

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

**Decision notice**

**Date:** 23 January 2014

**Public Authority:** Durham County Council  
**Address:** County Hall  
Durham  
DH1 5UF

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of the financial models referred to in the County Durham Plan, Preferred Options document.
2. Durham County Council ("the Council") refused the request in reliance of the exception provided by regulation 12(5)(e) of the EIR.
3. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(e) to the financial model sought by the complainant and that the public interest favouring withholding the financial model outweighs that favouring its disclosure.
4. The Commissioner does not require the Council to take any further action in this matter.

**Request and response**

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5. On 27 September 2012, the complainant wrote to Durham County Council ("the Council") and requested copies of the financial models referred to in the County Durham Plan, Local Plan Preferred Options document at paragraphs 4.144 and 4.159.
6. The council acknowledged the complainant's request on 28 September and made its formal response on 30 October. The council informed the complainant that it held only one financial model. It explained that the

paragraphs identified by the complainant referred to the same model. The council also explained that the model fell to be considered under the Environmental Information Regulations because it relates to environmental decision making.

7. The council informed the complainant that it is withholding the financial model in reliance of the exception provided by regulation 12(5)(e) of the EIR. The council provided the complainant with a detailed rationale for its application of this exception.
8. Following an internal review the council wrote to the complainant on 21 December. The council again confirmed that it held only one financial model relevant to the complainant's request.
9. Having reviewed the withheld information the council felt able to provide the complainant with a redacted version of the model. It also provided explanatory notes relating to the categories of information shown on the disclosed spreadsheet. The council confirmed that it was withholding the redacted information in reliance of the regulation 12(5)(e) exception of the EIR.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 19 March 2013 to complain about the way his request for information had been handled. Whilst the complainant acknowledged the Council had provided him with a copy of the spreadsheet, he believed that he was entitled to the information which had been redacted.
11. The Commissioner wrote to the complainant on 19 July. The Commissioner confirmed that the focus of his investigation would be to determine whether Durham County Council is entitled to rely on regulation 12(5)(e) as the basis for refusing to provide the withheld information.

## Reasons for decision

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### Regulation 12(5)(e) – commercial confidentiality

12. The Council has applied this exception to the information which was redacted from the spreadsheet sent to the complainant on 21 December 2012.
13. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
14. For the 12(5)(e) exception to be appropriately applied, the Commissioner considers that the following conditions need to be met:
  - 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 of the information?

#### *Is the withheld information commercial or industrial in nature?*

15. For the withheld information to engage the exception provided by regulation 12(5)(e) it must relate to commercial activity or be industrial by its nature. The information must relate to the commercial activity of either the public authority concerned or to that of a third party.
16. The Commissioner considers that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
17. The Commissioner has examined the financial model sought by the complainant. He has also considered the representations made by the Council in respect of the model and in particular the information which was withheld from the complainant. The Commissioner notes that the financial model relates to the future building and economic development within County Durham and that it contains information which forecasts the following:
  - Costs of building major infrastructure schemes;

- The price the Council may receive for land;
  - The sums the Council will receive by section 106 of the Town and country Planning Act 1990;
  - The sums the Council will receive for Community Infrastructure Levy; and
  - The assumptions for the Council's Aykley Heads site.
18. The Commissioner considers that the information contained in the financial model is clearly commercial in nature and therefore this element of the exception is satisfied.

*Is the information subject to confidentiality provided by law?*

19. For this element of the exception to be satisfied the information must be subject to confidentiality provided by law. This may include confidentiality imposed under a common law duty of confidence, a contractual obligation or be provided by statute.
20. The Council has assured the Commissioner that the financial model sought by the complainant was provided in confidence by its third party advisor – Grant Thornton UK LLP. The Commissioner notes that the model carries the following disclaimer:
- “The Model is confidential and is intended only for the firm’s client. It may not be copied or distributed and must be kept confidential save as to matters which are already within the public domain.”
21. The Council therefore asserts that the common law duty of confidence applies in this case.
22. The Council has assured the Commissioner that it has treated the model as confidential and only its Principle Accountant, Finance Manager and Head of Finance have access to the full model or to the assumptions that are used to populate it or to the figures used to calculate the outputs.
23. The Council has also assured the Commissioner that the model has not been shared with any outside party.
24. On the basis of the disclaimer attached to the model and the assurances given by the Council, the Commissioner accepts that the financial model is subject to a duty of confidence and therefore this element of the exception is satisfied.

*Does the information have the necessary quality of confidence?*

25. The Commissioner considers that the information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
26. On the basis of the Council's submissions the Commissioner is satisfied that the distribution of the withheld information has been limited and that it is not otherwise accessible.
27. The financial model has significant implications to the Council's financial future as it relates to its economic and environmental planning. Having examined the financial model the Commissioner is satisfied that the information it contains is not trivial.

*Was the information provided in circumstances importing an obligation of confidence?*

28. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*<sup>1</sup>, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

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

29. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012) the Tribunal accepted evidence that it was 'usual practice' for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.

30. In applying the 'reasonable person' test the Tribunal stated:

*"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence ) apparently without regard to the particular purpose for which they were being approved)... the developer*

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<sup>1</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

*did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realised that that was what the developer was doing.*<sup>2</sup>

31. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and its very limited distribution and access leaves the Commissioner to conclude that the withheld information has the necessary quality of confidence and therefore this element of the exception is satisfied.

*Is the confidentiality provided to protect a legitimate economic interest?*

32. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
33. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm *would* be caused by the disclosure.
34. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

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

35. The Council has identified the economic interests of two parties that would be damaged should the financial model be disclosed in its entirety: It argues that the County's economic future would be damaged by disclosure, together with commercial interests of the Grant Thornton UK LLP – the company which created the model.

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<sup>2</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol\\_CC\\_v\\_IC\\_&\\_PBSA\\_\(012\)\\_Decision\\_24-05-2010\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(012)_Decision_24-05-2010_(w).pdf)

36. The Council assured the Commissioner that it had consulted with Grant Thornton about the complainant's request as it believed it was relevant to the company's interests.
37. Generally the Commissioner will not accept speculation from a public authority about the harm it identifies concerning a third party's interests unless there is evidence that the arguments genuinely reflect the concerns of the third party involved. In this case the Council has assured the Commissioner that it has consulted with Grant Thornton on two occasions and was given the company's position about the harm that would ensue from disclosure of the financial model in its entirety. The Commissioner has decided to accept the submissions of the Council which it made in respect of Grant Thornton.

*The Council's legitimate economic interests*

38. The Council has argued that disclosure of the financial model would harm its own commercial interests. The information sought by the complainant relates to future building and economic development within the County and the Council asserts that disclosure would undermine its negotiating position with developers and would adversely affect its ability to manage its forward plan.
39. The financial model reflects a number of commercial assumptions. The Council believes that if details of these assumptions were to be released into the public domain its position when negotiating with third parties in the future would be compromised and would lead to a worse outcome for the public and for the environment.

*Grant Thornton's legitimate economic interests*

40. The Council assures the Commissioner that the company has invested a significant amount of time and resources into developing the methodology contained within the financial model. The model has been further developed through the latest legislative guidance, market knowledge and the results of commercially sensitive discussions with the Council itself and with the Council's advisors.
41. If the financial model was to be disclosed in its entirety the company's commercial interests would be damaged as other third party advisors, operating in competition in the same market could use and copy its proprietary methodology.

*The Commissioner's conclusions*

42. The Commissioner acknowledges that the withheld information contains financial modelling information which is of significant commercial value. He considers that disclosure of the withheld information would adversely

affect the Council's negotiating position and be detrimental to the Council's economic interests.

43. The Commissioner considers that disclosure of the financial model in its entirety would provide third parties with knowledge that would not otherwise be available in a competitive market. Disclosure of this information would be of detriment to the commercial interest of both the Council and of Grant Thornton.
44. The Commissioner notes that information of the type contained in the financial model is exactly the type of information which regulation 12(5)(e) seeks to protect. This, together with the confidential nature of the information leads the Commissioner to conclude that the disclosure of the financial model in its entirety would adversely affect the Council's and Grant Thornton's legitimate economic interests and therefore finds that the exception provides by regulation 12(5)(e) is engaged.

### **The public interest test**

45. Having determined that regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest test.

46. Regulations 12(1) and 12(2) of the EIR provide:

*"(1)... a public authority may refuse to disclose environmental information requested if –*

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

*(2) A public authority shall apply a presumption in favour of disclosure."*

48. In considering the public interest in this case the Commissioner has had regard to the submissions made by the complainant, the Council and by the Council on behalf of Grant Thornton.

### *The public interest favouring disclosure*

49. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
50. Disclosure can assist the public in understanding the basis of how public authorities make their decisions. This in turn fosters trust in public



authorities and may allow greater public participation in the decision making process.

51. In this case, disclosure of the requested information would help the public to understand the assumptions used by Grant Thornton in constructing the financial model for the Council and allow the information to be scrutinised for its validity and or accuracy. It would also allow the public to understand how the model informed the Council's Local Plan Preferred Options which refers to it as follows:

*"[Paragraph 4.144] The timing of delivery impacts on cash flow and this needs to be looked at in more detail, however early indications identify a number of possible solutions which will include private sector financing, a public /private partnership or public borrowing. This is the basis of a financial model which the Council has developed to determine the deliverability of the strategy.*

*[Paragraph 4.159] A financial model has been developed to test out different scenarios for the phasing and development of key development sites which will inform the development of a financial framework to support delivery. Elements of the financial framework include future council tax income from the additional homes over the Plan period, the business rates uplift from the new businesses that will be attracted into Durham City and the ability to retain additional income and use is as part of a finance model such as Tax Increment Financing. Additionally there are private sector development contributions and Community Infrastructure Levy which will support the delivery of infrastructure requirements in the City."*

*The public interest favouring withholding the information*

52. The Council has asserted that disclosure of the financial model in its entirety would adversely affect the Council's ability to make effective economic and environmental plans for the future. This in turn would adversely affect the County's economic future.
53. The Commissioner accepts that disclosure of the financial model could be used by those with whom the Council negotiates in ways which would not be to the Council's financial benefit. This would be to the detriment of the citizens of County Durham to whom the Council owe a duty.
54. The Commissioner also accepts that Grant Thornton would suffer a detriment should the financial model be disclosed in its entirety. He is mindful that the company works in a competitive market which requires a significant degree of confidentiality to protect its products and methodology.

*The balance of the public interest*

55. In considering the balance of the public interest, the Commissioner considers that due regard should be given to the purpose of the exception provided by regulation 12(5)(e): This is to protect the confidentiality of information which passes from a third party to a public authority.
56. As a starting point, the Commissioner acknowledges that there is an inherent public interest in the prevention of adverse economic effects to the interests of the provider of the information, the holder of the information and to the principle of confidentiality. In this case the Commissioner has given due weight to the potential impact of disclosure on the economic interests of Durham County Council and to those of Grant Thornton UK LLP.
57. The Commissioner acknowledges that the ultimate decisions taken by the Council in respect of its Local Plan Preferred Options and financial model will affect all of its constituent population. He is also mindful of the sums of money which the decisions may involve, either in terms of Council expenditure or income.
58. Whilst there is a public interest in promoting public understanding and participation in the planning process, this must be offset against the public interest in allowing the Council to carry out its functions effectively. The Commissioner considers that the maintenance of the confidentiality of the information contained in the financial model is a key element to achieving this effectiveness in this case.
59. The Commissioner has therefore concluded that the public interest in maintaining the exception provided by regulation 12(5)(e) outweighs the public interest in disclosing the information sought by the complainant.

## Right of appeal

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60. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

61. 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.
62. 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 .....**

**Andrew White**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**