

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

**Decision notice**

**Date:** 6 September 2022

**Public Authority:** Bristol City Council  
**Address:** The Council House  
College Green  
Bristol  
BS1 5TR

**Decision (including any steps ordered)**

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1. The complainant requested information from Bristol City Council ("the Council") about the performance of its housing stock. The Council withheld some information under section 43(2) FOIA: Prejudice to commercial interests.
2. The Commissioner determined that the request fell to be considered under the EIR. Having considered the application of regulation 12(5)(e) – adverse effect on the confidentiality of commercial interests – which has similarities to section 43(2) FOIA, he is satisfied that the information was withheld correctly. However, the Council breached regulation 5(2) since it responded outside the statutory period of 20 working days.
3. The Commissioner does not require the Council to take any steps.

**Request and response**

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4. On 8 March 2021, the complainant wrote to the Council and requested information in the following terms:

"I am writing to request, under the Freedom of Information Act 2000 (FOIA), information about Bristol City Council's asset management in relation to its housing stock, as discussed in the following report:

<https://democracy.bristol.gov.uk/documents/s54593/Appendix%20A%20HRA%20Asset%20Management%20Strategy%202021-2026.pdf>

- 1) Please provide a copy of the detailed 2019 evaluation that forms the basis of section 5, 'Performance of our stock', in the above document. Please take this to encompass all content generated as a result of the evaluation, including but not limited to reports, maps, data visualisations, analysis and spreadsheets. I do not expect you to identify individual addresses so please provide to street or block level, redacting property numbers as appropriate.
- 2) Please provide copies of any further analysis conducted over the past 12 months using Savills' SHAPE tool. Again, please take this to encompass all content generated, including but not limited to reports, maps, data visualisation, analysis and spreadsheets. I do not expect you to identify individual addresses so please provide to street or block level, redacting property numbers as appropriate.
- 3) Please provide copies of any emails referring to the 2019 evaluation and any subsequent SHAPE housing stock analysis, along with their attachments, in which the following individuals were senders, receivers or copied in: [officers' and officials' names redacted].

As per FOIA section 16, please contact me by phone [number provided] or email at the earliest possible opportunity if any clarification of the request is needed."

5. The Commissioner notes that the request refers to data analysis software known as SHAPE: this stands for Savills Housing Asset Performance Evaluation.
6. The Council responded on 29 April 2021 and provided some information. With regard to request 1, it redacted references to specific properties under section 40(2) FOIA – third party personal data. It also removed some personal information from emails under this exemption, and explained that some emails were not held, due to individuals having left the organisation.
7. In addition, with regard to all three parts of the request, it stated that it had withheld some information, including analysis at block and street level, under section 43(2) FOIA – commercial interests.
8. The complainant requested an internal review in respect of the information which had been withheld under section 43(2). On 16 June

2021 the Council responded but upheld its position that some information was covered by section 43(2) and that the balance of the public interests favoured the exemption being maintained.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 28 July 2021 to complain about the way his request for information had been handled.
10. The Commissioner notes that the withheld information relates to the financial performance of the Council's housing stock. It covers matters such as ongoing and projected maintenance costs, energy performance and the cost of fire safety works.
11. He has therefore determined that the information is on measures and activities which are likely to affect the elements and factors of the environment, as defined in regulation 2(1) of the EIR. The withheld information is, therefore, "environmental" within the definition at regulation 2(1)(c).
12. The Commissioner notes that the complainant did not question the redaction of names and contact details, nor of specific property addresses, as being third party personal data. As a result those redactions are not covered in the analysis below.
13. Noting the Council's position that it considered disclosure of the relevant information would be prejudicial to its commercial interests, he has pro-actively considered, in this notice, whether the information was correctly withheld under regulation 12(5)(e) of the EIR – adverse effect on commercial confidentiality.

## **Reasons for decision**

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### **Regulation 12(5)(e) EIR: adverse effect on the confidentiality of commercial or industrial information**

14. Regulation 12(5)(e) of the EIR states 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.

15. The Commissioner has published guidance<sup>1</sup> on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.
16. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:
  - The information is commercial or industrial in nature;
  - It is subject to confidentiality provided by law;
  - The confidentiality is protecting a legitimate economic interest; and
  - The confidentiality would be adversely affected by disclosure.

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

17. The Commissioner has considered the withheld information, and notes that it comprises data and a report relating to the performance of the Council's housing stock.
18. Specifically, the Council withheld:
  - 1) Detailed "block level" data extracted from the SHAPE tool (portfolio overviews and spreadsheets);
  - 2) Report entitled "Investment Review" prepared by Savills;
  - 3) Report entitled "SHAPE Final Results" prepared by Savills;
  - 4) A small amount of wording from a slide entitled "Worst NPV (net present value)" (most of this slide was disclosed).

The Commissioner is satisfied that, since the information relates to financial performance, the information is commercial in nature.

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

19. The phrase "confidentiality provided by law" in this circumstance, as explained in the Commissioner's guidance, includes confidentiality imposed on any person by the common law of confidence, contractual

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<sup>1</sup> <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

obligation, or statute. In contrast to section 41 of FOIA, there is no need for the public authority to have obtained the information from another. It covers information obtained from a third party, information jointly created or agreed with a third party, and also covers information that the public authority has created.

20. For a common law duty of confidentiality to exist, it is required (a) that the information has the necessary quality of confidence, and (b) that it was imparted in circumstances which gave rise to an obligation of confidence.
21. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public. In this case, the Commissioner is satisfied that this is so, since the information relates to one of the Council's core functions – the management of its housing stock – and has not been published.
22. Regarding (b), whether it was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has considered the information set out in paragraph 18, above. With regard to 1), 2) and 3), these were provided only to the Council by Savills, in delivering its professional services. With regard to the slide at point 4), it is part of an internal PowerPoint presentation prepared only for use at the Council.
23. In each case, the Commissioner is satisfied that the intention was that the information would remain confidential, for consideration only within the Council.
24. The Commissioner considers that the common law duty of confidentiality exists with regard to the information, and is satisfied that the information is subject to confidentiality provided by law.

**Is the confidentiality protecting a legitimate economic interest?**

25. As the Tribunal confirmed in the case of Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011) ("Elmbridge"), to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person(s) the confidentiality is designed to protect.
26. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.

27. Regarding the first element, the Commissioner is satisfied that the Council has a legitimate economic interest in managing its housing stock effectively, in order to meet its legal obligations under the various Housing Acts. It also has an interest in maintaining a strong commercial position going forward, in order to negotiate any future contracts and/or transactions relating to its properties.
28. The Council has also explained why it considers that disclosure would harm its interests: the second element.
29. It explained that it believed "that the disclosure of the withheld information could impact its ability to negotiate a potential future sale (at an acceptable price) or procure a contract for the investment and maintenance of the properties."
30. It further commented that: "Disclosure of this information would prejudice the council's ability to propose, develop, and appraise approaches to improving the performance of its stock."
31. It was also concerned that disclosure may negatively impact on its relationship with Council tenants, by causing concern and worry about the future of their homes at a point when the Council's future actions were in fact undecided, leading, in turn, to damage to the Council's reputation, which could adversely affect its position in future commercial activities.
32. As explained in his guidance, the Commissioner's approach is that the wording of this part of the exception – it may be engaged "where the confidentiality is provided by law to protect a legitimate economic interest" – should be interpreted strictly: that the confidentiality must be objectively required at the time of the request.
33. In this case, the Commissioner is satisfied that the Council correctly asserted that the confidentiality was required to protect a legitimate economic interest.

**Would the confidentiality be adversely affected by disclosure?**

34. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
35. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of confidential information into the public domain would inevitably harm

the confidential nature of that information, and would also harm the legitimate economic interests that have been identified.

36. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).
37. In all the circumstances of this case, the Commissioner is satisfied that the exception is engaged.

### **The balance of the public interests**

38. Regulation 12(5)(e) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Even where the exception is engaged, the information should still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.
39. In addition, under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

### **Factors in favour of disclosure**

40. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of, particularly, environmental matters, a free exchange of views, and more effective public participation in decision-making, all of which ultimately contribute to a better environment.
41. With regard to transparency, in this case, the complainant considers that the Council has not demonstrated that disclosing the information requested would prejudice its commercial interests by negatively impacting competitive processes. He commented: "In fact the reverse may be true, meaning that disclosure could increase competition within public-sector tendering, thus serving the public interest."
42. The complainant also considered that "given the contentious recent history of social housing regeneration schemes in London and elsewhere, the public interest weighs clearly in favour of disclosure,



especially as Bristol City Council's responses suggest it is considering selling some of its homes or land. The council has committed to balloting residents on proposals to regenerate its estates, so the more unvarnished information that is in the public domain, the better the public interest will be served."

### **Factors in favour of maintaining the exception**

43. The Council considers that the information and particularly the data generated by the SHAPE tool could be misinterpreted and publicised in such a way, by certain individuals, as to cause deliberate concern that certain properties are being identified for sale or extensive redevelopment, at a time when its course of action was in fact not settled.
44. It considers that it "would likely cause concern and anxiety to individuals living in or around poorly performing properties, resulting in a strain on council resources to engage with and reassure these individuals. This would in turn take hinder the ability of council officers to undertake their core roles, resulting in a poorer service being delivered." The Council therefore asserts that disclosure would not be in the public interest, since its officers would be distracted from their core tasks by the effects of disclosure.
45. The Council also considered that residents who rent or own properties close to poorly-performing areas, may decide to sell their properties or terminate their contracts, without being adequately informed.

### **The Commissioner's decision**

46. In determining the balance of the public interests, as covered in his guidance, the Commissioner will consider (a) the specific harm that disclosure would cause to the relevant economic interest at stake, and (b) whether there is any wider public interest in preserving the principle of confidentiality. These factors need to be weighed against the public interest in disclosure.
47. Focusing on (a), the envisaged harm, regulation 12(5)(e) only protects confidentiality as far as it is necessary to protect the legitimate economic interests identified by the Council, and the weight given to this factor depends on the extent, severity and frequency of the harm in a particular case.
48. In this case, by finding the exception at regulation 12(5)(e) to be engaged, the Commissioner has already accepted that releasing the withheld information would negatively affect the confidentiality of the legitimate economic interests of the Council. He has therefore considered the extent of the envisaged harm.



49. The adverse effects chiefly being envisaged by the Council relate to its ability to manage its properties effectively and to do associated business effectively. It envisaged wide-ranging effects, including harm to its relationships with tenants, its reputation, and its commercial bargaining position. It also envisaged being distracted from its core tasks by possible negative publicity, believing the information was likely to be deliberately publicised in such a way as to cause alarm.
50. Having considered the withheld information, the Commissioner agrees that the disclosure of the information would cause the envisaged types of harm and that the level of harm would be substantial.
51. Regarding (b), the wider interest in preserving the principle of confidentiality, this is of less importance here, although the Commissioner acknowledges that some obligation of confidence does exist to Savills in terms of the confidential nature of the information it provided for the Council's consideration, and regarding the operation of its SHAPE tool.
52. Whilst not normally of direct relevance to regulation 12(5)(e), the Commissioner also notes that, in this case, preserving confidentiality allows the Council a safe space in which to consider the performance of its housing stock effectively, whilst protecting its commercial interests by preventing the harm described above.
53. The Commissioner's view is that there is some public interest in learning precise facts about the financial performance of all of the housing owned by the Council, street by street. However, the Commissioner notes that the published report referred to in the request provides a detailed overview. Whilst it does not contain street-by-street analysis, it goes some way towards meeting the public interest in this matter and allows scrutiny of the Council's position.
54. He is satisfied that the balance of the public interests lies in the exception being maintained, and that the information has therefore correctly been withheld.
55. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019): "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

56. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
57. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

**Regulation 5 EIR – duty to make environmental information available**

58. Regulation 5(1) states that, subject to certain provisions, a public authority that holds environmental information shall make it available on request.
59. Regulation 5(2) states that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
60. In this case, the Council responded to the request outside this time-frame and has therefore breached regulation 5(2) of the EIR.
61. Since a response has now been provided, the Commissioner does not require the Council to take any steps.

## Right of appeal

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62. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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 .....**

**Sophie Turner**  
**Senior FOI Upstream Regulation Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**