

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 May 2013

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed development of Macclesfield town centre and terms of Cheshire East Council's (the "council") contract with the developer, Wilson Bowden. The council provided the complainant with some information but withheld much of the information under the exceptions for internal communications, the course of justice and the confidentiality of commercial information.
2. The Commissioner's decision is that the council has wrongly applied the exception for the confidentiality of commercial information and that, whilst the exception for the course of justice is engaged in relation to some of the information, the public interest favours disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld 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.

Request and response

5. On 24 September 2012, the complainant wrote to the council and requested information in the following terms:
 1. *A copy of the most recent contract between Wilson Bowden and Cheshire East.*
 2. *A copy of the section of the cabinet minutes which covers the decision to enter into a revised contract with Wilson Bowden.*
 3. *A copy of the Part Two section of the minutes of the 20 December 2010 cabinet meeting covering point 13: Key decision 59 Wilson Bowden Development Agreement – if this is not the same document as referred to in point 2 above.*
 4. *A copy of the strategic, legal and financial risk assessment relating to the proposed Wilson Bowden development, if this is not included in parts 2 or 3.*
6. The council responded on 22 October 2012. It refused to provide the requested information, citing the exceptions for internal communications, the course of justice and the confidentiality of commercial and industrial information. In relation to request part 4, the council stated that there "is no single such document". It made reference to a "financial assessment" report of "CBRE", stating that this information would be withheld under the exception for the confidentiality of commercial and industrial information.
7. Following an internal review the council wrote to the complainant on 29 November 2012 and 14 December 2012, where it provided redacted versions of some of the requested information, maintaining its reliance on exceptions to withhold the outstanding information. In relation to part 4 of the request, the council maintained that, where information was held, this was being refused under the exceptions for course of justice and commercial confidentiality.

Scope of the case

8. On 3 January 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the council disclosed further information to the complainant and confirmed that, in withholding the remaining information, it was relying on the exceptions for the course of justice and the confidentiality of commercial information.
10. The Commissioner agreed with the complainant that he would investigate the council's decision to withhold the remaining information and also whether the council's response addressed the full scope of their request.

Reasons for decision

Regulation 5 – duty to provide environmental information on request

11. Under regulation 5 of the EIR, public authorities that hold environmental information have a duty to provide such information on request.
12. The complainant has raised concerns that the council might not have identified and provided all the information specified in their request. The Commissioner has put the complainant's concerns to the council and sought clarification of the extent of relevant information it holds.
13. In relation to parts 2 and 3 of their request, the complainant explained that it provided the council with further clarification of the information it expected this to identify, namely:

"a copy of the part two information relating to key decision 59 (i.e., of the council's Cabinet meeting of 20 December 2010) which is not in the public domain. This would include any additional minutes plus the additional part two report referred to in John Nicholson's report relating to agenda item 5."

"...what information the councillors who decided to enter into a revised contract with the developers Wilson Bowden were being given and what options were offered to them....upon which they based their decision.."
14. The council has explicitly confirmed to the Commissioner that it does not hold any further information relating to key decision 59 other than the Part 2 Cabinet report and the minutes of the Cabinet meeting which are

in the public domain. The complainant was provided with a redacted copy of the Part 2 Cabinet report and the withheld information was redacted under the exceptions for the course of justice and the confidentiality of commercial information.

15. The complainant has also raised concerns about the council's response to part 4 of their request, which asked for:

"A copy of the strategic, legal and financial risk assessment relating to the proposed Wilson Bowden development, if this is not included in parts 2 or 3."

16. The council's response to this element of the request stated that "...there is no single such document" and that any relevant information was contained within legal advice withheld under the course of justice exception and the CBRE report, withheld under the exception for the confidentiality of commercial information. The Commissioner notes that the council specified this in its responses to the complainant's request.

17. The complainant has expressed concerns that public planning schemes should not proceed without a prior risk assessment and considers that it should hold information which goes beyond that contained within the documents it referred to in its responses.

18. In order to establish the relevant facts, the Commissioner approached the council with a number of questions, routinely used in such scenarios. These, together with the council's responses are listed below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

19. The council confirmed that no searches were carried out as it considered that the legal advice of Nabarro Nathanson and the financial assessment of CBRE to be the legal and financial assessments identified in the request. The council also considered that there was no separate strategic risk assessment.

Was any recorded information ever held relevant to the scope of the request but deleted/destroyed?

20. The council confirmed that it is not aware of any recorded information ever held relevant to the scope of the request that was deleted or destroyed.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is not relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

21. The council explained that the relevant documents that were used to inform recent Part 2 Cabinet reports, so the council would typically retain documents of a similar age.

Is there a business purpose for which the requested information is held? If so, what is this purpose?

22. The council confirmed that the legal advice of Nabarro Nathanson and the financial assessment of CBRE were background documents to Part 2 cabinet reports and so would have been held for this reason.

Is there information held that is similar to that requested and has the council given appropriate advice and assistance to the applicant in line with the duty contained at regulation 9 of the EIR?

23. The council confirmed that it considers that the legal advice of Nabarro Nathanson and the financial assessment of CBRE constitute the information which has been requested. The information has been retained by the council and has been referred to in two letters to the complainant.

Conclusion

24. Having considered the council's explanations and the concerns raised by the complainant, the Commissioner has concluded that, on the balance of probabilities the council has correctly identified and confirmed the extent of relevant information it holds. Whilst he acknowledges the complainant's incredulity that further information is not held, he does not consider that this, in itself, constitutes evidence which contradicts the council's explanation.
25. The Commissioner has concluded that, in relation to the elements of the request identified by the complainant, the council complied with its obligations under regulation 5 of the EIR.

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

Information withheld under this exception: Paragraph 9.1 of the December 2010 report; sections 8 & 9 of the May 2011 report; Legal advice of Nabarro Nathanson

26. 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.”

27. 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”.

28. 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.

29. 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.

Legal advice of Nabarro Nathanson

30. The Commissioner has considered whether the advice provided to the council by Nabarro Nathanson in January 2011 engages the exception. The council explained that the advice was given by the council’s legal solicitors in anticipation of the May 2011 report and the advice sought

related to the possibility of legal proceedings being brought against aspects of the proposed development.

31. The Commissioner has viewed the withheld advice and accepts that it is held confidentially and has not been 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 confidence had been lost. The Commissioner accepts that the withheld advice is subject to LPP and that it falls within the scope of the exception.
32. The Commissioner is satisfied that there is a real potential that disclosure of the information 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.

Paragraph 9.1 of the December 2010 report and section 9 of the May 2011 report

33. The council has argued that disclosure of the withheld information would adversely affect the course of justice, as distinct from the disclosure of material which is covered by LPP.
34. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
35. The Commissioner accepts that disclosure of information that is subject to LPP would undermine this important and well-established common law principle. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
36. The Commissioner's guidance confirms that the scope of the course of justice exception is broad. Having viewed the withheld information, the Commissioner notes that it makes reference to legal matters and discusses and sets out the relevant legal considerations and clarifies and develops the council's legal position.
37. The Commissioner considers that regulation 12(5)(b) is not limited to excepting only information that is subject to LPP. The wording of the exception has a broad remit encompassing any adverse effect on the course of justice generally; this allows for documents that are not subject to LPP to still be covered by the exception, as long as 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. The Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.

38. In *Rudd v IC & Verderers of the New Forest (EA/2008/0020)* the Tribunal clarified that 'the course of justice' does not refer to a specific course of action but "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'" (paragraph 29).
39. In light of the above, the Commissioner has concluded that the information falls within the scope of the exception and, for the same reasons cited above in relation to the legal advice of Nabarro Nathanson, he is satisfied that disclosure would be more probable than not to result in adverse effect to the course of justice.

Section 8 of the May 2011 report

40. Having viewed the relevant part of the report, the Commissioner is satisfied that, as it reflects the legal advice the council obtained from Nabarro Nathanson, section 8 is also subject to LPP. He has also concluded, similarly, that disclosure would be more likely than not to result in adverse effect to the course of justice.
41. The Commissioner has gone on to consider the public interest test as it relates to all the information falling within the scope of the exception.

Public interest in disclosing the information

42. The council has provided very limited public interest arguments in favour of disclosure. Its sole argument identifies that, the public, as taxpayers indirectly funding such projects, are entitled to be given knowledge of proposals.
43. The Commissioner has also considered arguments provided by the complainant and other relevant factors.
44. The complainant has stated that, in relation to the legal risks of the scheme to the council and, by extension, to council tax payers, there is a distinction to be drawn between a legal risk and legal advice. The complainant has asked the Commissioner to consider the extent to which information being withheld under the "cloak" of legal advice relates to the facts on which advice has been sought, rather than the advice itself.

45. The complainant has also argued that disclosure in this case would service the public interest in being assured that the advice does not relate to any flawed council processes or decision making.
46. In furthering this argument the complainant directed the Commissioner to the council's refusal notice of 22 October 2012 which asserts that disclosure of the withheld information could expose the council to legal proceedings brought by third parties "...having knowledge of the potential opportunities for challenge referred to in the contract, given that the development and its use are controversial." The complainant contends that there is no public interest in concealing a flawed or vulnerable decision or a failure to follow correct procedure.
47. The complainant has also argued that disclosure would ensure that the council's actions in relation to this high profile and controversial development are subjected to an appropriate level of scrutiny. This would serve the general public interest in accountability and transparency in relation to the council's decision-making and use of public resources (council owned land) and, in relation to this specific enterprise, provide reassurance that the council has acted in the best interests of council tax payers.
48. The complainant has argued that disclosure would ensure that the public has full knowledge of the arrangements between the council and the developer when it is consulted about the developer's plan for the council owned site. The complainant has submitted that the need for such knowledge-sharing and engagement is heightened because of the scale of the proposed development and the potential impact on local residents and businesses.
49. The Commissioner notes that the council inherited the original Wilson Bowden development agreement for delivering the Macclesfield town centre scheme from the former Macclesfield Borough Council in March 2009. The agreement is a binding legal document between the council and Wilson Bowden which sets out the basis upon which the partnership between both parties will deliver the town centre scheme. When the associated planning application, submitted by Wilson Bowden to the council did not progress (for various reasons), the scheme was amended and became smaller in scale. It was decided that the development agreement needed to be revised to reflect this. The withheld legal

advice was sought to advise on the legality of the variations to the scheme and the council's compliance with EU procurement regulations¹.

50. 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 proposal to build a waste transfer station at Lyme Green Depot in Macclesfield, Cheshire².
51. 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."
52. 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 concern. 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."
53. The Lyme Green report also makes the following recommendations for the future practice of the council:

¹ Cheshire East Council Reports to Cabinet, 20 December 2010 and 3 May 2011 – extracts taken from redacted versions disclosed to the complainant.

²

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

"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...."³

54. It is not the Commissioner's role to assess whether the council has followed appropriate governance procedures in creating the revised development agreement with Wilson Bowden or, more generally, in progressing the development. However, he considers that the council's previous failings, as documented in the Lyme Green report and the report's recommendations, combined with the large scale of the proposed development, the involvement of publically owned land and the potential environmental impact on residents generates a significant weighting in favour of transparency and disclosure of the information.
55. The Commissioner considers that authorities should expect that large scale developments involving the use of council land will attract a significant degree of public scrutiny and he further considers that the findings and recommendations of the Lyme Green report impose a heightened expectation of transparency on the council's actions in such scenarios.

³ See pgs. 15, 46, 47 and 12:

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

Public interest in maintaining the exception

56. 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.
57. The council provided the Commissioner with further arguments which it considered reflected the public interest in maintaining the exception. For example, it pointed to the fact that there are existing rights enshrined by law for members of the public to object to planning proposals and possible compulsory purchase orders. Release of the withheld information would significantly harm the council's future ability to do business with third parties and engage in negotiations on this and other regeneration projects.
58. Whilst the council accepts the need for the public engagement with the proposals, it has argued that information has been made available and the public has been widely consulted.
59. The council also argued that disclosure would result in specific, negotiated commercial terms being revealed to, amongst others, development companies and would result in commercial entities being unwilling to deal with the council as opposed to other landowners, especially private sector landowners. This, the council argues, would frustrate major developments such as this, leading to stagnation of the local economy and consequent detriment to the public as a whole. The council considers that the significance of this to its growth initiative is considered to outweigh arguments in favour of disclosure in this case.

Balance of the public interest arguments

60. 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 which 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.
61. 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”⁴.

62. The Commissioner notes that the legal advice is still current, relating as it does to a live proposal which has not yet been finalised. 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 by revealing the Council’s legal strategy for dealing with potential challenge and undermining the principle that legal advice remains confidential.
63. However, the Commissioner notes that there are strong arguments in favour of disclosure, not least the scale of the project, the extent to which council and hence publicly owned land is being used⁵, the number of residents affected and the significant local opposition to the scheme⁶. He also considers that, in the light of the Lyme Green report, the public interest in transparency, in facilitating scrutiny of the council’s decision-making and providing reassurance the council has improved its governance arrangements are very strong.
64. Other factors which contribute to the weighting in favour of disclosure include the shortfall in information available to local residents compared with the information available to the council as a decision-making resource. The Commissioner accepts that the council is delegated to reach decisions on behalf of the public, however, following the Tribunal decision in *EA/2010/0012*, the Commissioner’s guidance sets out that he considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. In particular, the Commissioner notes that the Tribunal gave weight to the Directive (2003/4/EC) which gave rise to the EIR, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

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

⁵ “...the Council holds a freehold interest in part of the South Macclesfield Development Area and the adjoining retail planning allocation, totalling 26.5 hectares...” See:

[http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000241/M00003102/AI00011306/\\$CABINETreportEconomicMasterplan101220FINAL.docA.ps.pdf](http://moderngov.cheshireeast.gov.uk/ecminutes/Published/C00000241/M00003102/AI00011306/$CABINETreportEconomicMasterplan101220FINAL.docA.ps.pdf)

⁶ The complainant submitted their request on behalf of the local campaign group opposed to the scheme, “Wake up Macclesfield”. Details of the grounds of their opposition can be found on their website: <http://wakeupmacc.org.uk/>

*"Increased public access to environmental Information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*⁷

65. The Commissioner considers that disclosure of the information would, in this instance, enable the community affected by the development to understand and participate in the council's decision making and be reassured that its approach was not based on flawed processes or deficient legal advice. Whilst the Commissioner acknowledges the significant weighting in favour of maintaining the exception which live legal advice brings he considers that the size of the scheme and the extent of the potential effects on the community enhances the public interest arguments in favour of increased scrutiny and disclosure.
66. In relation to the council's arguments about the adverse impact of disclosure on its ability to negotiate commercial terms or to progress this or other redevelopment schemes, the Commissioner is not convinced that these arguments are relevant to either the exception or to the specific withheld information. He is also not satisfied that the arguments provided by the council in this regard explain how these effects would occur in this context or that they transcend their somewhat generic nature. He has, therefore, discounted these arguments from his consideration of the balance of the public interest.
67. With reference to the Tribunal decision in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006), cited above, the Commissioner notes that the Tribunal states that, in relation to the inbuilt public interest in maintaining LPP, the "countervailing considerations" must be "strong", rather than exceptional.
68. Weighed in the round, and considering all the aspects discussed above, the Commissioner is not persuaded that, with reference to the specific facts of this case, the public interest in maintaining the exception is as weighty as the factors that favour disclosure.
69. Having considered the factors above, the Commissioner considers that, in view of the numbers of people affected by the proposed scheme, the shortfall in information available to the public to assist their participation

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

in the decision-making, the significant environmental impact of the project and the need for public reassurance that the council has followed appropriate governance procedures, the public interest in disclosing the information is not outweighed by the strong public interest in maintaining the exception, which is all the stronger in this case because the opinion is still live.

70. In the Commissioner's view, the factors in favour of disclosure here are not equally strong; they are stronger.

Regulation 12(5)(e) – commercial confidentiality

71. 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".
72. 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?
73. The Commissioner has considered each of these factors as they relate to the withheld information.

Information withheld by the council

*Paragraphs 7.1, 7.2, 9.1 and 11.1 of the December 2010 report;
Paragraphs 7.1, 7.3, 7.6, 7.7, 8.3-8.6, 12.6, 9.1 and 12.6 of the May 2011 report and, of Annex One, paragraphs 1.1-1.3, 2.1, 3.1, 3.5, 6.0, 6.1, 7.1, 9.1, 9.2, 9.3-9.5, 10.0, 10.1, 11.1-11.3, 12.3, 12.4, 12.5, 13.1, 19.1.
CBRE Report in its entirety*

Is the information commercial or industrial in nature?

74. 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.

75. The Commissioner notes that the withheld information relates to the financing of and other details of the commercial arrangements between the council and Wilson Bowden for taking the redevelopment forward. The Commissioner notes that the information has been created for the purpose of supporting the proposal for a commercial activity, namely, the proposed redevelopment.
76. The Commissioner considers that the information is clearly commercial in nature and that it relates to the commercial activity of the council and Wilson Bowden. He has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

77. 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.
78. In support of its application of the exception the council has directed the Commissioner to paragraph 25 of its Development Agreement with Wilson Bowden. The council confirmed that paragraph 25 has been provided to the complainant so, as it is publically available, the Commissioner has reproduced it here:

"Each party to this Agreement shall treat as confidential all information obtained from the others under or in connection with this Agreement..."

79. The Commissioner notes that the information in question is not trivial and he is mindful that the explicit reference to confidentiality in the Development Agreement creates an expectation that information associated with the development would not be disclosed. The Commissioner is satisfied that the information is protected by an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

80. 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?

81. In this case the council has confirmed that the economic interests to be protected are those of the council and Wilson Bowden.

Legitimate economic interests and disclosure would cause harm

82. 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.
83. The council has stated that disclosure of the information would significantly harm the council's future ability to do business with third parties and engage in negotiations on this and other projects. The council has argued that, if commercial and other project specific details were revealed, actual and potential partners would be prejudiced in negotiations with landowners and prospective tenants and prejudiced in their ability to secure the delivery of their schemes. The council further argued that, if landowners became aware of budgets to acquire their land and/or development cost forecasts and other financial information in relation to a project, this would strengthen the landowners' bargaining position, thereby jeopardising the scheme and/or the ability to deliver it within budget.
84. The council has also argued that the consequence of specific, negotiated commercial terms being revealed to, among others, development companies, would result in commercial entities being unwilling to deal with the council and would frustrate major large development projects such as this, resulting in stagnation of the local economy and detriment to the public as a whole.
85. The Commissioner considers that, in order for the exception to be engaged, public authorities need to demonstrate that disclosure of information would cause some harm to a legitimate economic interest. In addition to showing that the likelihood of any such harm occurring would be more probable than not, authorities should be able to link these effects to the information being withheld.
86. Having considered the council's arguments in this regard, the Commissioner notes that they are highly speculative in nature, making reference to the general, potential effects of disclosure of commercial information on projects of this nature. The Commissioner further notes that the potential effects of disclosure sketched by the council are not explicitly linked to the specific information which is being withheld and, having viewed the information, it is not apparent that the information is relevant to the supposed effects of disclosure.

87. Having considered the relevant facts and arguments the Commissioner has concluded that the council has failed to properly explain the nature of the harm which disclosure of the information would cause in this specific case, failed to demonstrate that disclosure of the information would result in this harm to its own economic interests and failed to link any such effects to the withheld information.
88. 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.
89. The Commissioner has concluded that the council has failed to show that disclosure would cause harm to its own legitimate economic interests.
90. Where a third party's interests are at stake, public authorities should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner (EA/2006/0014, 11 December 2006)*.
91. The Commissioner notes that the council has not provided any evidence that it consulted with Wilson Bowden in relation to the request, nor has it provided any arguments which explain what harm disclosure would cause to Wilson Bowden's economic interests.
92. As the Commissioner has concluded that the council has not demonstrated that disclosure would harm its own or Wilson Bowden's economic interests he has decided that the exception is not engaged. He has not, therefore, gone on to consider the public interest arguments.

Right of appeal

93. 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

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

94. 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.
95. 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

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