>[http://www.ico.gov.uk/~media/documents/library/Environmental\\_info\\_reg/Introductory/EI\\_P076\\_GUIDANCE\\_FOR\\_PUB\\_DOC\\_VERSION3.ashx](http://www.ico.gov.uk/~media/documents/library/Environmental_info_reg/Introductory/EI_P076_GUIDANCE_FOR_PUB_DOC_VERSION3.ashx)



75. The Commissioner, however, does not agree with this analysis. This is because the Commissioner can envisage a number of scenarios where it would be reasonable for a public authority to provide information to an applicant even if that information can, potentially, be accessed elsewhere. For example, an applicant may find it difficult to view information in situ.
76. In the absence of further arguments that support the application of the exception, the Commissioner considers he has no choice but to find that regulation 12(4)(b) is not engaged. In making this finding, the Commissioner notes that it is not sufficient for a public authority simply to argue that a request is unreasonable; it must instead demonstrate that a request can objectively be deemed as manifestly unreasonable. In this regard, the Commissioner does not find that the request can be perceived as being 'clearly' or 'obviously' unreasonable.

### **Withheld Information considered under the Act**

#### **Part d of the request – copies of contracts**

77. The public authority has confirmed that it holds a Fee Proposal which, the Commissioner understands, relates to the employment of the services of Bidwells. The public authority does not consider this information falls within the scope of the requests but that, if the Fee Proposal was relevant, it would be exempt from disclosure under section 43 of the Act.
78. The Commissioner notes, again, that the public authority did not provide him with a copy of the Fee Proposal despite his repeated requests. He has, however, considered the application of section 43 based on the information he has received from the public authority.
79. While the Commissioner has not inspected the withheld information, the Commissioner observes that the cumulative effect of the complainant's requests is wide-reaching. In this context, the Commissioner considers it unlikely that the Fee Proposal would not be covered by any part of the request and, specifically, part d. This is because a Fee Proposal would appear to set out a contractual relationship between the public authority and an agent involved in the sale of the land at Keresley, namely Bidwells.
80. The Commissioner would nevertheless agree with the public authority that the Fee Proposal falls under the provisions of the Act and not the EIR. This is because the information relates to the terms by which the public authority would engage the services of an agent. This Proposal,

regardless of the services that the agent goes on to provide, does not in the Commissioner's view relate to the factors and elements referred in the definition of environmental information contained at regulation 2(1) but merely represents the conditions required to instruct Bidwells to act on the public authority's behalf.

81. Section 43(2) provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The Commissioner understands that it is both its own and Bidwells' commercial interests that the public authority considers would be prejudiced in this instance.
82. When considering whether a prejudice based exemption is engaged the Commissioner will be guided by the approach taken by the Information Tribunal in *Hogan v Information Commissioner*. In that case the Tribunal found:

*"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is need to identify the applicable interest(s) within the relevant exemption...Second, the nature of 'prejudice' being claimed must be considered...A third step for the decision-maker concerns the likelihood of occurrence of prejudice."*<sup>4</sup>

83. The public authority has argued that the engagement of services in relation to the land transaction is conducted in a competitive environment. It has therefore insisted that the release of the information could impair the ability of Bidwells to sustain its business activity. In addition, it is claimed that disclosure could damage the interests of both the College and Bidwells as the information represents the price at which each is respectively willing to buy and sell its services.
84. When considering the nature of the prejudice being claimed by a public authority the Commissioner will again be guided by the findings of the Information Tribunal in *Hogan*:

*"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice is, as Lord Falconer of Thoroton has stated 'real, actual or of substance'...If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."*<sup>5</sup>

---

<sup>4</sup> *Hogan v Information Commissioner and Oxford City Council* [EA/2005/0026 and EA/200/0030], para. 28 – 34.

<sup>5</sup> *Hogan*, par. 30

85. The Commissioner has not been provided with any evidence that demonstrates how the particular terms contained in the Fee Proposal, which relate to a specific and isolated project, would be transferable to any future activities of either party. To this extent, the Commissioner considers that the public authority failed to provide realistic and cogent arguments relating to the nature of prejudice that took account of the information itself and the circumstances of the case.
86. The Commissioner cannot therefore accept, on the basis of the arguments provided, that there is a real risk that disclosure would prejudice the bargaining position of either party, particularly given the public authority's assertion that activities of this nature only form a peripheral part of its role.
87. On the basis of the arguments provided, and echoing the points made at paragraph 68, the Commissioner has found that section 43(2) is not engaged.

## **Procedural Requirements**

### **The EIR**

#### **Regulation 5 – Duty to make information available**

88. Regulation 5(1) requires a public authority to make environmental information available on request, with regulation 5(2) stipulating that the information should be made available within 20 working days.
89. By failing to provide the information held at parts e and f (category ii and iii)) of the request within 20 working days, the Commissioner finds that the public authority breached regulation 5(1) and (2).

#### **Regulation 14 – Refusal of a request**

90. Regulation 14 states that, where a public authority is refusing a request under any exception in the EIR, it must identify the exception and give reasons why the exception applies within 20 working days. Regulation 14(5) also requires a refusal notice to contain details of an applicant's right to ask a public authority to carry out a review of its response.
91. The Commissioner has determined that the public authority breached regulation 14(1), (2), (3) and (5) by failing to issue a valid refusal notice within 20 working days.

## The Act

### Section 1 – Right of access to information

92. Section 1(1) of the Act requires a public authority to (a) confirm whether it holds requested information and (b) communicate that information to an applicant, unless either (a) or (b) are subject to an exemption. Section 10(1) states that a response complying with section 1(1) should be provided within 20 working days.
93. The Commissioner considers that the public authority breached section 1(1)(b) of the Act by failing to disclose a copy of the Fee Proposal, covered by part d of the request, within the statutory timeframe.

### Section 17 – Refusal of a request

94. Section 17(1) requires a public authority to (a) state that it is withholding information (b) specify the exemption and (c) state why the exemption applies. This refusal notice should be issued within the statutory time limit of 20 working days
95. By failing to inform the complainant within 20 working days of the exemptions it later came to rely on with regards to information covered by parts d and e of the request, the Commissioner considers that the public authority breached section 17(1)(a), (b) and (c) of the Act.

## The Decision

---

96. 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 public authority correctly cited regulation 12(4)(d) as grounds to refuse disclosure of the document covered by part f (category i).

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached regulation 5(1) and (2) of the EIR by not making information available to the complainant within 20 working days.
- The public authority did not provide a valid refusal notice under regulation 14(1), (2), (3) and (5) of the EIR.

- The public authority failed to provide information covered by the Act within 20 working days, in breach of section 1(1)(b) and 10(1).
- The public authority failed to issue a refusal notice identifying the exemptions it later came to rely on in breach of section 17(1)(a), (b) and (c) of the Act.

## **Steps Required**

---

97. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose the following information to the complainant:
    - Part d, a copy of the Fee Proposal
    - Part e, a copy of the Deed of Bequest
    - Part f, category ii) and iii) information
98. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

99. 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

---

100. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 8<sup>th</sup> day of August 2011**

**Signed .....**

**Steve Wood  
Head of Policy Delivery  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

---

### Freedom of Information Act 2000

#### Section 1 - General Right of Access

Section 1(1) provides that –

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

#### Section 17 - Refusal of Request

Section 17(1) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (a) specifies the exemption in question, and
- (b) states (if that would not otherwise be apparent) why the exemption applies."

#### Section 21 - Information Accessible by other Means

Section 21 provides that –

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1)-
  - (c) information may be reasonably accessible to the applicant even though it is accessible only on payment, and



(d) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment."

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

### **Section 43 - Commercial interests**

Section 43 provides that –

(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).

### **Environmental Information Regulations 2004**

#### **Regulation 2 - Interpretation**

Regulation 2(1) provides that –

"the Act" means the Freedom of Information Act 2000(c);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate record authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

"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 –

- (e) 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;
- (f) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (g) 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;
- (h) reports on the implementation of environmental legislation;
- (i) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (j) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

- (a) a body referred to in section 80(2) of the Act; and

(b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

### **Regulation 3 – Application**

Regulation 3(2) –

For the purposes of these Regulations, environmental information is held by a public authority if the information –

(c) is in the authority’s possession and has been produced or received by the authority; or

(d) is held by another person on behalf of the authority.

### **Regulation 5 - Duty to make available environmental information on request**

Regulation 5(1) –

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) –

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

### **Regulation 6 - Form and format of information**

Regulation 6(1) –

Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

(a) it is reasonable for it to make the information available in another form or format; or

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

Regulation 6(2) –

If the information is not made available in the form or format requested, the public authority shall –

- (a) explain the reason for its decision as soon as possible and not later than 20 working days after the date of receipt of the request for the information;
- (b) provide the explanation in writing if the applicant requests; and
- (c) inform the applicant of the provisions of regulation 11 and the enforcement and appeal provisions of the Act applied by regulation 18.

## **Regulation 12 - Exceptions to the duty to disclose environmental information**

Regulation 12(1) –

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

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) –

A public authority shall apply a presumption in favour of disclosure.

Regulation 12(4) –

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

- (a) it does not hold that information when an applicant's request is received.
- (b) the request for information is manifestly unreasonable;

- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or

Regulation 12(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;