

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 10 October 2018

Public Authority: Tendring District Council
Address: Council Offices
Thorpe Road
Weeley
Essex
CO16 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the proposed development of a Garden Community.
2. Tendring District Council (the Council) provided some information but withheld the remainder citing regulations 12(5)(b) (the course of justice), 12(5)(e) (the confidentiality of commercial information), 12(4)(d) (unfinished documents) and 13 (personal information) of the EIR.
3. The Commissioner has investigated its application of regulations 12(5)(b), 12(5)(e) and 12(4)(d). She has also considered the timeliness of its handling of the request.
4. The Commissioner's decision is that the Council cited regulations 12(5)(b) and 12(5)(e) appropriately. However, while she found that regulation 12(4)(d) was cited correctly in respect of some of the information withheld by virtue of that exception, she found that the Council failed to demonstrate that regulation 12(4)(d) was engaged in respect of the remaining withheld information.
5. She also found that the Council breached regulations 5(2) (time for compliance) and 5(11) (representations and reconsideration) as the Council failed to respond to the complainant's request within 20 working

days and failed to respond to the complainant's request for an internal review within 40 working days.

6. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the Valuation Analysis document.
7. The Council 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

8. By way of background to the request in this case, the Council told the Commissioner:

"Tendring District Council, Braintree District Council, Colchester Borough Council and Essex County Council ("the Councils") have collaborated to identify an agreed strategic approach to the allocation and distribution of large scale housing led, mixed use development, including employment opportunities and infrastructure provision, in the form of Garden Communities.

The Councils have collaborated closely on the preparation of their Local Plans, ...

Section 1 of the Local Plan dealt with strategic issues and had included proposals for three Garden Communities in north Essex, one of which straddled the Tendring Colchester administrative boundary, being close to the Crockleford Heath area".

9. In its lengthy submission, the Council told the Commissioner:

"The broad area of search for a Garden Community is identified within the Draft Local Plan but specific boundaries are not..."

10. With respect to the timing of the request, the Council acknowledged that a public consultation commenced in June 2017, with the request for information in this case being received on 4 July 2017.

11. It also told the Commissioner:

"The independent Public Examination for Part 1 of the Local Plan was commenced on 16 January 2018 however this remains with the Inspector who will decide whether to hold any further hearing sessions".

Request and response

12. On 4 July 2017, the complainant wrote to the Council and requested information in the following terms:

"I also wish to see any evidence gathered to date regarding the loss of the agricultural land and associated loss of flora and fauna if the garden community was to be developed. I also wish to see any communication between any member of TDC, including Councillors, and landowners and other stakeholders that is covered under the Freedom of Information Act 2000 in relation to the development of the garden community centred around Crockleford Heath".

13. The Council responded on 3 August 2017. It provided a number of links to website resources.
14. Following further exchanges of correspondence, the Council provided an internal review on 1 November 2017. The internal review confirmed that the request has been considered under the EIR.
15. The Council confirmed it held some of the requested information. It provided some information within the scope of the request but refused to provide the remainder, citing the following exceptions as its basis for doing so:
- Regulation 12(4)(e) (internal communications)
 - Regulation 12(5)(b) (course of justice)
 - Regulation 12(5)(e) (commercially sensitive)
 - Regulation 12(4)(d) (unfinished documents)
 - Regulation 13 (personal information).

Scope of the case

16. Following earlier correspondence, on 1 December 2017 the complainant provided the Commissioner with the necessary documentation to support his complaint about the way his request for information had been handled.
17. The complainant objected to the Council treating his request for information under the EIR and not the FOIA. He was also dissatisfied with the timeliness with which the Council responded and that it withheld some of the information within the scope of the request.

18. During the course of the Commissioner's investigation, the Council explained, with respect to the first part of the request- "*any evidence regarding the loss of the agricultural land and associated loss of flora and fauna*" - that information held through the planning process had been placed on the Council's website.
19. The Council also confirmed that further information within the scope of the first part of the request was supplied to the complainant through dealing with the request and that none of the withheld information related to that part of the request.
20. With respect to the information within the scope of the second part of the request, the Council supplied the Commissioner with a copy of the withheld information, together with a lengthy submission detailing its reasons for withholding that information.
21. In its submission, the Council confirmed that, having reconsidered its handling of the request, it no longer considered that regulation 12(4)(e) applied. Instead, the Council confirmed that it considered that regulation 12(5)(b) applied to the information previously withheld by virtue of regulation 12(4)(e).
22. With respect to her consideration of the withheld information, the Commissioner's investigation has been assisted by the summary provided by the Council setting out the information held in scope of the request, and by a copy of the withheld information, annotated throughout to show where the Council considers an exception applies. In the Commissioner's view it was appropriate and necessary for the Council to provide that level of detail in this case.
23. In addition to providing specific arguments in respect of its own position, the Council told the Commissioner that it wished to rely on her decision in case reference FS50668116. It argued that there were similarities between that case and the scenario here. It also referred to the decision in case reference FER0400956.
24. Whilst acknowledging the existence of those cases having been investigated, each case must be considered on its merits.
25. The matter under consideration in this case relates to a request for information in the context of the development of a Garden Community.
26. The analysis below considers whether the Council considered the request under the correct access regime. It also considers the Council's application of exceptions to the information requested in the second part of the request, namely:

" ... any communication between any member of TDC, including Councillors, and landowners and other stakeholders ... in relation to

the development of the garden community centred around Crockleford Heath”.

27. The Commissioner also considered whether the Council considered the matter in a timely way.

Reasons for decision

Is the withheld information environmental information?

28. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition it must be considered for disclosure under the terms of the EIR rather than the FOIA.
29. The Commissioner has published guidance¹ on regulation 2(1). That guidance states that the test that public authorities should apply is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.
30. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant parts of the definition are found in 2(1)(a) to (f) which state that it is any information in any material form on:
- the state of the elements of the environment and the interaction among these elements;
 - factors affecting or likely to affect those elements;
 - measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements;
 - reports on the implementation of environmental legislation;
 - cost-benefit and other economic analyses and assumptions used within the framework of those measures and activities; and
 - the state of human health and safety, conditions of human life, cultural sites and built structures in as much as they are or may be affected by those elements.

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

31. Explaining why it considered it appropriate to deal with the request under the EIR, the Council told the Commissioner:

"The measure under consideration, development of a Garden Community, is something proposed for the future.... The Council has considered whether, if the measure were to go ahead, it would be likely to affect the elements and factors referred to in regulation 2(1)(a)".

32. The Council explained to the Commissioner that it considered that the withheld information fell within the definitions in regulation 2(1)(c) and (e) for the following reasons:

"(c) the request for information 'in relation to the development of the garden community' relates to the proposal to deliver a large development being a measure and activities which is likely to affect the state of the land as an element of the environment. Part of these proposals include the negotiations with the landowners on control of the land, how it will be used and who will develop it; and

(e) the correspondence between some of the project stakeholders includes financial modelling and valuations analyses and assumptions used within the proposed delivery of Garden Communities by the commercial framework established by the Councils, in particular through the LDVs [Local Delivery Vehicles]".

33. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
34. While acknowledging that the request for information is wide-ranging, the information is associated with a garden community development.
35. In this case, the Commissioner is satisfied that the requested information is environmental within the meaning of the EIR by virtue of regulations 2(1)(c) and (e), as it is information on activities affecting, or likely to affect, the land and landscape which are elements of the environment referred to under regulation 2(1)(a).
36. As the withheld information is information 'on' issues defined within regulation 2(1) as environmental information, the Council was correct to consider the information under the EIR.

Exceptions

37. The Council considers that the following regulations apply in this case:
- Regulation 12(5)(b) (course of justice)

- Regulation 12(5)(e) (commercially sensitive)
- Regulation 12(4)(d) (unfinished documents)
- Regulation 13 (personal information).

38. The exceptions in regulation 12(4) relate to the nature of the request or the type of information while those listed under regulation 12(5) relate to situations where disclosing the requested information would have an adverse effect.

39. The Commissioner has first considered the Council's application of regulation 12(5)(b).

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

40. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

"the course of justice, 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".

41. The exception is subject to the public interest test.

42. The successful application of the exception is therefore dependent on a public authority being able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception;
- disclosure would have an adverse effect on one or more of the factors cited; and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

43. In correspondence with the complainant, the Council described the information withheld by virtue of regulation 12(5)(b) as:

"... communications between the Council and its in-house and external lawyers which is protected by legal professional privilege".

44. In its submission to the Commissioner the Council confirmed its view that the information withheld under regulation 12(5)(b) of the EIR is legal advice which is subject to legal professional privilege and that it is therefore exempt from disclosure.

45. The Commissioner's guidance on regulation 12(5)(b)² recognises that the course of justice element of this exception is very wide in coverage. The Commissioner accepts that public authorities may wish to consider applying this exception to requests for material covered by legal professional privilege (LPP).
46. The Commissioner's interpretation of LPP is guided by the Information Tribunal's (now First-Tier Tribunal) description of the meaning of the concept in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023). The Tribunal described LPP as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchange between the client and his, her or its lawyers, as well as exchange which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."
47. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). There must be a real prospect or likelihood of litigation rather than just a fear or possibility.
48. The fact that the information is capable of attracting legal professional privilege is not sufficient for it engage regulation 12(5)(b). For the exception to be engaged its disclosure must have an adverse effect on the course of justice.
49. As long as it can be shown that disclosure would produce an adverse effect, as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test.
50. With respect to the nature of the information withheld by virtue of regulation 12(5)(b) in this case, the Commissioner notes that the withheld information comprises, for example "*Emails, reports and papers*

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

providing advice and issues for discussion from [named solicitors]", "Preparation for Land Agreement negotiations with [third party name redacted]", "instructions to solicitors in response to request for approval of approach with next stage of negotiations" and "legal matters to consider prior to formal decision making".

51. With regard to the disclosure of the withheld information having an adverse effect upon the course of justice, the Commissioner has not seen any evidence that the Council explained its rationale to the complainant. However, in correspondence with the Commissioner it told her:

"...legal advice must be confidential to allow both parties to freely negotiate".

52. During the course of the Commissioner's investigation, the Council clarified that it received legal advice for the purpose of agreeing and completing a land agreement. It confirmed that it considers that the advice is still live.

53. It also confirmed that it considers that the withheld information is subject to one of the two types of privilege within the concept of LPP – namely advice privilege – and that its disclosure would have an adverse effect upon the course of justice.

54. The Commissioner recognises that legal professional privilege (LPP) exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice.

55. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the Information Tribunal have recognised that disclosure would likely prejudice this integrity.

56. She also recognises that the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

57. In this case, having viewed the withheld information, the Commissioner is satisfied that the withheld information comprises material covered by legal professional privilege, including information and legal advice relating to land agreements, and communications about that advice.

58. The Commissioner is also satisfied, from the evidence she has seen, that as the advice was still 'live' at the time of the request and negotiations ongoing, disclosure of that information would have an adverse effect on the course of justice.
59. Accordingly, the Commissioner has concluded that the Council was entitled to engage the exception at regulation 12(5)(b) in respect of the information withheld on that basis.

Public interest test

60. In common with all EIR exceptions, the exception at regulation 12(5)(b) is subject to a public interest test. Therefore, the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

Public interest arguments in favour of disclosing the requested information

61. In correspondence with the Commissioner, the complainant put forward generic arguments in support of his view that the requested information should be disclosed. For example, he told the Commissioner:

"This FOI is very serious as TDC have now held a series of public meetings on the proposed Garden Community. ... Their failure to provide me with the requested information ... is a serious breach of my rights to respond to their Garden Community plans".

62. From the evidence she has seen, the Council did not identify any public interest arguments in favour of disclosing the requested information.

Public interest arguments in favour of maintaining the exception

63. In correspondence with the Commissioner, the Council argued that it:

"... is under a fiduciary duty to ensure that public funds are used appropriately and that it can obtain its own legal advice, with the protection of being privileged, on the assessment of proposed terms within any land agreement".

64. In that respect the Council told the Commissioner that disclosure of the legal advice it had requested and received would result in the Council being put:

"...at a significantly unfair disadvantage in reaching a land agreement on terms which do not prejudice its financial position or the interests of the District of Tendring".

Balance of the public interest arguments

65. In her guidance on regulation 12(5)(b), the Commissioner states:

"The public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test".

66. The Commissioner accepts that there is always a general public interest in disclosure, deriving from the purpose of EIR. She also accepts that in this case there is some public interest in disclosing information to present a full picture.
67. In considering where the balance of the public interest lies in the circumstances of this case, the Commissioner has given due weight to the fact that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice.
68. In relation to LPP, the Commissioner considers that there is a significant public interest in maintaining LPP due to the importance in 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 administration of justice.
69. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council. However, no such arguments appear to be present.
70. The Commissioner is also mindful of the timing of the request in this case, noting that, at the time of the request, the negotiations that were the subject of the legal advice were recent or ongoing.
71. Accordingly, the Commissioner finds that regulation 12(5)(b) applies and that the public interest favours withholding the information.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

72. 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"*.
73. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.
74. Breaking down the constituent parts of the exception, the Commissioner considers that the disputed information must satisfy all four of the following conditions in order for the exception to be engaged:

- the information is commercial or industrial in nature;
- the information is subject to confidentiality provided by law;
- the confidentiality is provided to protect a legitimate economic interest; and
- the confidentiality would be adversely affected by disclosure.

75. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure would cause some harm.

76. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.

Is the information commercial or industrial in nature?

77. 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.

78. In correspondence with the complainant, the Council simply stated:

"Commercially sensitive – Confidentiality of commercial or industrial information - the land negotiations contain both confidential and commercial information".

79. Expanding on the arguments it provided to the complainant, the Council told the Commissioner:

"The Council submits that the requested information being 'the communication between any member of TDC, and landowners and other stakeholders ... in relation to the development of the garden community' concerns information relating to the commercial and confidential negotiations between the Councils and their advisers and Option Holders and their legal representatives, of the land covered by the proposed garden community location".

80. The Council identified its own commercial interests as being those that would be adversely affected if the requested information was to be disclosed. It told the Commissioner:

"The Council is seeking to protect its own interests and fiduciary duty to protect the public purse by withholding the information. The Council's ability to negotiate the minimum land values in respect of not only this area of land but also future market value

negotiations are likely to be impacted upon, and putting the Council under significant risk of failing to achieve best price consideration”.

81. It argued that its reputation and ability to maintain a strong negotiating position:

“... will be significantly impacted upon, if potential vendors or purchasers are aware that even when negotiating subject to contract, the Council will disclose information relating to those communications, before completion”.

82. The Council explained that the approach that was being taken with respect to the Garden Community Development would, amongst other things, ensure that infrastructure was developed to serve the needs of the community and minimise any adverse impacts on existing communities as well as help to ensure effective future stewardship of those community facilities.

83. Having considered both the Council’s submissions and the withheld information, the Commissioner is satisfied that the withheld information is commercial in nature.

Is the information subject to confidentiality provided by law?

84. For the second element to be met, the information must be subject to confidentiality which is provided by law. This may include confidentiality imposed under a common law duty of confidence, a contractual obligation or be provided by statute.

85. For the common law duty of confidence to apply, the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.

86. In its submission to the Commissioner, the Council said:

“The correspondence, reports and papers ... have clearly been provided on the basis that they were confidential, as they form the basis of on-going discussions and negotiations on future formal land agreements”.

87. The Council confirmed that, at the time of the request, the parties were still in the process of negotiating, with all matters still being subject to contract.

88. In support of its application of regulation 12(5)(e), the Council argued that the information is confidential between the parties and subject to contract until any agreement is approved by the LDV [Local Delivery Vehicle] Board, completed and registered at the Land Registry.

89. It argued that, if the information was disclosed, trust and confidence while the parties were negotiating would be adversely affected.
90. From the evidence she has seen, the Commissioner is satisfied that the withheld information was not in the public domain at the time of the complainant's request. Nor does the Commissioner consider the information to be trivial: therefore it is capable of having the necessary quality of confidence.
91. The Commissioner also accepts that the information would be reasonably understood as having been shared in circumstances importing an obligation of confidence. On this basis, the Commissioner accepts that the information within the withheld material which has not already been disclosed into the public domain will be subject to the common law duty of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

92. To satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
93. In this case, the Council confirmed that confidentiality is designed to protect its own legitimate economic interests and to protect the public purse. It argued that disclosing the information *would* prejudice its bargaining position.
94. Having considered the submission the Council provided, and reviewed the withheld information, the Commissioner is satisfied that disclosing the information would have the effects which are identified in the exception. Namely, disclosure would adversely affect the legitimate economic interests of the Council in relation to the negotiating position of land values at a point when plans were not finalised.

Would the confidentiality be adversely affected by disclosure?

95. As the Commissioner has concluded that disclosure would adversely affect the Council's legitimate economic interests, it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.
96. Since the necessary four criteria have been met, the Commissioner has concluded that the information that the Council continues to withhold engages the exception under 12(5)(e).

Public interest test

97. Having found the exception engaged, the Commissioner has next considered whether, in all the circumstances of the case, the public

interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

Public interest arguments in favour of disclosing the requested information

98. As above, the arguments put forward by the complainant and the Council in favour of disclosing the requested information were limited.

Public interest arguments in favour of maintaining the exception

99. In favour of maintaining the exception, the Council argued that the current negotiations and future market value negotiations were likely to be impacted, putting the Council under significant risk of failing to achieve best price consideration.

100. It told the Commissioner:

"Due to the fact that the commercial interests in this regard are ensuring that financially viable minimum land values are obtained through a voluntary agreement, the Council is under a fiduciary duty to protect public money, and that the disclosure could have a negative impact upon the terms of the agreement or force the Council into a compulsory purchase route, it is in the public interest to maintain the exception and outweighs the disclosure".

101. The Council also told the Commissioner that once the terms of any agreement are finalised, such details would be available at HM Land Registry. However it considered that to disclose information at the time of the request *"would be premature and against the wider public interest"*.

Balance of the public interest

102. The Commissioner accepts that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.

103. In that respect, the Commissioner notes that the Council has released information about the Draft Local Plan as well as Council and Committee Reports. She also notes that details will be publically available once the terms of any land agreement are finalised.

104. She considers that this demonstrates transparency and goes a long way to meeting any wider public interest in the requested information.

105. In reaching her decision with respect to the balance of the public interest, the Commissioner has given weight to the argument that disclosure in this case would undermine the Council's competitive position and its relationship with local landowners, and affect its ability to do similar business with others in future, and that those relationships serve the public interest.

106. The Commissioner is therefore satisfied that the public interest favours withholding the information the Council has confirmed that it continues to withhold.

Regulation 12(4)(d) Material in the course of completion, unfinished documents and incomplete data

107. Regulation 12(4)(d) provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data.

108. The fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.

109. The Commissioner acknowledges that the aims of the exception are to:

- protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
- provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.

110. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test.

111. In this case, the information withheld by virtue of this exception comprises a number of worksheets, a valuation analysis document, agendas, papers and reports for the North East Essex Garden Communities Shadow Joint Delivery Board and miscellaneous draft project documents produced for discussion.

112. With respect to the financial viability information, the Council told the Commissioner that the worksheets were produced:

"... for the purpose of highlighting and reviewing the modelling of financial information for Garden Community viability purposes and were created in 2016".

113. Describing the worksheets, the Council argued:

"It is highly sensitive and information inserted within the model can be varied, therefore it was not produced to be the final viability information which the Councils were to rely on (incomplete data) and is a draft version (unfinished)".

114. With respect to the Valuation Analysis, the Council confirmed that it considered that the document was *"material which is still in the course of completion"*.

115. It argued that it was to provide valuation advice in relation to development sites to be used to formulate not only the policies for Garden Communities at a strategic level, but also for the purposes of the on-going land negotiations.

116. With respect to the notes and reports, it explained that they *"provided updates to the Board on negotiations"* and *"set out what the financial issues are, areas of conflict and matters to be addressed"*. The Council argued that, as the documents only contain data which is relevant to that point in time and as the commercial negotiations remain open, they are regarded as incomplete data.

117. Summarising its arguments in respect of the information withheld by virtue of regulation 12(4)(d), the Council told the Commissioner:

"... the fact that DPD [Development Plan Document] policies are still being formulated and the land agreements have not been finalised added considerable weight to the argument that disclosure would prejudice this safe space".

The Commissioner's view

118. The Commissioner acknowledges – and it is not in dispute – that, at the time of the request, a public consultation on the Draft Local Plan was in progress.

119. She also acknowledges the Council's argument that the approval of the Local Plan has its own statutory process.

120. The Commissioner recognises that some of the information withheld by the Council by virtue of this exception comprises documents which appear, in themselves, to be complete and which are not, for example, labelled 'draft'.

121. However, she is mindful that, in her guidance³, she accepts that while a particular document may itself be finished, it may be part of material which is still in the course of completion. She also acknowledges that the need for public authorities to have a 'thinking space' for policy development was recognised in the original proposal for the Directive on public access to environmental information which the EIR implement.
122. The Commissioner has considered whether the withheld information relates to information in the course of completion. The relevant consideration here is the information contained within each document itself and the purpose for which it was created, not the overall application to which it relates. The fact that a public authority has not completed a particular project, or other piece of work, does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception.
123. Having viewed the withheld information, and considered the Council's arguments, the Commissioner does not find the exception engaged in respect of the Valuation Analysis report. From the evidence she has seen, the report represented commentary/analysis by property consultants, with the commentary relating to scenarios and analysis based on the information and assumptions provided by third parties.
124. While she acknowledges that the report provides independent advice at a point in time, the Commissioner considers that it is generic in nature.
125. The Commissioner accepts that, at the time of the request, the Garden Communities were in the very early stages of design. However, the Commissioner does not accept that the Council has demonstrated that the analysis report is information in the course of completion or that it will impact upon information which is still in the course of completion.
126. However, she finds the exception engaged in respect of the remaining information withheld by virtue of exception 12(4)(d).
127. She has next gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

128. Neither party put forward public interest arguments in favour of disclosing the material withheld by virtue of regulation 12(4)(d).

³ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

Public interest arguments in favour of maintaining the exception

129. Although expressing its arguments in terms of prejudice rather than public interest, the Council told the Commissioner:

"In this case the fact that the land agreements have not been finalised added considerable weight to the argument that disclosure would prejudice this safe space".

Balance of the public interest

130. The Commissioner recognises that there will always be a significant public interest in ensuring transparency with respect to proposals/plans to develop land, not least because of the impact that such a development will have on local inhabitants.

131. In that respect, she acknowledges the amount of information that the Council has published regarding this proposed development.

132. In accordance with the exception, the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into. There is a public interest inherent in regulation 12(4)(d) in favour of ensuring that a public authority does not have to expend resources on justifying information contained in a draft document that may, ultimately, be subject to change.

133. Taking all the above into account, and mindful of the timing of the request, the Commissioner finds that the public interest in favour of maintaining the exception outweighs that in disclosure.

Regulation 5 Duty to make available environmental information on request

134. In his correspondence with the Council, the complainant expressed dissatisfaction with the timeliness with which it handled his request for information.

135. He told the Council:

"I am unhappy with your decision not to treat my request as a freedom of information request. This seems like a strategy to avoid falling under the FOI requirement to respond within 20 days".

136. The Commissioner has issued guidance on time limits for compliance⁴. That guidance states:

"Under the EIR, a public authority has a duty to inform the requester whether it holds the information and if so, to communicate the requested information to them 'as soon as possible, and no later than 20 working days after the date of receipt of the request.' [Regulation 5(2)]".

137. In this case, the request for information was made on 4 July 2017. The Council acknowledged that a response was due by 1 August 2017. As it was not until 3 August 2017 that the Council responded, the Commissioner finds the Council in breach of regulation 5(2) of the EIR.

Regulation 11 Representations and reconsideration

138. The Commissioner has issued guidance on internal reviews under the EIR⁵. In her guidance, the Commissioner states:

"A requester can ask for an internal review if he believes a public authority has failed to deal with his request properly, for example by incorrectly applying an exception, taking more than 20 working days to respond, or mishandling the request in some other way".

139. With respect to the responsibility of the public authority, her guidance states:

"Upon receiving a complaint the public authority must:

- Consider the requester's representations and any supporting evidence they have provided; and*
- Decide if it has complied with the requirements of the EIR.*

The authority must notify the requester of the outcome of the internal review as soon as possible and no later than 40 working days after receiving the complaint".

⁴ <https://ico.org.uk/media/for-organisations/documents/1622/time-for-compliance-eir-guidance.pdf>

⁵ https://ico.org.uk/media/for-organisations/documents/1613/internal_reviews_under_the_eir.pdf

140. In this case, the complainant expressed dissatisfaction with the Council's handling of his request for information on 4 September 2017; the Council responded on 1 November 2017.

141. In failing to notify the requester of the outcome of the internal review within 40 working days, the Commissioner finds the Council in breach of regulation 11.

Regulation 13 personal data

142. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.

143. Regarding its application of regulation 13 in this case, the Council confirmed that it considered that regulation 13 applied to some of the information also withheld by virtue of regulation 12(5)(e). It told the Commissioner:

"Personal data is contained within the Option Agreements made between the Landowners and the Developer".

144. As the Commissioner has determined above that the Option Agreements were correctly withheld, she has not considered the Council's application of regulation 13 to the same information.

Right of appeal

145. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

146. 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.

147. 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

**Deborah Clark
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SK9 5AF**