

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

Decision Notice

Date: 10 January 2011

Public Authority: Doncaster Metropolitan Borough Council
Address: Floor 1
The Council House
College Road
Doncaster
DN1 3AJ

Summary

The complainant asked for internal emails sent to or by named council officers relating to a valuation. Doncaster Metropolitan Borough Council ("the Council") refused to provide any of the emails it held on the basis that they were excepted under regulations 12(4)(e), 12(5)(b), 12(5)(e) and 13(1) of the Environmental Information Regulations 2004 ("the EIR") and the public interest favoured withholding the information. During the Information Commissioner's investigation, the Council withdrew its reliance on regulation 12(5)(b) and identified that it held some information that it did not consider was excepted. The Information Commissioner ("the Commissioner") found that regulation 12(4)(e) was engaged in respect of all the withheld information but that the public interest favoured disclosure of the majority of it. He found that part of the contents of one email relating to a particular subject had been correctly withheld using this exception. The Commissioner also found that some information was excepted under regulation 13(1). He did not find it necessary to consider regulation 12(5)(e) as he found that some of this information was excepted under regulation 13(1) and the remainder had been correctly withheld using regulation 12(4)(e) and the public interest favoured maintenance of the exception. He found breaches of regulation 5(1), 5(2) and 14(2) and requires the disclosure of the relevant information within 35 days.

The Commissioner's Role

1. The 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 Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

Background

2. Since 2005, the Council has been part of a joint venture company with Arena Leisure to manage the facilities at Doncaster's Town Moor racecourse. This company is called Doncaster Racecourse Management Company ("DRMC"). This company was formed to deliver the major development of Doncaster Racecourse and Exhibition Centre. DRMC held the title to the racecourse through a development agreement on the understanding that upon successful completion of the development, they would be granted a long term lease to manage and operate the new facilities. DRMC intended to enter into another Development Agreement with Doncaster Bloodstock Sales ("DBS") to allow it to operate a new Doncaster Bloodstock Sales facility on the site with a long term lease also granted to them upon successful completion of the development. As part of the above development agreement, DBS required an additional piece of land. This land was public space owned by the Council. On completion of the development, DRMC and DBS signed a long term lease.
3. The request in question concerns a valuation of the additional area of land described above. The valuation was carried out by an external company and formed the basis for determining the value of the subsequent section 106 agreement under the Town and County Planning Act 1990. It also formed the basis for assessing whether the terms which had been agreed in principle for the site were below the best reasonably obtainable. The Council has clarified that it was not the intention to use the valuation to revisit the negotiations that had already taken place in respect of the price to be paid by DBS.

The Request

4. On 23 October 2008, following correspondence with the Council, the complainant wrote to the Council and requested information in the following terms:

"Many thanks for sending the report. Now it has been published, the Council can forward the internal emails regarding DBS requested under several FOI requests earlier this year".

5. On 20 November 2008, the Council replied referring to the complainant's request "for copies of the email communications sent and received by [names of two council officers] in relation to the DBS valuation". It stated that the Council required more time to respond and would aim to respond by 4 December 2008.
6. The complainant replied on the same day expressing dissatisfaction. He pointed out that the Council had not explained why further time was required. The complainant stated that if he did not receive a response the next day, he would complain to the Commissioner. The complainant also took issue with the scope of his request as set out by the Council. He stated that his requests covered emails from "various staff" although he did not specify which staff members he was referring to.
7. The Council responded on 2 December 2008. It referred to the request as being for "copies of emails sent and received by various staff in relation to the valuation of the DBS site". It confirmed that it held emails falling within the scope of the request. It explained that it considered that the request fell under the ambit of the EIR rather than the FOIA. It then went on to explain that it believed that the emails were excepted under the EIR because the exceptions under regulation 12(4)(e), 12(5)(b), 12(5)(e) and regulation 13(1) were engaged. It provided some rationale for applying the exceptions and set out its considerations in respect of the public interest test associated with the first three exceptions.
8. The complainant replied on 5 December 2008 expressing dissatisfaction with the refusal. He was particularly dissatisfied with the fact that the Council had applied the EIR when its previous refusals to provide the information had been made under section 31 of the FOIA. The complainant also made further information requests that are not the subject of this complaint.

9. The Council replied on 23 December 2008. It stated that it had decided to maintain its position, although the Council then went on to cite 12(1)(b) (which is not an exception), 12(5)(c) and (d). The remainder of the internal review concerned the other requests made that are not the subject of this complaint.
10. Having considered the above, the Commissioner noted that the actual request referred to earlier requests. However, the nature of the previous requests had, unfortunately, not been clearly set out in either the complainant's or the Council's correspondence. Before the Commissioner began his investigation, he spent some time trying to establish the nature of the previous requests that had been made to the Council. He has set out his understanding of the previous relevant correspondence below.
11. On 7 April 2008, the complainant wrote to the Council and requested information in the following terms:

"Please provide the information the Council holds on the valuation of the new DBS site under the terms of the FOI Act. This should include copies of relevant documentation including that generated by 3D".
12. The complainant wrote to the Council again the next day clarifying that he intended the above request to include "copies of electronic communications created by staff at 3D or the council in relation to the valuation"
13. On 8 May 2008, the Council responded and stated that it wished to rely on the exclusion under section 12 of the FOIA. It asked whether the complainant was able to narrow his request.
14. The complainant replied on the same day challenging its reliance on section 12. He stated that according to 3D's website, the officers dealing with the matter were [and he named three officers]. The complainant asked whether the Council's valuation department had been consulted about the site and if so, who had dealt with the matter.
15. The Council replied on 12 May 2008. It referred to a telephone conversation with the complainant as follows:

"During our telephone conversation you pointed out that you would like the search to be conducted in respect of the named officers in the 3D department and Strategic Asset Management department. I can confirm that the search has been organised and we hope to respond to you within the next week. I can also advise you that the officers that

dealt with the valuation from the Councils SAM department are [names of two officers]".

16. The complainant replied on the same day. He stated that the Council should have asked him earlier whether he could narrow his request. He also made a repeated information request for internal emails sent or received by the two named officers in the SAM department, and he requested internal emails relating to the handling of his information requests by a particular council officer.
17. There followed various items of correspondence between the Council and the complainant. The Council provided the emails relating to the handling of the complainant's requests however, in respect of all emails relating to the DBS valuation, the Council relied on the exemption under section 31 to withhold the emails that had been requested by the complainant. It stated that the public interest favoured withholding them.

The Investigation

Scope of the case

18. On 10 December 2008, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically expressed concern about the fact that the Council had previously handled his request under the FOIA and now it was being refused under the EIR. The complaint was at this time not considered to be valid by the Commissioner because an internal review had not been completed. However, once the Council had provided a copy of its review to the Commissioner, the complaint was accepted.
19. Once the complaint had been allocated, the Commissioner asked the complainant to provide copies of the several previous requests referred to in his request as the Commissioner felt that this was necessary to understand the precise scope of the request. However, the complainant refused to provide this information or confirm the scope of his complaint as he felt that this was already clear. Having investigated, the Commissioner wrote to the complainant on 5 November 2009 setting out his understanding of the scope of the request as follows:
 - All internal emails relating to the valuation of the new DBS site sent or received by

- (a) the following officers in the Council's Asset Management Department [name and job roles of two officers]
 - (b) the following officers in the Council's 3D department: [names of three officers]
20. The Commissioner informed the complainant that unless he had anything to add, he would proceed on the basis that the above accurately reflected the information he required. No correspondence was received from the complainant indicating that he did not accept that the Commissioner had accurately set out the nature of the information required.
21. In view of the above, the Commissioner's investigation was limited to considering whether the Council had correctly refused to provide the information requested as described in paragraph 19.

Chronology

22. On 5 August 2009, the Commissioner sent a standard letter to the Council asking for information to help him to investigate the complaint.
23. On 21 September 2009, the Commissioner contacted the complainant. The Commissioner set out his understanding of the complaint and he asked for copies of the several previous requests referred to in the request.
24. The Council replied to the Commissioner on 22 September 2009. It provided copies of the withheld information along with a table setting out why the information had been withheld. It contained exceptions under the EIR however the Council also explained that it had set out in the alternative exemptions under the FOIA as well. The Council explained why it was of the view that the EIR applied. It elaborated on its reasons for withholding the information. The Council also explained that it was no longer seeking to rely on the exception under 12(5)(b) as it felt that it had applied this exception to information that was not within the scope of the request.
25. From this time until 28 October 2009, the Commissioner was in contact with both parties, but mostly the Council, trying to establish the nature of the requests that were referred to in the request on 23 October 2008.
26. On 4 November 2009, the Commissioner telephoned the Council and asked it to confirm whether 3D was an internal council department. The Council confirmed that it was.

27. On 5 November 2009, the Commissioner wrote to the complainant setting out his understanding of the scope of the request based on the Council's responses. He informed the complainant that unless the complainant had anything to add, he would proceed on the basis that the information required was as described in the Commissioner's letter.
28. Following telephone conversations with the Council, on 22 December 2009, the Commissioner wrote to the Council to set out the scope of the request. At this point he set out his provisional view that the request had been correctly handled under the EIR. As significant work had been undertaken to clarify the scope of the request since the Council's original response, the Commissioner asked the Council to provide a new bundle of withheld information to the Commissioner. The Commissioner also asked for background information to help him to understand the context of the request and in particular, he asked for information about the valuation that was the focus of the request. The Commissioner also asked for a copy of the report that the complainant had referred to in his request on 23 October 2008 for background. In addition, the Commissioner asked the Council to clarify the inconsistencies between the exceptions it had cited in its response to the complainant and those it had cited in its internal review.
29. The Council responded on 15 January 2010. It provided a new bundle of withheld information and responded to the Commissioner's other enquiries. It also provided a copy of an external report that had been commissioned by the Council. This was entitled "Doncaster Bloodstock Sales: Report of the External Review of the Development Process" and was dated October 2008. For clarity, it appears that the fact that this report had not been completed was the reason why the complainant had been refused access to the emails prior to this request under section 31 of the FOIA.
30. From 2 February 2010 until 10 February 2010, the Commissioner and the Council discussed the withheld information over the telephone. Following these conversations, it was established that the new bundle did not contain all the information that fell within the scope of the request. The Council explained that it had supplied all internal emails between the named officers and not all internal emails sent to or by the named officers. It stated that it required more time to prepare a new bundle.
31. On 23 March 2010, the Council responded and provided a new bundle of withheld information along with a table setting out what information was excepted and why. The Council also explained that there was a small amount of information which it was able to disclose. It also referred to the fact that it had not included in the bundle internal

emails that it held which had various reports attached to them. It explained that some of the reports were in draft sent for comment and some emails simply had a final report attached to them. The Council stated that it had considered this information and was of the view that it was already in the public domain.

32. On 11 May 2010, the Commissioner wrote to the Council asking it to provide further supporting arguments in respect of the exceptions claimed. The Council responded on 9 June 2010 and provided further supporting arguments and evidence. In addition, the Council withdrew its reliance on regulation 12(5)(e) in respect of a number of emails.
33. The Commissioner wrote to the Council again on 12 July 2010 to explore in further detail some of its arguments in favour of withholding information under regulation 12(5)(e) and 12(4)(e).
34. The Council replied on 26 July 2010 and responded to the Commissioner's enquiries.

Analysis

Substantive procedural issues

Was the Council correct to handle the request under the EIR?

35. The Commissioner's view is that the Council correctly determined that the request should be handled under the EIR. Any information which meets the technical definition set out in regulation 2 of the EIR is classed as "environmental information". The relevant wording has been set out in the Legal Annex at the end of this Notice. The valuation in this case clearly concerns plans and measures that would affect the land. The relevant plan is the construction of a Doncaster Bloodstock Sales facility on the land and the relevant measure is a section 106 agreement. As described in the Background section of this Notice, the valuation was used to inform the section 106 agreement. The Commissioner has therefore taken the view that the emails requested represent information on plans and measures affecting the elements of the environment. As such, they fall within the scope of regulation 2(1)(c).

What information was held?

36. The Council identified that it held a number of emails including attachments relating to the request. This information was not provided

to the Commissioner in the bundle he considered because the Council advised the Commissioner that it had not included information that it believed was already publicly available because the information was included in the external report that was published in October 2008.

37. The Council also advised the Commissioner that there were also a small number of emails which the Council now felt could be disclosed save for redactions of personal data. The Council also confirmed that there were also two emails that it believed could be disclosed upon completion of the Commissioner's investigation. This information, and the information discussed in the paragraph above, has been considered further in paragraph 83.
38. Other than the above, the Council held information, some of which it believed contained information that was excepted under regulation 13(1) and 12(5)(e). The Council also felt that regulation 12(4)(e) applied to this information and all the remaining emails.

Regulation 13(1) – personal data

39. This exception provides that any personal data that is not the personal data of the complainant will be excepted from public disclosure under the EIR if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").
40. The Council informed the Commissioner that it was seeking to withhold the following information under this exception:
 - The names, job titles and contact details of council staff members (classed as junior by the Council) from all emails, including a private email address
 - The entire email where the content would reveal that the email was sent by [names of two staff members mentioned in the request]
 - Names of third party individuals who do not work for the Council
 - Name of a council employee who was not involved in the transaction
41. One of the third party individuals whose name was withheld by the Council under regulation 13(1) is a friend of one of the officers concerned. One of the emails reports a conversation between the two individuals and the Council applied regulation 12(5)(e) in respect of this information. However, the Commissioner has decided that it is more appropriate to consider the details of the conversation under regulation 13(1). If he is satisfied that this information is excepted

under regulation 13(1), it will not be necessary to consider the applicability of regulation 12(5)(e) to this particular information.

Is the withheld information personal data?

42. "Personal data" is defined in the DPA as information relating to a living individual who could be identified.
43. In relation to the first, third and last bullet point, the Commissioner accepts that a person's name, job title and personal contact details represent personal data because an individual is identifiable from such information.
44. In relation to the second bullet point, the Commissioner accepts that the content of the emails is likely to identify the two officers concerned for a number of reasons including the fact that the request specifically asked for emails sent or received by the officers as well as the fact that they work in small departments and could also be identified by the external company that conducted the valuation.
45. In relation to the details of a conversation with one of the officers' friends, the Commissioner accepts that this is personal data because the two individuals concerned can be identified.

Would disclosure contravene the first principle of the DPA?

46. The first principle of the DPA is most relevant in this case and provides that personal data should only be disclosed in fair and lawful circumstances.

Was it fair for the Council to disclose the information?

47. In considering whether a disclosure is fair under the first principle, the Commissioner considers that it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject, with principles of accountability and transparency.

Reasonable expectations

48. The Council has argued that the names, job titles and contact details of staff they classed as junior officers should be withheld because the officers would not have expected this information to be disclosed. In relation to two of the officers, it has argued that the content of the emails themselves should be withheld because the officers concerned would be identifiable from the contents. The Council has also pointed out that not all of the staff involved had "public-facing" roles. In

addition, the Council raised the point that its Monitoring Officer had felt that some of the emails fell within the scope of the Council's whistleblowing policy and that this gave staff a reasonable expectation that they could raise concerns in confidence.

49. In line with the Commissioner's guidance, it is generally accepted that the more senior a person is and the more involvement they have with the public, the greater their expectation of accountability and transparency should be in relation to the work they carry out for the Council. However, the Commissioner would point out that this is only a general principle and does not justify a "blanket approach" being taken in respect of correspondence involving staff members that are considered to be junior or not public-facing. All public authority staff should have some expectation of accountability and transparency by virtue of their roles and the fact that they are all subject to the FOIA and the EIR.
50. In this case, the Commissioner has taken into account that the officers were significantly involved in a transaction that related to an important development in the area and the sale of land affecting the environment, and that there would be a particular expectation of disclosure in relation to information relating to issues affecting the environment and also planning. He has also had regard to the fact that the transaction involved public money and that it is clear that a number of concerns appear to have been raised about the transaction as is evident from the fact that the Council felt it was necessary to publish an independent report on the issues.
51. Further, although the Council stated that a number of the emails had been deemed as falling within the scope of its whistleblowing policy, the Commissioner was not persuaded that the emails should be regarded as "whistleblowing" because he did not consider that the nature of the comments should warrant the level of protection afforded to whistleblowers. Rather it appears that the emails involve officers expressing concerns about a transaction in line with their particular job roles and it is not the view of the Commissioner that any concerns of this nature expressed by staff should be treated as "whistleblowing".
52. Having considered the circumstances above, the Commissioner has taken the view that in this case, it was not reasonable for staff members involved in this transaction to expect that information identifying them and their views about a work based issue would not be disclosed under the FOIA or the EIR. The only exception to this that the Commissioner has found is in respect of the private email address mentioned by the Council. As the email address was private rather

than a work email address, the Commissioner considers that there would not have been a reasonable expectation of disclosure.

53. The Council also advised the Commissioner that it was seeking to withhold a number of third party names involving individuals not working for the Council apart from one exception involving a council employee who it claimed was not involved in the transaction. It presented the Commissioner with a list of these persons.
54. The Council advised that it wished to withhold the name of an employee from the external company that carried out the valuation and the name of the managing director of DBS. It stated that it did not believe these individuals would have expected disclosure. The Commissioner notes that the Council provided no supporting argument to justify this statement. Further, the Commissioner does not accept that these individuals ought to have reasonably expected confidence in view of the nature of the transaction they were involved in.
55. As well as the above, the Council sought to withhold the name of an individual who submitted a complaint to the Council on a separate and unrelated matter and his name was mentioned in passing. In these circumstances, the Commissioner accepts that the named individual would not have reasonably expected disclosure of his name.
56. The Council also sought to withhold the name of a council employee who it said was not involved in the transaction. In the Commissioner's view, this individual was involved in the transaction if relevant information was sent to them about the matter and as such, the Commissioner believes that this individual should expect disclosure of their name.
57. Finally a passing reference was made to a family member of one of the officers and the name of a friend. The Commissioner accepts that these individuals would not have expected disclosure. In relation to the details of the conversation between the officer and his friend which the Council sought to withhold under regulation 12(5)(e), the Commissioner accepts based on the nature of this conversation that there would not have been a reasonable expectation of disclosure on the part of the friend at least.

Consequences of disclosure

58. The Council explained to the Commissioner that it felt that disclosure of the emails may damage the reputation of the officers concerned. The Council did not elaborate on how this may occur. It is not clear to the Commissioner how officers raising concerns, that appeared to be

legitimate concerns to them at the time, could damage their reputations. On the contrary, it suggests a genuine desire to carry out work properly and thoroughly. Having considered the emails, the Commissioner appreciates that there may be comments in the emails that may prove embarrassing because of the very free and frank nature of them. However, the Commissioner does not consider that this factor indicates that the consequences of disclosure for the individuals would be significant in this case, in terms of any further impact. The Commissioner again notes that the matter relates to their job role.

59. It was not apparent to the Commissioner that disclosure in relation to the other individuals concerned would have any specific adverse consequences, apart from in relation to the private email address, the name of the person who complained to the Council, the name of the family member of one of the officers and his friend as well as details of their personal conversation. The Commissioner's view is that these disclosures would represent an unwarranted invasion of privacy as these names and details had nothing or little to do with the transaction and for the most part were simply mentioned in passing or were private in nature. Disclosure could potentially be distressing for that reason.

Balancing the rights and freedoms of the data subject with the legitimate interests of the public

60. Having considered the above arguments, the Commissioner is of the view that it would be fair to disclose the names, job titles, and work contact details of the Council employees involved in the transaction. He also considers that it would be fair to disclose the content of the emails. However, he considers that disclosure of the private email address would be unfair and he therefore finds that regulation 13(1) was engaged in respect of this information. In the Commissioner's view, it would be fair to disclose the details of the third parties involved, with the exceptions of the name of the individual who submitted an unrelated complaint to the Council, the name of one of the officer's family members and his friend as well as details of the conversation with the friend. The Commissioner considers regulation 13(1) was engaged in respect of this information.

Is disclosure necessary?

61. In the paragraph above, the Commissioner has specified what information he considers it would have been fair to disclose. The Council has argued that it was not necessary to disclose this information in this case because the external and independent report it

commissioned into the concerns that were raised about the transaction meant that it had been sufficiently transparent. If this was the case, disclosure would not satisfy schedule 2 condition 6 of the first Data Protection Principle. However, the Commissioner's view is that where particular individuals have been involved in an important transaction that appears to have generated a significant amount of concern, it is important that the detail of the transactions should be understood by the public. Also, as explained above, the Commissioner's view is that he has not been presented with convincing arguments that disclosure would be unfair and therefore constitute unwarranted processing. Disclosure in this case may help the public to understand more about the problems discussed in the report and help to generate confidence in the report's conclusions. He therefore considers that regulation 13(1) was not engaged in respect of the information that it would have been fair to disclose, because it was also necessary to disclose this information.

Regulation 12(4)(e) – Internal communications

62. This exception is "class-based" so any information that is an internal communication" will be covered by this exception. Communications within one public authority will constitute internal communication for the purpose of this exception. Communications between a public authority and a third party will not constitute internal communications for the purpose of this exception except in very limited circumstances. The definition of a communication is broad and will encompass any information intended to be communicated to others or to be placed on file where it may be consulted by others.
63. The Council confirmed to the Commissioner that all of the emails being withheld under this exception are emails between council employees. The Commissioner is therefore satisfied that all the emails between council employees fall within the scope of this regulation. As the Commissioner was satisfied that the exemption was engaged, he went on to consider the public interest test associated with this exemption.

Public interest test

64. Naturally, a large amount of information held by public authorities will be "internal communications" and the scope of this exception is therefore quite broad. However in practice it is limited by the public interest test and consideration of what harm would result if the information was disclosed.

Public interest arguments in favour of disclosing the requested information

65. The Commissioner firstly considered the Council's refusal notice dated 2 December 2008 in which it had concluded that the public interest in maintaining the exception outweighed the public interest in disclosing the information. In its opening letter to the Commissioner dated 22 September 2009, the Council confirmed that it stood by this decision and largely made the same points that had been mentioned in the refusal. In particular, it confirmed that it felt the public interest in disclosure of the information was as follows:

"1. Providing a better understanding of the manner in which decisions were reached by the Council which would promote greater transparency and accountability for the action taken.

2. Enabling the public to understand, contribute to and challenge any decision and the process by which they were reached.

3. Improving confidence in the manner decisions are taken and to reassure the public that all relevant information has been taken into account when determining the particular course of action that has been taken".

Public interest arguments in favour of maintaining the exemption

66. The Council balanced the above factors against the public interest arguments in favour of withholding the information which it described as follows:

"1. Disclosure would reveal the private thinking thoughts of officers of the Council and would deter them from freely and frankly discussing their views in the future.

2. This would have a chilling effect on internal debate and the quality of decision-making. Officers would be more concerned about 'covering their back' than exchanging honest opinion and comment.

3. A lot of the information about the land and its valuation is already in the public domain though published reports and committee papers. Disclosure of the internal e-mails would not increase the public's understanding of the issues.

4. The whole transaction and valuation issues have been the subject of an external independent report which has been published. The e-mails would not add anything further".

67. The Council explained that the nature of the correspondence meant that it was particularly likely to create a chilling effect in the future and this in turn, would prejudice the Council's commercial interests due to the nature of the officers' work.
68. The Council also explained that when the correspondence came to the attention of the Council's Monitoring Officer, it was felt that some of the emails fell under the scope of the Council's whistleblowing policy. It explained that the existence of such a policy is to ensure that officers have the ability to express concerns that they may have about matters they consider to amount to improper conduct, unlawfulness or practice falling below established standards. The Council stated that it felt disclosure of the emails in this case would damage staff confidence in its whistleblowing policy.
69. The Council specifically acknowledged that the public interest in withholding some of the information was less in the light of the content of the information and it even stated that in the case of some of the emails, when viewed in isolation, the public interest would favour disclosure. However, the Council felt that the correspondence should be read as a whole. The Council explained that it felt it would be relatively easy to identify the author and recipient of the emails from their content.
70. The Council also explained that in light of the timing of the request, the public interest favoured continuing to withhold the correspondence as a whole. It confirmed to the Commissioner that the valuation had been completed and acted upon by the time of the request. However, it stated that the "wider issues" were still under consideration. It pointed out that by the time of its response to the request it had only recently received the external report into the valuation that was published in October 2008.
71. Overall, the Council took the view that the public interest had been sufficiently met by the publication of the independent report that it had commissioned.

Balance of the public interest arguments

72. As acknowledged by the Council, disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

73. Regarding the content of the emails, the Commissioner can appreciate the Council's view that it is important that its officers are able to express their views in relation to valuation exercises freely and frankly. The Commissioner accepts that it is generally recognised that in some circumstances, public authorities need time and space to fully explore all the relevant issues to help them to make fully-informed and well-considered decisions. He also appreciates that if this was not the case, it could potentially have an adverse impact on the Council's ability to manage its affairs and effectively manage transactions of this nature.
74. For the reasons already explained in paragraph 51, the Commissioner was not persuaded that it was appropriate to designate the emails as "whistleblowing" under the Council's internal policy. For this reason, he does not consider that disclosure in this case would damage staff's confidence in the policy. In different circumstances, confidentiality may be appropriate.
75. The Commissioner was also not persuaded by the Council's argument that although, by its own admission, the public interest favoured disclosure in respect of some of the emails, it should not view this information separately from the entire exchange of correspondence. Although the information forms part of an exchange, it was not apparent to the Commissioner why this information could not be disclosed if the Council was satisfied that the public interest favoured disclosure. The Council appears to have been particularly concerned about identification of the officers concerned although the precise reason why this prevented disclosure of all of the emails was not clear.
76. The Commissioner has had particular regard in this case to the timing of the request. He notes that the valuation had been completed and acted upon and that the Council had commissioned a full report into the concerns. Although the Council has stated that "wider issues" were still being considered at the time of the request, it did not elaborate on this point despite having multiple opportunities to present arguments to the Commissioner in support of this exception. Although the Commissioner can appreciate that the Council would require time and space to discuss the issues while the valuation exercise was ongoing, in relation to the majority of the information he was not presented with compelling arguments that there was a need for a confidential space to continue after the matter had been effectively concluded or that disclosure at the time of the request would have created any "chilling effect" more significant than that which may already exist naturally following the introduction of the FOIA and the EIR.
77. The Commissioner also considered that the circumstances of this case involve the sale of land in connection with a significant development.

He has also noted that significant concerns were raised in connection with this matter. The external report commissioned by the Council deals with various concerns, including whether the valuation was properly commissioned from the external company involved and whether the correct instructions were given. Although the Council has argued that the publication of this report meant that there was no value in disclosure of the emails, the Commissioner disagrees. He considers that disclosure of the emails would have significantly enhanced transparency over the transactions in question and would have helped the public to understand more about the issues and the outcome of the report. Given that significant concerns were raised, the Commissioner's view is that more transparency and accountability in terms of allowing the public to see the actual exchanges that took place was in the public interest.

78. The Commissioner was persuaded that the public interest favoured withholding part of the contents of one email dated 1 December 2006 relating to a particular subject on the basis that the Council needed to discuss a particular issue in private. The Council also sought to withhold this information under regulation 12(5)(e) but as the Commissioner was satisfied that the information could be withheld under regulation 12(4)(e), he did not find it necessary to consider section 12(5)(e). The Council's more detailed arguments in respect of this particular information have been set out in a confidential annex to this Notice since to reveal the precise nature of the argument would reveal the information itself.
79. In view of the above, the Commissioner took the view that the public interest in maintaining the exception in the circumstances of this case did not outweigh the public interest in disclosing the information in respect of the majority of the information. However, the public interest did favour maintenance of the exception in respect of some comments on a particular subject that has been discussed in the confidential annex.

Procedural Requirements

80. The request was made on 23 October 2008 but a response was not provided by the Council until 2 December 2008. The Council therefore breached its obligation under regulation 14(2) of the EIR to issue a valid refusal notice within 20 working days of the request.
81. In relation to the exception under regulation 13(1), the Commissioner found that some information had been incorrectly withheld. This represented a breach of regulation 5(1) and 5(2) as the Council failed

to disclose this information within 20 working days of the request or by the date of its internal review.

82. In relation to the exception under regulation 12(4)(e), the Commissioner found that this exception had been correctly applied to all of the withheld information, however he did not agree that the public interest favoured withholding the majority of the information. This represented a breach of regulation 5(1) and 5(2) as the Council failed to disclose this information within 20 working days of the request or by the date of its internal review.
83. As discussed in paragraphs 36 and 37 of this Notice, the Council also held some information which it did not claim was exempted. It stated that it was willing to disclose this information and explained that much of it was considered to be publicly available in any case. As the Council did not disclose this information to the complainant within 20 working days of the request or by the date of its internal review, it breached regulation 5(1) and 5(2).

The Decision

84. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
- The Council correctly determined that regulation 12(4)(e) applied to all of the withheld information. In respect of some of this information (discussed in the confidential annex), it correctly determined that the public interest in maintaining the exception outweighed the public interest in disclosure of the information.
 - The Council correctly withheld some information using regulation 13(1) namely: the private email address of a member of the Council's staff, the name of an individual who submitted an unrelated complaint and the names of one of the officer's relatives and their friend. Although the Council did not apply regulation 13(1) to the details of the conversation that took place between the officer and his friend because it believed that regulation 12(5)(e) was engaged in respect of this information, the Commissioner has found that regulation 13(1) was engaged.
85. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The Council failed to respond to the request within 20 working days and therefore breached regulation 14(2).
- The Council incorrectly withheld information using the exception under regulation 13(1) and it therefore breached regulation 5(1) and 5(2) in respect of this information.
- Although the Council correctly determined that all of the information was excepted under regulation 12(4)(e), it incorrectly determined that the public interest favoured withholding the majority of this information. It therefore breached regulation 5(1) and 5(2) in relation to this information.
- The Council breached regulation 5(1) and 5(2) in relation to the information that it did not claim was excepted but which it did not disclose to the complainant.

Steps Required

86. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
- Disclose all of the withheld information with the exception of the information that the Commissioner has found was correctly withheld as set out in the Decision section of this Notice.
 - Disclose all the information that it did not claim was excepted including that which the Council claims was already publicly available.
87. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Other matters

89. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Scope of the request

- As noted in the Notice, the Commissioner spent some time trying to establish the precise scope of the request and this resulted in a considerable delay to the progress of his investigation. It was regrettable that none of the request correspondence contained a clear description of the request. Further, when the Commissioner initially contacted the Council, it was apparent that the Council itself was not clear about the scope of the request. The Commissioner trusts that the Council will ensure that it is clear about the scope of requests in the future. Where it is unclear, it should seek clarification from the complainant.

Internal reviews

- The Commissioner notes that the Council's internal review did not correctly cite the exceptions upon which the Council sought to rely. Its content also did not demonstrate that the issues were thoroughly reviewed. This was perhaps not helped by the fact that the Council chose to respond to another request within the letter representing its internal review of this request. The Commissioner would like to take this opportunity to remind the Council that internal reviews should not be cursory. They are intended to present the Council with an important opportunity to resolve issues before they are considered by the Commissioner. The Commissioner trusts that the Council will consider these comments and ensure that its internal reviews are sufficiently thorough in the future.

Right of Appeal

90. 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: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

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

Dated the 10th day of January 2011

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex – The Environmental Information Regulations 2004

Regulation 2(1) - Interpretation

“In these Regulations –

‘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 –

- (a) 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;
- (b) 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);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...”

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

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

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

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;