

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 January 2013

Public Authority: Cheshire East Council
Address: Westfields,
Middlewich Road,
Sandbach,
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested a copy of "Tatton Park Report pt 2". Cheshire East Council (the "council") refused the request, citing the EIR exceptions relating to internal communications, commercial confidentiality, the course of justice and intellectual property rights.
2. The Commissioner's decision is as follows:
 - The exception for internal communications is engaged but the public interest favours disclosing the information;
 - The council has not demonstrated that the exception for commercial confidentiality is engaged;
 - The exception for the course of justice is engaged but the public interest favours disclosing the information;
 - The council has not demonstrated that the exception for intellectual property rights is engaged.
 - In respect of the information where both the internal communications and the course of justice exceptions are engaged, the aggregated public interest in maintaining these exceptions does not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to the complainant.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. Tatton Park is owned by The National Trust, with whom Cheshire East has a 99-year, fully-repairing lease (formerly with Cheshire County Council). Within the constraints of the lease Tatton Park ("Tatton") is currently managed by the council as a trading account on a quasi-commercial basis, with around 800,000 visits annually and a net annual output to the local economy of £8.8m¹.
6. In January 2011 the council launched a new vision for Tatton – the "Tatton Park Vision" which set out an intention to develop the visitor experience, generate new sources of income and eliminate the need for public subsidy. It also established the aim to raise the number of annual visitors to 1 million. In fulfilling these goals the council identified the development of a new attraction for Tatton as a priority area for action and investment².
7. In February 2012 the council announced that it was working with Bure Valley Adventures Ltd ("Bure Valley") to bring an attraction – an adventure park, to Tatton.
8. There has been substantial public interest in the proposed development with local interest groups expressing concerns about its impact on Tatton itself and on local infrastructure³.
9. A planning application for the proposed adventure park – "Bewilderwood", was submitted to the council by Bure Valley in April

¹ See:

[http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000417/M00002800/AI0004749/\\$01TattonParkBoardTORreport.docA.ps.pdf](http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000417/M00002800/AI0004749/$01TattonParkBoardTORreport.docA.ps.pdf), and
[http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000283/M00003218/AI00011599/\\$TattonParkVisionPart1.docA.ps.pdf](http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000283/M00003218/AI00011599/$TattonParkVisionPart1.docA.ps.pdf)

² See:

[http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000241/M00003103/AI00011488/\\$TattonParkVisionPart1.docA.ps.pdf](http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000241/M00003103/AI00011488/$TattonParkVisionPart1.docA.ps.pdf)

³ See, for example: <http://www.knutsford.com/news/tag/bewilderwood>

2012. At the time the request was received (and at the time of writing) a decision regarding the application was pending.

Request and response

10. On 28 May 2012, the complainant wrote to the council and requested information in the following terms:

"I believe that the "Tatton Park Report pt 2" is being incorrectly restricted from public view I am therefore writing to formally request a copy.

11. The council responded on 20 June 2012. It stated that it was refusing the request, citing the exceptions for internal communications and commercial confidentiality.

12. Following an internal review the council wrote to the complainant on 19 June 2012. It stated that it was maintaining its position.

Scope of the case

13. On 23 July 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

14. The Commissioner agreed with the complainant that his investigation would look at whether the council had correctly withheld the requested information.

15. During the course of the Commissioner's investigation the council confirmed that it also wished to rely upon the exceptions for course of justice and intellectual property rights.

Reasons for decision

Regulation 12(4)(e) – internal communications

16. Regulation 12(4)(e) of the EIR states:

"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."

17. Regulation 12(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. It is only necessary to demonstrate that the information falls within the category defined by the exception.
18. However, as with all EIR exceptions, this is a qualified exception. Therefore, even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Internal Communications

19. The Commissioner considers that the concept of a communication in this context is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. An internal communication is also a communication that stays within one public authority.
20. The council confirmed that the withheld information was prepared for internal Cabinet consideration and its circulation was strictly limited on a 'need to know' basis.
21. Having considered the council's submissions and the withheld information the Commissioner is satisfied that it constitutes an internal communication and that the exception is engaged. He has gone on to consider the relevant public interest arguments.

The public interest test

22. The Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:

*"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications."*⁴

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

23. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commissioner proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes.
24. The Commissioner considers that these factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority will have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes.

Public interest in disclosure

25. In considering the public interest in disclosing the withheld information the council's submissions made reference to the underlying presumption in favour of disclosure, the general principles of openness and transparency and the significance of the substantive issue for local people.
26. In relation to the significance of the Bewilderwood project for the local population, as previously noted, the Commissioner is aware that there has been significant coverage of the matter in online blogs and local and national newspapers⁵.
27. The complainant has voiced concerns about the public expenditure associated with the Bewilderwood project, the impact on the local area and the council's dual role as planning authority and promoter of the project. The complainant has stated that disclosure of the withheld report would provide reassurance that the council is acting with propriety.
28. In support of their concerns the complainant directed the Commissioner to documents published on the council's website which make reference to the withheld information⁶.

⁵ See, for example: <http://www.knutsford.com/news/tag/bewilderwood>; <http://www.guardian.co.uk/uk/the-northerner/2012/apr/27/tatton-park-plans-residents-traffic> and <http://www.savetattonpark.co.uk/>

⁶ The complainant also directed the Commissioner to a letter sent by the council's planning department to Bure Valley's representatives which identifies concerns about potential shortcomings in the Bewilderwood planning application. Whilst the Commissioner notes the relevance of this, he has not considered it as part of his decision as the letter post-dates the time of the request and internal review and cannot be considered as a relevant public

29. The Commissioner notes one particular document, which contains the minutes of a council cabinet meeting of 1 August 2011 and, with reference to the Bewilderwood project, states:

"That Officers be permitted to, in consultation with the Portfolio Holder to complete negotiations on:

a) Heads of Terms for a Land lease of the attraction site (shown in attached plan, at Appendix 2 of the report) to a single venture company – a company with appropriate site rental conditions and turnover rent derived from visitor number levels.

b) Heads of Terms on a Loan to the single venture company including appropriate security measures and step-in rights"

30. The Commissioner notes that further reference is made to the council's expenditure in relation to the project, both actual and potential, in a response to an FOI request submitted by another applicant in June 2012⁸. Further references to the potential cost of the project "£6.5 million" appear in report submitted by Bidwells on behalf of Bure Valley.⁹ The same report also states that the Bewilderwood development is projected to provide the council with annual income of £300,000, over and above the repayment of the "loan" which is financing the project.
31. In determining whether there is a specific public interest in transparency and accountability in the facts of this case the Commissioner has considered other relevant, publically available information. In particular, the Commissioner has considered the relevance of a report published by the council's Audit and Governance Committee (the "Lyme Green report") which examined the council's practice in relation to a

interest factor. However, he notes that, if the factors were relevant at the time there is no reason why they could not to be included in the public interest analysis:

<http://doc.cheshireeast.gov.uk/NorthgatePublicDocs/07396018.pdf>

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<http://modern.gov.cheshireeast.gov.uk/ecminutes/ieListDocuments.aspx?CIId=241&MID=3630>

⁸ See here:

<http://www.whatdotheyknow.com/request/116125/response/286631/attach/2/20120601LetterToCrossen.doc>

⁹ Paragraph 4.3, page 27:

<http://doc.cheshireeast.gov.uk/NorthgatePublicDocs/07333694.pdf>

proposal to build a waste transfer station at Lyme Green Depot in Macclesfield, Cheshire¹⁰.

32. The Commissioner notes that among the key findings of the Lyme Green report include: the council began developing the site before planning permission had been granted; incurred expenditure beyond the approved budget (breaking Finance and Contract Procedure Rules) and, in awarding the relevant contract, the council did not comply with EU procurement regulations. In relation to the latter issue, the council states that the council's Contract Procedure Rules (CPRs) "...set various value thresholds at points where commensurate competition should be undertaken by officers to ensure that value for money is being achieved and that all tender opportunities are fairly and appropriately advertised to suppliers."¹¹
33. The Commissioner notes that the Lyme Green Depot matter has been widely reported in the local press and is clearly a matter of significant public concern¹². In addition to the specific cost to the taxpayer of the aborted plans for the development (the Lyme Green report estimates this to be in the region of £810, 000) the matter also raises broader concerns about the council's general practice. The minutes of the council's Audit and Governance Committee (14 June 2012) comment that "...in its efforts to develop a waste transfer facility in the north of the Borough the council has undermined local confidence in its governance arrangements."¹³
34. The Commissioner considers that the Lyme Green Depot development and the Bewilderwood project are comparable initiatives, involving significant public expenditure. The projects share other characteristics – as in the case of the Lyme Green Depot initiative, there does not appear to be evidence that the council conducted a procurement exercise in selecting a company to deliver an adventure park at Tatton.
35. The Lyme Green report also makes the following recommendations for the future practice of the council:

¹⁰

[http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000240/M00004527/AI00016585/\\$05LymeGreenAppendix1.docA.ps.pdf](http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000240/M00004527/AI00016585/$05LymeGreenAppendix1.docA.ps.pdf)

¹¹ <http://moderngov.cheshireeast.gov.uk/ecminutes/mgConvert2PDF.aspx?ID=18030>, paragraph 10.4.3.

¹² See, for example: <http://www.wilmslow.co.uk/news/article/6480/aborted-recycling-centre-costs-taxpayers-800000>

¹³ See paragraph 6.2:

<http://moderngov.cheshireeast.gov.uk/ecminutes/mgConvert2PDF.aspx?ID=18030>

The Council's Governance Arrangements must be strengthened to ensure that it complies with EU and National Legislation....

...The Council's Governance Arrangements must be strengthened to ensure that Finance and Contract Procedure Rules are complied with....

...The Council's Arrangements for monitoring capital expenditure must be strengthened to ensure that approval is obtained for the full value of a scheme prior to expenditure being incurred and that reports used to monitor expenditure are accurate and timely....

...The Council's Project Management Arrangements must be reviewed and strengthened to ensure that objectives are met, constraints are identified, tolerances defined and benefits realised. Arrangements must ensure there is sufficient evidence to support decision making and provide assurance to other stakeholders that the Council has acted responsibly...."¹⁴

Public interest in maintaining the exception

36. The council has argued that the development of an attraction at Tatton is a key priority in its Tatton Vision. Disclosure of the report would be likely to jeopardize the delivery of any future potential project, threatening the future implementation of any development policy – something which would be against the public interest.
37. The council considers that disclosure of the information at what is an early stage in the lifecycle of the project would be likely to result in potentially dangerous and misleading speculation arising. The council considers that it would find itself in the position of being unable to pave the way to improve situations or properly judge what degree of risk might be acceptable.
38. The council further submitted that, on large scale sensitive and complex issues such as this, it considers that the public interest favours councillors and senior staff having the time and space to consider policy options and risks along with the merits and wider implications before publicising a potential project. The council has argued that it is

¹⁴ See pgs. 15, 46, 47 and 12:

[http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000240/M00004527/AI00016585/\\$05LymeGreenAppendix1.docA.ps.pdf](http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000240/M00004527/AI00016585/$05LymeGreenAppendix1.docA.ps.pdf)

important that staff are uninhibited in their advice and that decision makers can have a free and frank debate on proposals and potential courses of action. The council considers that the thwarting of such processes by enforced disclosure of the report cannot be in the public interest.

39. In arguing that the public interest has already been served by making other information publically available, the council has also stated that it has consulted widely on non-confidential aspects of the project and that it has had regard for the public's views.

Balance of the public interest

40. In balancing the public interest arguments in this case the Commissioner has given due weight to the position public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure might have on council staff's willingness to contribute uninhibited and robust advice.
41. The Commissioner notes the council's argument that, at the time the request was received, the Bewilderwood project was still incomplete and the associated planning application was still open and subject to approval. The Commissioner acknowledges that the confluence of the withheld information's sensitive nature and the ongoing status of the broader project are arguments which carry some weight.
42. The Commissioner has weighed this against the fact that the report's recommendations had been accepted by the council long before the request was made (in August 2011).¹⁵ The Commissioner considers that, in effect, this stage in the nexus of advice-giving and exchanging of views had come to an end and the council had begun implementing the recommendations set out in the withheld report. So, whilst the Commissioner has given some weight to the council's arguments, he does not consider that the council has made adequate public interest arguments which demonstrate that the severity or extensiveness of any inhibition enhance this weighting.

¹⁵ See here:

<http://moderngov.cheshireeast.gov.uk/ecminutes/ieDecisionDetails.aspx?Id=967>

43. In relation to the council's argument that the need for transparency and accountability has been served by public consultation and the availability of public information, the Commissioner has had regard for examples of this which were submitted to him by the council. He notes that these disclosures and engagements with the community are largely related to the progress of the associated planning application and form a part of the planning regime's statutory process.
44. The Commissioner is not convinced on the basis of the evidence provided that the council has made attempts to place information in the public domain about the basis of its engagement with a sole provider in procuring the delivery of the Tatton project. He is also concerned that information published by the council might not assist the public understanding of its activities or demonstrate sufficient transparency in relation to its handling of the project¹⁶.
45. The Commissioner notes that the council's Constitution states "All purchasing activity must be carried out in accordance with the Council's Procurement Strategy"¹⁷. The council's Procurement Strategy states "All procurement activity undertaken by Cheshire East Council will be fair, legal, ethical and transparent."¹⁸ The code of conduct for procurement states:
- "All procurement activity must be undertaken to the highest standards of ethics and probity. The Council insists on ethical standards from its suppliers, and in turn it must exhibit the highest ethical standards itself. Officers and members must not only be fair and above board in all business dealings, but should also avoid any conduct that is capable of having an adverse interpretation put on it."*¹⁹
46. The Commissioner has balanced the arguments advanced by the council against the general arguments for transparency and accountability which, in this case, he finds are instantiated in specific, compelling arguments for disclosure.

¹⁶ See, for example, the council's response to the following FOI request:

<http://www.whatdotheyknow.com/request/118481/response/293373/attach/2/20120703ResToCrossen.doc>

¹⁷ Paragraph D.25, page 303:

http://www.cheshireeast.gov.uk/pdf/Constitution_18th_April_2012.pdf

¹⁸ Page 12, <http://www.cheshireeast.gov.uk/pdf/Yc-CE-ProcurementStrategy.pdf>

¹⁹ Ibid., paragraph 3.63, page 23.

47. The Commissioner considers that the significant expenditure of public funds, the need for public reassurance and confidence in the council's practice in relation to substantial projects of this type (with reference to the recommendations and other aspects of the Lyme Green report), the significant local disquiet about the nature of the development and, on the basis of the publically available evidence, the apparent absence of a competitive tendering process all combine to produce a heavy public interest weighting in favour of disclosure of the information.
48. Whilst the National Trust is not in this case the relevant public authority, the Commissioner considers that the council has a role to play in facilitating the National Trust's will as trustee of the property. The relationship between the two, one a public body, the other a widely well-regarded national institution is, therefore relevant.
49. The Commissioner notes that the National Trust it has given its support to the Bewilderwood project²⁰ and the Commissioner is mindful that the public perception of the National Trust as an institution set up to conserve historic buildings and environments might be affected or damaged by its stance. He notes that the National Trust's annual report for 2010/2011 explicitly states:

*"But we will never turn our outdoor places into giant adventure playgrounds. Peace and beauty are supreme gifts in a high-pressured, uncertain world. Our overriding duty will always be to protect that quiet, uniquely local spirit which speaks to us from each special place in our care."*²¹

50. The Commissioner considers that there is a possibility that the public might perceive a conflict between the National Trust's statements regarding its general role and its specific position in relation to the Bewilderwood project²². Given the council's role in furthering the project the Commissioner feels that there is strong case here for transparency to reassure the public that institutions are acting in accordance with their stated policies. The Commissioner considers that the potential environmental impact of the proposed development and

²⁰ See the following document, which forms part of the associated planning application:
<http://doc.cheshireeast.gov.uk/NorthgatePublicDocs/07347102.pdf>

²¹ See page 3, available online here: <http://92.52.118.192/annualreport2011.pdf>

²² An example of this perception is provide in the following article:
<http://www.guardian.co.uk/uk/the-northerner/2012/apr/27/tatton-park-plans-residents-traffic>

the possible effects on the local community add further strength to the public interest weighting in favour of disclosure.

51. Having considered the relevant arguments the Commissioner has concluded that the public interest in transparency and accountability and in disclosure of the information, in this case, when combined with the general presumption in favour of disclosure, outweighs the public interest in maintaining the exception.

Regulation 12(5)(e) – commercial confidentiality

52. Regulation 12(5)(e) of the EIR 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”.
53. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
- 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?
54. The Commissioner has considered each of these factors as they relate to each element of the withheld information.

Information provided by Price Waterhouse Cooper (PWC)

Is the information commercial or industrial in nature?

55. 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.
56. The Commissioner notes that the withheld information consists of risk and cost-benefit analyses and assessments of the potential funding structure and options for Bewilderwood. The Commissioner notes that the information has been created for the purpose of supporting the proposal for a commercial activity, namely, the Bewilderwood development.

57. The Commissioner considers that the information is clearly commercial in nature and that it relates to the commercial activity of the council and Bure Valley. He has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

58. In relation to this element of the exception, the Commissioner has considered whether 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.
59. The council has argued that financial advisory information provided to it by PWC was provided in confidence. The information in question was originally provided to the council in December 2010 in the form of a report into the prospective financial impact of the Bewilderwood project. Extracts from this report appear in the withheld information. Having viewed the relevant sections of the withheld information the Commissioner is satisfied that this was provided to the council by PWC.
60. In support of its position that the information engages the exception, the council provided the Commissioner with correspondence from PWC. The Commissioner notes that the correspondence states that copies of the information provided by PWC may not be provided to persons other than those it identifies and states that the council should consult with PWC should it be the subject of a request for information. However, the Commissioner can find no explicit reference within the correspondence to the information to which it refers having been provided in confidence nor to disclosure of the information being likely to result in an actionable breach of confidence.
61. However, having had regard for the content of the information, which consists of risk and cost-benefit analyses and assessments of the potential funding structure and options for Bewilderwood he notes that it is not trivial. In addition, having considered PWC's reference to restrictions on disclosure in correspondence with the council, the Commissioner is satisfied that the information is protected by an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

62. 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.

Whose interests?

63. In this case, the withheld information was provided by PwC to the council and the council has confirmed that it considers that it owes a duty of confidence to PwC in respect of information contained in the withheld report. The Commissioner therefore considers that it is the interests of PwC that are being argued in this case.

Legitimate economic interests

64. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
65. The council has not explained how the information provided by PwC, which relates to its appraisal of the legitimate economic interests of another party, Bure Valley, relates to or impacts upon PwC's own legitimate economic interests.

Disclosure would cause harm

66. The Commissioner considers that in assessing whether disclosure of information would cause harm, public authorities need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure.
67. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
68. The Commissioner notes that PwC was commissioned by the council to provide advice about a project being undertaken by the council, the Commissioner does not see how disclosure would cause any detriment to PwC. He also notes that the references to restrictions on disclosure were made by PwC in the context of the report provided to the council in December 2010, not the information from the report reproduced in the withheld information.
69. The council has stated that it has approached PwC for further submissions in relation to this matter and that it has "reinforced its stance" in relation to its perception of the confidentiality of the

information. However, the council has not provided evidence of this nor has it clarified the nature of the specific stance. The Commissioner considers that the council has been given due opportunity to provide evidence and arguments in support of its position.

70. In the absence of any further clarification or arguments from the council the Commissioner considers that the council has not provided sufficient evidence that disclosure of the specific information would result in a successful claim for an actionable breach of confidence nor that disclosure would adversely affect PwC's legitimate economic interests. In respect of the withheld information which relates to PwC, therefore, the Commissioner has concluded that the exception is not engaged.
71. As he has concluded that the exception is not engaged, the Commissioner has not gone on to consider the public interest arguments.

Information provided by Addleshaw Goddard

Is the information commercial or industrial in nature?

72. The Commissioner notes that the information provided to the council by Addleshaw Goddard relates to the Bewilderwood project, the focus being the legal dimension of options under consideration. The advice relates to the council's own interests in pursuing the project and identifies legal strategies which the council might take in delivering the project.
73. The Commissioner considers that the information is commercial in nature and that it relates to the commercial activity of the council and Bure Valley. He has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

74. The council has argued that the information contained within the withheld information, provided by Addleshaw Goddard, was marked as "private and confidential – privileged legal advice".
75. The Commissioner has considered the withheld information in the context of the council's application of the course of justice exception below. He finds in that context that the information constitutes confidential communications between the council and its legal advisors. He has concluded, therefore, that the information has the necessary quality of confidence and that it satisfies this element of the exception.

Is the confidentiality provided to protect a legitimate economic interest?

76. 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.

Whose interests?

77. In this case, the withheld information was provided by Addleshaw Goddard to the council and the council has confirmed that it considers that it owes a duty of confidence to Addleshaw Goddard in respect of information contained in the withheld report. The Commissioner therefore considers that it is the interests of Addleshaw Goddard that are being argued in this case.

Legitimate economic interests

78. The council has not explained how the information provided by Addleshaw Goddard relates to or impacts upon Addleshaw Goddard's own legitimate economic interests.

Disclosure would cause harm

79. The Commissioner considers that in assessing whether disclosure of information would cause harm, public authorities need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure.

80. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

81. The Commissioner considers that the council has not explained how disclosure would affect the legitimate economic interests of Addleshaw Goddard; however, for completeness, he has also considered whether disclosure would result in any detriment to the confider.

82. In order to establish that an 'actionable' breach of confidence would result from disclosure a public authority must show that an action for breach of confidence would result in detriment to the confider and, on the balance of probabilities that such a claim would succeed.

83. The advice provided by Addleshaw Goddard relates to the council's own interests in pursuing the project and identifies legal strategies which the council might take in delivering the project. Given that the focus of the

advice relates to the legal status of the council's approach, the Commissioner does not consider that disclosure of the information would result in any detriment to the confider, Addleshaw Goddard. He has not been provided with any arguments or explanation from the council in this regard and accordingly, he is not convinced that, in the absence of any rationale for action, that any claim for an actionable breach of confidence would be successful.

84. In view of the above, the Commissioner has concluded that, in relation to the information provided by Addleshaw Goddard, the exception is not engaged and he has not gone on to consider the public interest arguments.

Information provided by Bure Valley

Is the information commercial or industrial in nature?

85. Having viewed the withheld information the Commissioner is satisfied that it relates to the council's and Bure Valley's ability to participate in a commercial activity, namely the commercial viability of the Bewilderwood project. The withheld information includes details of Bure Valley's business plan, accounts and financial modelling and details of the council's potential investment and other options relating to the commercial impact of the Bewilderwood project.
86. The Commissioner notes that, in applying the exception, the council did not specify which sections of the withheld report constituted the information provided to it by Bure Valley. In effect, the council sought to apply the exception in a general, blanket manner, covering the entire withheld information. However, having viewed correspondence provided to the council by Bure Valley's representatives (see below), the Commissioner considers that information falling within the scope of the exemption is confined to certain sections of the annex to the withheld report, i.e., "Appendix 1".

Is the information subject to confidentiality provided by law?

87. The council provided the Commissioner with correspondence from Bure Valley's representatives which confirms that the information was provided under the terms of a confidentiality agreement. The council argues, therefore, that the information was provided under a clear and express duty of confidence, the information has the quality of confidence (it is not in the public domain) and disclosure would result in detriment to Bure Valley. Failure on the part of the council to comply with the duties of confidence imposed would be an actionable breach of the terms upon which the information was submitted to it.

88. Having viewed the information contained in sections of the appendix to the withheld report, the Commissioner notes that it includes details of Bure Valley's business plan, accounts and financial modelling and details of the council's potential investment and other options relating to the commercial impact of the Bewilderwood project. The Commissioner accepts that the information is not trivial and has concluded that the information has the necessary quality of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

89. 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.

Whose legitimate economic interests?

90. The council has argued that "clearly", Bure Valley would be adversely affected by disclosure of its business plan, modelling and the terms which it, in principle, is prepared to accept because of the use to which competitors might put this sensitive industry information.
91. The council confirmed that it consulted with Bure Valley at the time of the internal review and it provided the Commissioner with evidence of this process.
92. The Commissioner has had sight of submissions made by Bure Valley's representatives which confirm that it considers that disclosure of the 'business plan' would provide its competitors with a commercial advantage and would cause prejudice and harm to its own commercial interests.
93. Having had regard for the withheld information and the arguments provided by the council and Bure Valley, the Commissioner considers that it is being argued that the confidentiality in this instance is provided to protect Bure Valley's legitimate economic interest.

Disclosure would cause harm

94. The Commissioner considers that in assessing whether disclosure of information would cause harm, public authorities need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The Commissioner has considered this further below.
95. Bure Valley indicated to the council that it considered the information should be withheld under section 43 of the Freedom of Information Act

2000 (FOIA) and invited to provide the council with further details of the nature of the prejudice it considered would result from disclosure. The Commissioner has not been provided with evidence that these further details were submitted to the council so he has based his conclusions on the arguments submitted.

96. In determining whether an exception is engaged the Commissioner will consider arguments submitted by public authorities and refer to the relevant withheld information. In addition to being able to explain the nature of an implied adverse affect, public authorities must be able to demonstrate the causal link between any such affect and the disclosure of specific information. The Commissioner is not obliged to generate relevant arguments on an authority's behalf or to provide the causal link between putative effects and specific information.
97. Having considered the withheld information as a whole the Commissioner is of the view that it is largely concerned with the viability of and the proposed arrangements for the progression of a specific development. He notes that the information does not relate to an ongoing tendering exercise so it is not apparent what benefit the majority of the development-specific information would be either to the council's 'competitors' or to 'rivals' of Bure Valley.
98. As there does not appear to have been an opportunity for competitors to Bure Valley to make submissions to the council it is unclear to the Commissioner why disclosure of the information would have any effect in this regard. As noted above, as the council has not provided clarification of how these alleged effects would result, the Commissioner is not obliged to hypothesise in this regard or to otherwise demonstrate how or why these adverse affects would result.
99. The Commissioner also considers that the specific financial elements of the withheld information are high-level in nature and equivalent to the type of information which companies would make publically available via, for example, such channels as Companies House.

Conclusion

100. The Commissioner has concluded that the council has failed to show that, in applying the exception, it properly considered the sensitivity of the specific information at the time of the request and the specific nature of any harm that would be caused by disclosure.
101. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

102. In this case, the Commissioner does not consider that it has been shown that disclosure of the information would adversely affect the economic interests of Bure Valley. As he has concluded that the exception is not engaged, the Commissioner has not gone on to consider the public interest arguments.

Regulation 12(5)(b) – course of justice

103. Regulation 12(5)(b) provides that the disclosure of information can be refused if its disclosure would adversely affect, “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.”

104. In the Information Tribunal hearing of *Kirkaldie v Information Commissioner and Thanet District Council* (EA2006/001) the Tribunal stated that the purpose of this exception was reasonably clear and that:

“...it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.

In this hearing the Tribunal decided that legal professional privilege (LPP) is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

105. Legal advice privilege may apply where no litigation is in progress or being contemplated. In order for information to be covered by LPP, the communications must be:

- confidential,
- made between a client and professional legal adviser acting in their professional capacity and;
- made for the sole or dominant purpose of obtaining legal advice.

Communications made between adviser and client in a relevant legal context will therefore attract privilege.

106. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself. The Commissioner’s view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is also capable of attracting LPP. However, this is only to the extent that the

comment or discussion, if disclosed, would be disclosing legally privileged information.

107. The council has confirmed that the entire report constitutes advice provided to it by an external legal advisor in relation to legal implications of the Bewilderwood project. The Commissioner has first considered whether the council has correctly concluded that the entire report falls within the scope of the exception.
108. The Commissioner has viewed the withheld information and a copy of the original legal advice which is referred to in the withheld report. The Commissioner considers that references to legal advice are confined to section 8 and section 9(a)-(c) and 9(g) of the report. He is satisfied that these specific sections of the report are subject to LPP but he has concluded that the remainder of the report is not and does not, therefore, engage the exception. He has confined his further consideration of the council's use of the exception to the sections of the report identified above.
109. Information will only be privileged so long as it is held confidentially and not disclosed. As far as the Commissioner can see, the legal advice remained confidential at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner accepts that the withheld information is legally privileged and that it falls within the scope of the exception.
110. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of complex, contentious matters which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
111. As the Commissioner has concluded that regulation 12(5)(b) applies in this case, he has gone on to consider the relevant public interest arguments.

Public interest in disclosing the information

112. The Commissioner notes that the council has not provided any public interest arguments in favour of disclosing the information. He has, therefore considered arguments provided by the complainant and provided his own analysis of what he considers to be the relevant arguments.

113. The complainant has argued that, given the widespread public concern about the Bewilderwood project and the significant public expenditure involved, they have a right as a local council tax payer to have sight of the withheld information.
114. The complainant has noted that the council has stated that the purpose of the project is make Tatton more financially self-sustainable. They have queried how members of the public can assess whether the likelihood of this happening justifies the financial outlay and potential risk to the public purse if the information is not made available. In effect, without access to the information, the public cannot make a balanced comment or appraisal of the council's plans for public expenditure.
115. The Commissioner notes that the complainant's specific argument is an example of the generic arguments for transparency and accountability in public life; arguments which can carry weight. He notes the FOIA's assumption in favour of disclosure and the rationale behind the assumption, namely these generic principles and the potential for the disclosure of information to improve the quality of public debate and participation in the democratic process.
116. The Commissioner considers that additional weight can be added to the factors above in cases such as this, where substantial public expenditure potentially affecting a significant number of people is involved.
117. The Commissioner also considers that in cases where a public authority has demonstrated a lack of transparency in its actions, the weighting towards disclosure is further enhanced. The Commissioner has given some consideration to whether this and other specific factors are relevant to this case in a confidential annex.

Public interest in maintaining the exception

118. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the weighting of such arguments, as they have been submitted to him by the council.
119. The council has also argued that there is the potential for other consultants who have submitted information contained in the withheld

information to bring actions should this information be disclosed. It also considers that the controversial nature of the project and the specific content of the legal advice are such that disclosure might provide further grounds for parties to submit a legal challenge. The council considers that it is not in the public interest to invite litigation which would incur costs from the public purse.

120. The Commissioner notes a further strong factor in support of maintaining the exception is that the legal advice is also still current as it relates to a live issue which is still incomplete.

Balance of the public interest arguments

121. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
122. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)*: "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest"²³.
123. The Commissioner notes that the legal advice is still current, relating as it does to the live Bewilderwood project which has not yet been completed. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's strategy in pursuing the development and this could result in adverse effect to the course of justice via revealing the Council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. .
124. The Commissioner, however, wishes to record that the Tribunal states that the "countervailing considerations" must be "strong", rather than indicating that they should be exceptional.
125. Weighed in the round, and considering all the aspects discussed above, the Commissioner is not persuaded that, with reference to the specific

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http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

facts of this case, the public interest in maintaining the exception is as weighty as the factors that favour disclosure.

126. Having considered the factors above and the additional detail provided in the confidential annex, the Commissioner considers that the amounts of money involved, the numbers of people affected, the significant environmental impact of the project and crucially the lack of transparency in the council's actions and reasons, that the public interest in disclosing the information outweighs the strong public interest in maintaining the exception, which is all the stronger in this case because the opinion is still live.

127. In the Commissioner's view, the countervailing considerations here are not equally strong; they are stronger.

Regulation 12(5)(c) – intellectual property rights

128. Under regulation 12(5)(c), a public authority may refuse a request for information protected by intellectual property rights. The Commissioner's guidance describes intellectual property (IP) rights as follows:

*"IP rights arise when owners are granted exclusive rights to certain intangible assets. Although there are many forms of IP rights the main ones relevant to requests will be copyright, database rights and copyright in databases. Copyright covers a wide range of recorded information, not just original literary works which include computer programs, original musical or artistic works."*²⁴

129. In order for the exception to be engaged, a public authority must; firstly, successfully explain why it considers information is subject to an intellectual property right and, secondly, demonstrate how disclosure would affect the intellectual property right.

Is the information subject to an intellectual property right?

130. The relevant legislation in considering whether information is subject to IP rights is the Copyright Designs and Patents Act 1988 (CDPA).

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_intellectual_property_rights.ashx

131. The Commissioner's guidance clarifies that, under the CDPA, copyright can extend to a wide range of recorded information:

- original literary, dramatic, musical or artistic works;
- sound recordings, films or broadcasts; and
- the typographical arrangement of published editions (e.g. how text is arranged on the page)²⁵.

In relation to artistic works, copyright can include:

- a graphic work (eg painting, drawing, diagram, map, chart or plan), photograph, sculpture or collage - irrespective of artistic quality;
- a work of architecture - a building or a model for a building; or
- a work of artistic craftsmanship²⁶.

132. The Commissioner's guidance goes on to explain that the author or creator of a work owns the copyright and copyright is infringed when the work is used without the permission of the copyright owner, for example, it is copied, issued, lent or rented, performed or communicated to the public²⁷.

133. The council has argued that Bure Valley considers that their business plan, which some of the withheld information draws upon, contains not only commercially sensitive information but also 'trade secrets' and would reveal aspects of its intellectual property which, if disclosed, would cause prejudice and harm.

134. The council has clarified that the "Bewilderwood concept" is a bespoke one, building on books and characters specifically created for the Bewilderwood group.

135. Having looked at the "Bewilderwood" website, which reproduces characters created by the Bewilderwood group, the Commissioner notes that, under the title "Intellectual Property", the following statement

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http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/intellectual_property_rights_and_disclosures_under_the_foia.pdf

²⁶ Ibid.

²⁷ Ibid.

appears "We own or license the copyright in all the material that appears on the Site".²⁸

136. Whilst the Commissioner acknowledges that it might be that these characters might well be subject to IP rights, having viewed the withheld information, he can find no reference either to specific characters or to books to which Bewilderwood or Bure Valley owns IP rights. In the absence of any clarification from the council in this regard, the Commissioner has concluded that the withheld information does not contain information which falls within the definition of the exception.
137. As the council has neither defined what it considers to be a 'trade secret' nor provided a specific example of this within the withheld information, the Commissioner has not considered this element further.
138. As the Commissioner has found that the withheld information does not contain anything which would be subject to an IP right he has concluded that the exception is not engaged and he has not gone on to consider the public interest test.

Aggregated public interest test

139. Further to the ruling from the European Court of Justice, in the case of Office of Communications (Ofcom) v the Information Commissioner (C-71/10)²⁹, for the information which engages both 12(4)(e) and 12(5)(b) the Commissioner has gone on to consider whether the aggregated public interest in maintaining both these exceptions outweighs the public interest in disclosure.
140. Whilst the Commissioner does not repeat all the public interest arguments here, he has concluded that, for the information which engages both exceptions, whilst the aggregated public interest in maintaining regulations 12(4)(e) and 12(5)(b) is considerable it does not outweigh the public interest in disclosure in this case.

²⁸ <http://www.bewilderwood.co.uk/terms-and-conditions/>

²⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0071:EN:HTML>

Right of appeal

141. 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

142. 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.

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

Signed

**Lisa Adshead
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