

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

Decision Notice

Date: 28 September 2011

Public Authority: Winchester City Council
Address: City Offices
Colebrook Street
Winchester
Hampshire
SO23 9LJ

Summary

The complainant requested a copy of a financial viability appraisal in relation to a revised development scheme. The public authority withheld the information by virtue of regulation 12(5)(e) of the EIR. The Commissioner's decision is that some of the information was correctly withheld but that other information should have been disclosed. The Commissioner has therefore ordered disclosure of all information falling within the scope of the request, except that which the Commissioner has concluded is exempt under regulation 12(5)(e). The Commissioner has also identified procedural shortcomings in the way the Council handled the complainant's request.

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.

Background

3. The withheld information in this case relates to an application for planning permission for the development of an area named Freeman's Yard. Planning permission was originally granted in 2007 for a mixed use development comprising the refurbishment of existing offices and a barn, and a redevelopment of 6 live/work units and 16 dwellings, along with improvements to existing access ("the previous scheme").
4. In late 2009 a revised application for planning permission was made by the developer, for an amended development on the same site ("the revised scheme"). The revised scheme contained elements which were contrary to policies set out in the Adopted Winchester District Local Plan Review 2006. As a result, the application was reported to the Council's Development Control Committee ("DCC") for approval.
5. The withheld information consists of a financial viability appraisal ("the report") which outlines the reasons why the previous scheme was found not to be financially viable, and setting out revised options for the scheme. The report was considered by the DCC and it was decided, in this case, that a departure from the policies in question was acceptable, and the application was approved in 2010. The report was not made publicly available as part of the planning approval process, and the Council has confirmed to the Commissioner that there is no requirement for any information relating to a planning application (other than the statutory information that forms part of the planning register) to be made available to the public as a matter of course.

The Request

6. On 19 June 2010 the complainant wrote to the Council in respect of the planning application for the revised scheme for Freeman's Yard. The Commissioner notes that this correspondence was not phrased as a formal request under the Act or the EIR. However, within this correspondence the complainant expressed his dissatisfaction with the fact that the report had not been placed into the public domain along with all other relevant documents, in order for members of the public to be able to make informed objections in relation to the revised scheme. The complainant made the following statement:

"it seems to me that there has been an injustice in that a "financial viability appraisal" submitted by the applicant was not placed in the public domain along with all the other relevant documents".

7. The Council responded on 4 August 2010 and stated that the report should not be disclosed to the public. The Council maintained that the information had been submitted to the Council on the basis that it should be kept confidential, that it was provided to protect the legitimate economic interest of the developer, and that disclosure of the report would adversely affect this confidentiality. The Council made no mention in its response of whether it had considered the request under the provisions of the Act or the EIR.
8. On 4 August 2011 the complainant wrote to the Council in accordance with its complaint procedures. The complainant quoted sections of the Local Government (Access to Information) Act 1985 in support of his view that the requested information should be made publicly available.
9. The Council responded to the complainant on 26 August 2010. The Council confirmed that, in its view, the information in question fell within the definition of "exempt information" as defined by the Local Government (Access to Information) Act 1985. At this stage, the Council also confirmed that it had considered the request under the EIR, confirming its view that the information should be withheld due to the confidential nature of the report.
10. On 21 October 2010 the complainant wrote to the Council, making a formal request for the report as follows:

"I am asking you formally to be allowed to see the viability report under the terms of the Local Government (Access to Information) Act 1985, section 100H(4)".
11. On 10 November 2010 the Council responded to the complainant, maintaining its assertion that the information in question was "exempt" by virtue of the Local Government (Access to Information) Act 1985. The Council also confirmed that the request would go on to be considered formally under the Act or EIR, and that a response would follow.

The Investigation

Scope of the case

12. On 24 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant was initially complaining about the fact that no formal response had been issued by the Council to his request of 21 October 2010.

13. During the course of the investigation, the Commissioner came to the view that the Council had already considered the request, albeit unofficially, under the provisions of the EIR and therefore that it had already issued a response. The Council confirmed to the Commissioner that on the basis of the complainant's letter of 19 June 2010, it had decided to treat the request "as if [the complainant] had submitted an EIR request to see the report". Hence, in the Commissioner's view, the Council's response of 4 August 2010 should be considered as its initial response to the request for information. The complainant's subsequent letter of 4 August 2010 to the Council expressed his dissatisfaction with the response he had received, therefore the Commissioner considers this to be a request for an internal review, and the Council's response of 26 August 2010 to be the Council's internal review response. The Council confirmed its agreement with this approach on 24 June 2011. Therefore, the scope of the Commissioner's investigation was to determine whether the Council had correctly withheld the requested report under the provisions of the EIR.

Chronology

14. On 4 February 2011 the Commissioner wrote to the Council and asked it to respond formally to the complainant's request of 21 October 2010 within 10 working days.
15. On 2 March 2011 the Commissioner wrote to the Council following the complainant's confirmation that no formal response to his request of 21 October 2010 had been received. The Commissioner confirmed that the complaint had now been deemed eligible for formal consideration.
16. On 16 May 2011 the Commissioner wrote to the Council to confirm the scope of his investigation. The Commissioner proposed that the focus of his investigation should be to determine whether the report had been correctly withheld by the Council. The Commissioner also requested a copy of the withheld information, along with further arguments to support the Council's decision to withhold the report.
17. The Council responded on 24 June 2011, confirming its agreement with the Commissioner's approach and the scope of his investigation. The Council provided a copy of the withheld information along with further arguments to support its decision to withhold the report by virtue of regulation 12(5)(e) of the EIR.

Analysis

Exceptions – Regulation 12(5)(e)

18. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. This exception is subject to a public interest test where the exception is engaged.
19. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that need to be met, namely:
- Is the information commercial or industrial in nature?
 - Is the 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?

Is the information commercial or industrial in nature?

20. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The Commissioner notes that the report in question was produced for the benefit of a commercial organisation, for the purposes of supporting an application to further its commercial ends. The Council confirmed that the report was produced in a commercial context to assist the business operations of the developer in question. The subject matter of the report related to financial analysis, financial proposals, build costs, property forecast valuations and profit margin information. Therefore the Commissioner considers that the information is clearly commercial in nature, and therefore considers that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

21. In relation to this element of the exception, the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. There is no need for the

information to have been obtained from another party as is the case with section 41 of the Act.

The Council's position

22. The Council provided the Commissioner with examples of the wording used within the report, and the wording used in correspondence between the Council and the developer when the report was shared between the two parties. The Council considered that this wording demonstrated the confidential nature of the report. The Council explained that the report was provided to it by the developer on the basis that it "should be regarded as confidential". In December 2009, the developer wrote to the Council in relation to the scheme, and stated the following:

"A detailed Economic Viability Assessment has been prepared. This assessment includes commercially sensitive information. The applicant is however prepared to reveal and discuss this information with the Local Planning Authority on a private and confidential basis".

23. Within correspondence to the Council in January 2010, the developer made the following statement:

"...the viability information (on a private and confidential basis given it includes commercial sensitive information) to show the revised scheme is deliverable..."

24. During a meeting in January 2010, the developer again reportedly reminded the Council that the report was being supplied "on a strictly private and confidential basis".
25. The Council also provided the Commissioner with detailed submissions from the developer itself. The developer argued that the report was supplied to the Council on the basis of importing an obligation of confidence, and that it was also received by the Council in circumstances understood to import an obligation of confidence. Throughout its submissions the developer made reference to a previous case considered by the Commissioner¹, and subsequent Tribunal decision in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*, stating that the information was found to be subject to confidentiality in *Bristol* with, in the developer's view, a less convincing explanation of the confidential nature of the information than in this case.

¹ FER0209326

The complainant's submissions

26. The complainant put forward a number of submissions to the Commissioner. In his view, the report should have been made available in the public domain as it was provided as part of the planning process, and therefore should have been included with other planning information which was made publicly available for objectors to study before putting forward any objections. The complainant submitted evidence that the report in question was a key piece of evidence in relation to this planning decision, and therefore that it should have been included in the information that was made publicly available.
27. The complainant categorically stated that the report in question did “not contain confidential or exempt information, as defined in the legislation” (i.e. as defined in the Local Government (Access to Information) Act 1985).

The Commissioner's view

28. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
29. The Council has not provided any submissions to suggest that the confidentiality in this case has been imposed under contractual obligation or statute. Therefore the Commissioner has considered whether a common law duty of confidence applied in this case, by considering the following points:
 - Whether the information has the necessary quality of confidence
 - Whether the information was shared in circumstances importing an obligation of confidence

Does the information have the necessary quality of confidence?

30. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. The Commissioner further considers that information which is of importance to the confider should not be considered to be trivial.
31. The Council has not provided the Commissioner with any specific arguments to suggest that the report has the necessary quality of confidence. However, it is clear from the evidence provided by the Council that this information was provided to it by the developer with an expectation that it would be treated in confidence. Having viewed no evidence to the contrary, the Commissioner considers it unlikely that the report is otherwise accessible.

32. Having viewed the withheld information, it clearly relates to a development which will have an effect on the local area. The Commissioner therefore considers that the information in question is not trivial. He is satisfied that the information does have the necessary quality of confidence and, as a result has gone on to consider whether the information was shared in circumstances importing an obligation of confidence.

Was the information shared in circumstances importing an obligation of confidence?

33. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*² suggests that the 'reasonable person' test may be a useful one. He explained:

"if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

34. Such an approach was adopted by the Information Tribunal in *S v Information Commissioner and the General Register Office* (EA/2006/0030). The Tribunal concluded that an interview gave rise to an obligation of confidence, as the interviewee could expect any information to be provided to be kept in confidence because of "the fact that the interview is conducted in private, the display of notices indicating that the statistical information provided in the same interview is confidential and that nature of the information being sought".
35. Based on the Commissioner's view set out above, and based on the arguments put forward by the Council in paragraphs 22-25 above, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence. From the arguments supplied by the Council, the Commissioner considers that the circumstances gave rise to an explicit obligation of confidence due to the wording used in the report, and due to the assurances shared between the developer and the Council when discussing the information in question. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law and considers that this element of the exception is satisfied.

² *Coco v A N Clark (Engineers) LTD* [1969] RPC 41

Is the confidentiality provided to protect a legitimate economic interest?

36. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

37. The Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. As noted above, and in line with this approach, the Council provided detailed submissions from the developer itself.

38. The arguments provided by the developer tended to focus on particular elements of the report which, if disclosed, would create adverse consequences for the developer, whilst also stating that the "disclosure of the information [in its entirety] would clearly adversely affect such confidentiality and be prejudicial to [the developer's] commercial interests". Due to the various arguments put forward by the developer, the Commissioner considers that the report in question consists of different types of information. He has therefore considered each of these in turn, due to the different issues involved.

39. However, at the same time, the Commissioner notes the Council's argument in favour of maintaining the exception in respect of the report as a whole; that the developer's business activities are clearly legitimate economic activities which rely on financial and commercial information of this nature being kept confidential in order to allow the applicant to preserve their commercial position in respect of competitors and potential buyers of units on their development.

Property valuation information ("the valuations")

40. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this notice about the Council's submissions to support its position in respect of its application of this exception and the Commissioner's consideration of those arguments is limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of this exception. This annex will be provided to the Council but not, for obvious reasons, to the complainant.
41. The Commissioner accepts that disclosure of the valuations would have an adverse effect on the interests of the developer, and as such accepts that disclosure of this information would prejudice the commercial interests of the developer.
42. The Commissioner notes that the report also contains other figures which have been calculated on the basis of the valuations. Therefore the Commissioner considers that the disclosure of these figures would, in itself, mean disclosure of the valuations, and therefore his decision in paragraph 41 above also applies to these figures. The Commissioner has set out a list of these elements of the report within the confidential annex to this notice.

Build costs

43. The confidential annex sets out the Commissioner's findings in relation to the build costs in detail.
44. The Commissioner considers that the Council has not adequately demonstrated that disclosure of the build costs would have an adverse effect on the interests of the developer in question. The Commissioner therefore considers that it has not been demonstrated that the exception is engaged in respect of the build costs.

Other financial information

45. The report contains two tables of financial information (separated from the main body of the report); one for the previous scheme and one for the revised scheme. These tables include financial information about the developments, including the valuations and build costs (addressed above) but also details of other costs related to the developments, land values, and information relating to the size of each proposed unit for both schemes.

46. Neither the Council nor the developer provided any specific submissions in relation to the other financial information contained within the report, other than to state that in their view, disclosure of the report in its entirety would have an adverse effect on the interests of the developer. The Commissioner also notes the Council's statement that "it should be noted that [the complainant] is seeking details of the financial and other commercial information in the report. Even if it were possible to redact the report to exclude any information which is considered not to be confidential, the remaining report would be somewhat meaningless, and would not therefore greatly assist [the complainant]".
47. The Council has not specified which elements of the report it considers "not to be confidential", but the Commissioner notes that the detailed arguments provided by Council and developer tend to centre on the valuations and build costs, which have been addressed above. The Council stated that "although it may be argued that some of the effects referred to in the letter from [the developer] may be possibilities, rather than certainties, it is considered that the other effects identified in this case (i.e. the advantages which would be given to local contractors and purchasers to the detriment of the applicant) *would* occur". Once again, the Council appears to be giving significant weight to the confidentiality that should be afforded to the valuations and build costs which have already been addressed by the Commissioner.
48. In the absence of specific arguments, and due to the fact that the Council has suggested that elements of the report could be considered not to be confidential, the Commissioner considers that the Council has not adequately demonstrated that the exception is engaged in respect of the remainder of the information contained within the financial pages (i.e. all information other than the valuations and build costs).

The main body of the report

49. Paragraphs 40-48 above relate to the financial tables contained within the report. The Commissioner will now go on to consider the remainder of information contained within the main body of the report. This information consists of a background to the scheme, details relating to the previous scheme, details relating to the revised scheme and a conclusion, explaining the recommendations of the developer.
50. The Council has explained that, in its view, the report in its entirety is exempt by virtue of regulation 12(5)(e). The developer has argued that the information included within the report is all specific, relevant and real information relating to the project. The developer argued that disclosure of the report would mean that it would immediately lose its status as confidential. The developer would be unable to limit the extent to which the confidential information was circulated to the public in

relation to any development project which it may choose to be involved with across the UK, thereby arguing that the adverse effects are not limited to this specific project, but would create an unfair business environment within which the developer would be required to operate more generally.

51. The developer went on to argue that the full extent of the adverse consequences cannot be entirely and accurately predicted, concluding by stating that the disclosure of the report would “inevitably create adverse consequences and has a real possibility of creating several adverse consequences”.
52. The Council has stated that, in its view, whilst the financial viability tables at the end of the report are the most sensitive, the body of the report refers to these figures as well as giving an explanation of the commercial rationale behind the developer’s approach, and it is therefore considered that disclosure of any part of the report would have an adverse affect.
53. In respect of the remainder of the report therefore, the Commissioner considers that the Council has provided very little in the way of specific arguments to support its application of regulation 12(5)(e) to the withheld information. Whilst the Commissioner accepts the arguments put forward by the Council at paragraph 52, that the main body of the report provides the rationale behind the developer’s approach, the Commissioner does not consider that the Council has gone on to make the direct link to explain why, specifically, disclosure of the main body of the report would have an adverse effect.
54. The Commissioner considers that the Council has not adequately shown why disclosure of the remainder of the report would have an adverse effect on the interests of the developer in question. The Commissioner therefore considers that it has not been demonstrated that the exception at regulation 12(5)(e) is engaged in respect of the main body of the report.

Would the confidentiality be adversely affected by disclosure?

55. The Commissioner considers that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available and would also inevitably harm the legitimate economic interests which have been identified.
56. For the reasons set out in this decision notice, the Commissioner has concluded that the exception is not engaged in respect of the build costs, other financial information, or the main body of the report. This is because the Commissioner is not persuaded that there are legitimate

economic interests which require the protection of confidentiality. Because the exception is not engaged in respect of this information he is not required to consider the public interest test in relation to its disclosure.

57. In relation to the property valuation information, the Commissioner considers that the first three elements of the test cited at paragraph 19 of this notice have already been established. The Commissioner therefore considers that disclosure of the valuations into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests which have been identified. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the valuations.

Public interest test

58. As stated in paragraph 18 above, even if regulation 12(5)(e) is engaged, regulation 12(1)(b) provides that the information must still be disclosed unless "in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".
59. The Commissioner has therefore gone on to consider whether in the case of the valuations, the public interest in maintaining the exception outweighs the public interest in disclosure of this information. In doing so he has given consideration to the detriment that disclosure would cause to the economic interests of the parties involved and the extent to which there is a wider public interest in preserving the principle of confidentiality. Whilst there is an inherent public interest in preserving confidentiality the Commissioner is cautious about placing significant weight on the generic argument. In the context of the exception at 12(5)(e) he considers that arguments concerning the undermining of confidentiality will carry more weight when related to the specific circumstances of the case.

Public interest arguments in favour of disclosing the requested information

60. The Commissioner recognises the general public interest in furthering the understanding of and participation in the public debate on issues of the day and the promotion of accountability and transparency in decision-making and in the spending of public money.
61. The Council identified a public interest in the openness and transparency of planning decisions, arguing that the public have a clear role in the planning process; both in supporting and objecting to applications, and

that in order for the decision-making process to be an informed one, all parties should have access to relevant material.

62. The Council also recognised that in this particular case, the revised application was contrary to various policies in the Local Plan, and therefore permission should have been refused unless material considerations indicated otherwise. In this case, the “material considerations” consisted of the withheld report.
63. The developer made further comparisons between this case and *Bristol* (as referenced in paragraph 25 above), arguing that since the development in this particular case is not owned by the Council and is not a listed building in a conservation area, the public interest in disclosure is at a lower level than that identified in *Bristol*.
64. The developer concluded by acknowledging the public interest in disclosure given the presumption contained within the EIR.
65. From the correspondence sent from the complainant to the Council, it is clear that, in the complainant’s view, the report should have been made publicly available as part of the normal planning process, thereby supporting his argument in favour of the public interest in disclosure of this information. The complainant also made reference to the fact that this decision was contrary to elements of the local plan, and described as a “material consideration” in the Council’s decision to approve the application for planning permission for the revised scheme.
66. The complainant also made reference to the necessity for public authorities to act in a ‘transparent’ manner, citing relevant parts of the Local Government (Access to Information) Act 1985.

Public interest arguments in favour of maintaining the exception

67. The Council provided numerous arguments in favour of maintaining the exception; these are listed below for ease:
 - a. The report contains specific information based on actual financial and commercial information which would adversely affect the developer.
 - b. There is a public interest in developers being able to submit information to the Council on a confidential basis, without fearing that the information will have to be disclosed to the public.
 - c. Not every piece of commercially sensitive information provided in confidence to a local authority should be disclosed to the public on request.

- d. The development in this case is not owned by the Council, and does not involve a listed building or a development in a conservation area. Also the potential impact of the revised development would arguably be less, as planning permission for development of the site had already been given for the previous scheme.
 - e. Appropriate development which can be permitted, taking into account all material considerations, should be allowed – the Council explained that the district has a large requirement for housing, which this development would contribute towards. The report in question was submitted to the Council on a confidential basis and if the Council had not agreed to accept the confidential report, the application might not have been submitted at all and the site could have remained undeveloped. As an alternative, the application might have been submitted without a viability report, meaning that the application may have been refused, again leading to the loss of this development opportunity.
 - f. The Council argued that developers should not be prevented from pursuing legitimate development opportunities, provided that the officers and the committee (who consider, report on and determine the application) have sufficient information to reach a decision on it. In this case sufficient information was available and officers were able to recommend approval with the benefit of having seen the report.
68. The developer also provided its view on the public interest in maintaining the exception:
- a. The developer made reference to the position confirmed in the Tribunal's decision in *Bristol*, that "there is of course an inbuilt public interest in maintaining commercial confidences". The developer argued that the initial indication and continued restatement of the fact that the report was being provided in confidence was important in this case. The developer argued that the report in this case contained pricing information relevant and specific to it and to the development and the houses within it, in stark contrast to the hypothetical information which formed the viability report in *Bristol*.
 - b. The developer made mention of the point in *Bristol* that it may be possible for a viability report to be constructed in a manner which does not reveal commercially sensitive information. The developer argued that such restructuring of reports may not always be possible and that in this case the report was constructed to include entirely commercially sensitive information

and disclosed in confidence on the basis that the confidence would be maintained. Any reworking of the report would involve heavy redaction, likely to make it unrecognisable, and therefore for the public interest in it to be limited.

- c. The developer also made mention of another decision by the Commissioner, which held that the protection of financial information was necessary, and that the disclosure of commercially sensitive information concerning the developers pricing breakdown would unfairly benefit competitors if disclosed into the public domain. The developer made mention of the Commissioner's point that "there is a strong public interest in maintaining a fair and competitive business environment", contending that disclosure of the report in this case would upset the "business environment", disadvantaging the developer and adversely affecting the public interest.

Balance of the public interest arguments

The Council's position

69. Both the Council and the developer provided an explanation of the balance of the public interest arguments. The Council acknowledged the importance of the report in the planning decision. However the Council attached significant weight to the nature and derivation of the information; which was based on actual, not hypothetical, information; and the adverse impact of disclosure on the developer. The Council also considered the importance of developers being able to submit reports in future on a confidential basis without fear of disclosure. In the Council's view, planning permission had already been granted for the previous scheme, and therefore the decision was about whether a revised scheme should be permitted, rather than whether as a matter of principle the site should be developed at all. In conclusion, the Council's view was that these factors outweighed the factors in favour of disclosing the information.

The developer's position

70. In balancing the public interest arguments, the developer's view was that the public interest in maintaining confidentiality substantially outweighed the public interest in disclosure, in accordance with the approach adopted by the Tribunal in *Bristol*. The developer maintained that disclosure of such confidential information would inevitably lead to significant economic loss and potential damages to the developer.

The Commissioner's position

71. The Commissioner is mindful of the fact there will always be some inherent public interest in preserving confidentiality, but the Commissioner will be cautious about placing significant weight on this generic argument. The Commissioner has taken into account the presumption in favour of disclosure provided in regulation 12(2) of the EIR.
72. The Commissioner is of the view that there is generally a strong public interest in public authorities being accountable for the decisions they made and the money they spend.
73. The Commissioner considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure.
74. In this case, the Commissioner considers that there is a further strong argument in favour of disclosure. As has been pointed out by both the developer and the Council, the revised application for planning permission meant the contravention of various local policies. Clearly the public interest in why this decision was made by the Council, and the fact that the report in question was viewed as a "material consideration" in its decision, is weighty. However, the Commissioner is considering the public interest specifically in relation to the valuations, since he has found that the exception is not engaged in respect of the remainder of the report. The Commissioner considers that disclosure of the valuations would not augment the transparency of the Council to any significant degree.
75. The Commissioner is also persuaded by the Council's argument, in paragraph 67d above, where it points out that the development is not owned by the Council. Whilst the Commissioner accepts the public interest in the decision that was made by the Council in this case, he considers that this public interest is lessened by the fact that the development is not owned by the Council, and so this case does not involve the spending of public money.
76. For the reasons set out above, the Commissioner is therefore of the view that the public interest in maintaining the exception outweighs the public interest in disclosing the valuations. Therefore the Commissioner is satisfied that the Council correctly withheld the valuations in reliance on the exception under regulation 12(5)(e) of the EIR.

Procedural Requirements

Regulation 5

77. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
78. As the Commissioner has concluded that some of the information requested was not exempt by virtue of regulation 12(5)(e), he considers that the Council breached regulation 5(1) in failing to make this information available on request, and regulation 5(2) for failing to make it available within 20 working days following receipt of the request.

Regulation 14

79. Regulation 14 of the EIR requires a public authority to inform a complainant in writing as soon as possible and no later than 20 working days from the date of the request if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (and appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner.
80. Whilst the complainant's initial request of 19 June 2010 was not treated as a formal request for information under the Act or the EIR, the Commissioner considers that the subsequent treatment of the request suggests that the Council's response of 4 August 2010 could arguably be its formal response. In a letter to the Commissioner on 24 June 2011 the Council accepted this conclusion.
81. Given the agreement set out in paragraph 80 above, the Council initially failed to consider the request under the EIR. As such the Commissioner concludes that the Council breached regulations 14(1), 14(2) and 14(3) of the EIR for failing to issue a refusal notice no later than 20 working days after receipt of the request stating the exception being relied on and the matters considered in reaching its decision with respect to the public interest under regulation 12(1)(b).

The Decision

82. 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 was entitled to rely on the exception at regulation 12(5)(e) in relation to the valuations contained within the report and the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

- The Council incorrectly relied on the exception at regulation 12(5)(e) in relation to all other withheld information contained within the report.
- The Council breached regulation 5(1) and 5(2) in relation to the information that the Commissioner has concluded not to be exempt under regulation 12(5)(e)
- The Council breached regulation 14(1), 14(2) and 14(3) for failing to issue a proper refusal notice under the EIR within 20 working days.

Steps Required

84. The Commissioner requires the public authority to take the following steps to ensure compliance with the Regulations:

- To disclose the build costs, other financial information and the main body of the report. A full list of this information is contained within the confidential annex.

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

Failure to comply

86. 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

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

88. 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.

89. 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 28th day of September 2011

Signed

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

Legal Annex

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 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 - Exceptions to the duty to disclose environmental information

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 –

- (a) international relations, defence, national security or public safety;

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (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; or
- (g) the protection of the environment to which the information relates.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.