

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

Decision Notice

Date: 19 September 2011

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Royal Lemington Spa
CV32 5HZ

Summary

The complainant requested information relating to discussions on the subject of plans to build a hotel and the extension to a conservation area. The council initially provided some information but withheld other information using the exemptions under section 42 and 43 of the Freedom of Information Act 2000 ("the FOIA"). At the internal review stage, the council indicated that the information may be environmental and if that was the case, it was excepted under regulations 12(4)(e), 12(5)(b) and 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR"). Following the complaint to the Commissioner the council decided to disclose some of the information that it had sought to withhold. It also identified additional information, some of which it disclosed and some of which it said was excepted under regulation 12(5)(b). The Commissioner found that regulations 12(5)(b) and 12(5)(e) were engaged and the public interest favoured maintaining the exceptions. As a result, the Commissioner did not find it necessary to consider the application of regulation 12(4)(e). He also found that the council did not hold any information that it had not identified. He found breaches of regulation 14(2) and 14(3). The Commissioner does not require any steps to be taken.

The Commissioner's Role

1. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

Background

2. The council owns the freehold title of land in Warwick called St Mary's Lands. This land encompasses Warwick Racecourse. The racecourse is leased to Warwick Racecourse Ltd which is a subsidiary of the Jockey Club. The most recent lease was granted in 2005. Warwick Racecourse has long sought to bolster its business during the majority of the year when racing is not taking place. The racecourse submitted a planning application on 27 July 2009 for a new hotel to be built on the land it leases from the council. The Council confirmed that the application was valid on 18 August 2009. It then embarked on the usual public consultation.
3. The complainant in this case lives nearby. The council has advised the Commissioner that concerns were raised about whether the council's decision as a planning authority might be influenced improperly by the gain which might accrue to it as the landowner and landlord if the hotel was built. The council understands that the complainant's particular concern is that the council bound itself to support the hotel at an early stage and therefore undermined its ability to consider the planning application fairly. At the time of writing this notice, the council's position is that it has not made a decision on whether as landowner and landlord of the racecourse it would wish to support the proposed hotel. In addition, the planning application is still under consideration.
4. In relation to the part of the request concerning a conservation area, the council explained that there was a proposal to extend the conservation area around the land occupied by the racecourse and as part of the public consultation in respect of this proposal the racecourse was consulted. The racecourse objected on the basis that it would adversely affect its ability to function as a business. As a result of these objections, the council and the racecourse had discussions to try to alleviate the racecourse's concerns. The outcome was that following the consultation period, the conservation area was extended.

The Request

5. On 23 August 2010, the complainant requested information from the council in the following terms:

"I wish to make a formal Freedom of Information request, seeking full disclosure of information of any and all meetings between Warwick Racecourse Ltd and Warwick District Council relating to its application to build a hotel on St Mary's Lands in Warwick and its discussions on the extension to the Warwick Conservation Area.

1. *I specifically would like to see ALL letters, emails, minutes of meetings, WDC notes and disclosure of all meetings in which no minutes were kept (i.e. diary entries that a meeting did take place and who attended).*
 - a. *Relating to Warwick Racecourse Ltd, its parent company Racecourse Developments Ltd (Or any other companies owned by the Jockey Club such as Jockey Club Racecourses and its agents including: The Sitwell Partnership, Dexter Moran Associates, Barton Willmore*
 - b. *This FOI is for all current and former Warwick District Council staff including*
 - i. *[name redacted]*
 - ii. *[name redacted]*
 - iii. *[name redacted]*
 - iv. *[name redacted]*
 - v. *[name redacted]*
 - vi. *[name redacted]*
 - vii. *[name redacted]*
 - viii. *Conservation Department*
 - ix. *The Executive Committee of WDC*
2. *I also make a further Freedom of Information request for ALL and any information on meetings or discussions – including all letters and emails – between Warwick District Council and Warwick Racecourse Ltd relating to:*
 - a. *The lease Warwick Racecourse Ltd has on the St Mary's Lands – including:*
 - i. *Duration*
 - ii. *Rent review dates*
 - iii. *Clauses relating to triggers for a rent review outside normal rent review dates*
 - iv. *Formula for setting the rent*
 - v. *Restrictive covenants*
 - vi. *Permitted Developments*
 - vii. *How it is related to the Warwick District Act 1984*
 - b. *This relates to all WDC staff including those listed in 1b and also the WDC Legal Department and [name redacted]"*
6. The council emailed the complainant on 16 September 2010 to say that its response was going to be late. The Council invited the complainant

to collect the information from its offices when it had been prepared. Following the complainant's agreement to collect the information, the Council sent a further email on 29 September 2010 stating that the requested information would be available at its office on the afternoon of 6 October 2010.

7. When the complainant collected information on 6 October 2010, the council had enclosed a letter. The letter referred to "the first aspect" of the request and stated that the council had disclosed the majority of this information. However, it said that it had not disclosed some information as it considered that it was exempt under section 41, 43 and 42. It said that the public interest favoured maintaining these exemptions. The council also referred to the "second aspect" of the request and said that it understood that the complainant had already been supplied with a copy of the lease in question. It said it was still collating information relating to the lease and it hoped to be able to respond fully to this part of the request by 14 October 2010.
8. The council sent a further email to the complainant on 13 October 2010 replying to what it called the "second aspect" of the request. It said that it was unable to release the information requested in relation to the Warwick Racecourse's lease on St Mary Lands. It noted that the complainant had already been provided with a copy of the lease on 20 September 2010. It said that the remainder of the information is exempt under section 42 of the FOIA or section 43. It said that the public interest favoured maintaining the exemptions.
9. On 14 October 2010 the complainant wrote to the council to ask it to undertake an internal review of its refusal.
10. The council completed an internal review on 26 November 2010. The council conceded that it had not responded to the request on time and it apologised for this. However, it added that it considered that it had been correct to refuse to provide the complainant with the information it had withheld. The council also said that it considered that the EIR may be relevant and if they were, the information would also be excepted under regulations 12(4)(e), 12(5)(b) and 12(5)(e).
11. Following the complainant's complaint to the Commissioner, the council wrote to the Commissioner on 25 February 2011. It said that it had reviewed all of the documents that were originally withheld from the complainant and that it was now prepared to disclose some of this information because of the passage of time. It also stated that it would provide this information to the complainant. The council has provided the Commissioner with a bundle of the information that it still wishes to withhold using the exemptions and exceptions already cited.

The Investigation

Scope of the case

12. On 6 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The length of time taken to reply to the initial request and the time taken for the internal review
 - The council's refusal to provide the information
13. During a telephone call with the complainant on 23 March 2011, the complainant also informed the Commissioner that he wished him to consider whether the council held recorded information concerning meetings about the matters in question which were earlier than those identified by the council. He also alleged that the council had not identified all the information falling within the scope of the request following the disclosure of some information towards the end of the Commissioner's investigation.
14. For clarity, this notice does not concern any information that has already been provided to the complainant, either through this request or previous correspondence.

Chronology

15. On 31 January 2011, the Commissioner sent a standard letter to the Council to inform it that a complaint had been received. He also asked the council to provide him with copies of the withheld information.
16. On 25 February 2011, the Council sent a letter to the Commissioner explaining that because of the passage of time, it had decided to disclose some of the withheld information to the complainant. It said that the remaining withheld information would be forwarded to the Commissioner in a separate bundle. This bundle was subsequently received by the Commissioner.
17. Between 22 March 2011 and 8 August 2011, the Commissioner was in contact with both the complainant and the council in order to clarify the issues and further his enquiries.
18. For clarity, in terms of the interpretation of the request, the council informed the Commissioner that it had interpreted the request broadly to cover all recorded information relating to discussions between the

parties referred to in the request (including its own current and former staff members) concerning the application to build a hotel and the extension to the conservation area. As the complainant did not dispute this interpretation, the Commissioner proceeded to investigate on this basis.

19. As part of this correspondence, the council indicated that it held more information relating to the request than had been initially identified. It said that it was prepared to disclose some of this, but wished to withhold some of the information on the basis that it was excepted from disclosure under regulation 12(5)(b). The council also agreed to disclose some of the information that it had originally withheld using regulation 12(5)(e).

Analysis

Substantive Procedural Matters

Should the request be handled under the EIR?

20. The council initially dealt with the request under the FOIA. In its internal review, it expressed uncertainty about whether the request should actually have been handled under the EIR. It applied various exceptions in the alternative. Regulation 2(1)(c) of the EIR provides that any information on plans affecting or likely to affect the elements and factors of the environment will be environmental information for the purposes of the EIR. Having considered the withheld information, the Commissioner understands that it concerns the proposal to build a hotel and discussions concerning a conservation area. In view of this, the Commissioner's view is that the requested information should be considered under the EIR as it is on plans that are likely to affect an element of the environment, in this case the land.

Did the Council hold more recorded information than that identified?

21. During the Commissioner's investigation, the council conceded that it had held more information than it had identified initially. The additional information that was withheld has been considered by the Commissioner in the remainder of this notice. However, the complainant expressed concerns about whether any more information was held. In particular, he was interested in meetings that took place earlier than those identified by the council. It is also the case that when some information was disclosed to the complainant as part of the Commissioner's investigation, this prompted further queries from the complainant on the subject of whether any further information was held.

22. In cases where there is a dispute over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the matter "on the balance of probabilities". This involves the consideration of the steps taken by the authority to check that no further information was held and any explanation of why no further information was held. In this case, the council explained to the Commissioner that it had searched all paper and electronic records (including individual email accounts) relating to those individuals specified in the request and any other staff members or departments that could hold relevant information. The council said that having revisited the matter following the complaint to the Commissioner, it was satisfied that it had identified all the information it held falling within the scope of the requests.
23. In relation to the specific point raised about earlier meetings, the council explained to the Commissioner that according to the recollection of the district council officers, the first solid ideas regarding the hotel did not come forward for discussion until the first half of 2005 around the date that the lease to the racecourse was completed on 27 June 2005. The council explained that searches for information had only revealed information dating back to 2006 and it therefore seems likely that any earlier discussions were simply considered to be informal pre-application discussions with planning officers which would not have been recorded.
24. In relation to other specific queries raised by the complainant following the disclosure of some information, the council explained that having considered these queries, it remained satisfied that it did not hold any further recorded information based on the searches it conducted. The council also explained that in relation to certain references within the disclosed information, the complainant had made incorrect assumptions that there was recorded information held relating to those particular issues.
25. The council also said that it was not aware of any specific instances of information that would have been relevant to the request being deleted, destroyed or mislaid. It said that if any information had been deleted or destroyed before the request, such as email correspondence, this would have been in line with the council's normal course of business and not in breach of any record management policy it operates.
26. Having considered the responses provided by the council, it was clear that there were some short-comings in the council's initial searches for relevant information. However, further searches were conducted following the Commissioner's investigation and the Commissioner was satisfied that on the balance of probabilities the council did not hold

further recorded information other than that identified. The Commissioner will now turn his attention to the information that was being withheld by the end of his investigation.

Exceptions

Regulation 12(5)(b)

Was the information covered by Legal Advice Privilege?

27. Under this exception, a public authority can refuse to disclose information to the extent that 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 council applied the exception to withhold a number of emails.
28. The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege. 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 categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is contemplated or pending). In this case, the Council has stated that Legal Advice Privilege applied in the circumstances.
29. The Commissioner inspected the emails provided by the council that it had withheld using regulation 12(5)(b) and was satisfied that they were communications between solicitors and council officers for the dominant purpose of obtaining or giving legal advice. The Commissioner was therefore satisfied that the information was covered by Legal Advice Privilege. The circumstances did not suggest that the advice had lost its confidential character.

Would disclosure have caused an adverse effect?

30. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an “adverse” effect resulting from disclosure of the information as indicated by the wording of the exception.
31. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word “would” is “more probable than not”.

32. The council argued that disclosure of information that is subject to Legal Advice Privilege would have an adverse effect on the course of justice through a weakening of the general principle behind Legal Professional Privilege.
33. 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".
34. The Commissioner accepts that disclosure of the legally privileged information would undermine the important common law principle of Legal Professional Privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legally privileged information would adversely affect the council's ability to defend itself if it ever faced a legal challenge.
35. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the withheld information.

Public interest arguments in favour of disclosing the requested information

36. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities.
37. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to plans that would have a significant impact upon the environment or which concern public money. The Commissioner also notes that in this case, concerns have been expressed about a potential conflict of interest because the council is both the landowner and the planning authority. Disclosure may help to reassure the public that the council is acting appropriately.

Public interest arguments in favour of maintaining the exemption

38. The Commissioner's published guidance on Legal Professional Privilege states the following:

"Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness

between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice”.

39. In light of the above, there will always be a strong argument in favour of maintaining the exception because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

“...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”

40. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

41. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect the environment and concern public money. He has also taken into account the concerns raised by some members of the public about the process and that the disclosure may help to reassure them that the council is acting appropriately. However, having regard to the circumstances of this case, it is not the Commissioner’s view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council’s right to consult with its lawyers in confidence.
42. The Commissioner would observe that it is not a particularly unusual position for a local authority to be both the planning authority and the landowner. Furthermore, the Commissioner has not seen any evidence demonstrating that the council had not kept its roles separate. The Commissioner notes that the council has engaged with the public to reassure certain individuals that it keeps its roles separate and that certain planning information is already made public through the normal procedures. The Commissioner has seen no obvious evidence of unlawful activities or evidence that the council has misrepresented any of the legal advice it received. Further, if the complainant believes that the council had acted inappropriately other forums exist in which those concerns can be considered.

43. The Commissioner has also taken into account the fact that at the time of the request and of writing this notice, the planning application has not been determined and the lease negotiations are still ongoing. The information is still relevant to activities that are currently under consideration so the purpose of the information has not diminished. While the Commissioner appreciates that disclosure of the information may have given the public more opportunity to influence the outcome at an early stage, ultimately, the Commissioner did not consider that that the public interest in doing this in the circumstances outweighed the public interest in maintaining the strong principle that the council should be allowed to consult with lawyers in confidence in order to make decisions.
44. In view of the above, the Commissioner decided that the public interest in maintaining the exception outweighed the public interest in disclosure of the information.

Regulation 12(5)(e)

45. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
46. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the FOIA, it would cease to be confidential.

Is the information commercial or industrial in nature?

47. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The Commissioner accepts that the information is commercial in nature as it relates to a proposed planning application by the racecourse to build a hotel which will affect the racecourse's ability to expand as a business and participate in a commercial activity.

Is the information subject to confidentiality provided by law?

48. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law of confidence, contractual obligation or statute.
49. The council presented an argument that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner’s approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law of confidence under this heading are:
- Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
50. The council highlighted that some of the withheld information represented communications between itself and the valuation office agency (“the VOA”). It said that this information was not trivial nor was it publicly available. The council said that it believed that it had a reasonable expectation that any communications it made to the VOA about the matter would be treated in confidence given the nature of this relationship and the information. Having considered the matter, the Commissioner accepts that the VOA would have owed the council an implied duty of confidence in respect of any information supplied to it for the purposes of carrying out its professional role. The fact that this part of the exception could be engaged if a duty of confidence is owed to the council was established in the following case heard before the Information Tribunal: *South Gloucestershire Council / Bovis Homes* (EA/2009/0032).
51. The council said that the remaining information consists of communications between itself (or its valuer acting on its behalf) and the racecourse or its parent company, the Jockey Club. It said that this information was not trivial nor was it publicly available. The council explained that it believed that a common law duty of confidence had arisen and that the council owed this duty to the third parties. It said that the third parties provided the information to the council in confidence as part of the commercial negotiations with the council.
52. The Commissioner noted that the communication between the VOA and the council and the racecourse or the Jockey Club relates to discussions connected to the council’s role as landowner focused on the lease.

Some of these discussions took place prior to the submission of the planning application, and some after. The council said that some of the information had been marked “without prejudice” or “confidential” which indicates a reasonable expectation of confidence. The council acknowledged that not all of the information was marked confidential however it considered that this was implied because of the nature of the exchange and the relationship of the parties (landlord and tenant). The Commissioner agrees with the council that at the time of these communications, an implied duty of confidence existed because of the nature of the relationship between the parties and the contents of the correspondence.

Is the confidentiality required to protect a legitimate economic interest?

53. The council explained to the Commissioner that the discussions between the council as landlord, the VOA and the racecourse as tenant were not resolved by the time of the request and are still ongoing at the time of writing this Decision Notice. It said that the council as landowner has not yet consented to the proposed hotel under the terms of the lease. The council said that the negotiations are still at a sensitive stage and disclosure of the information could prejudice its own commercial negotiations or those of the third party.
54. The council argued that disclosure of a number of emails between itself and the VOA would prejudice its ability to achieve the best value it can from its land. The council explained that the information relates to the council's ability to make decisions as a freehold owner of the land and identifies issues that require clarification to help it to negotiate effectively with the racecourse. The council also pointed out that there has been opposition to the proposed development, including opposition from the complainant in this case. It explained that given this background, premature disclosure of the details of the negotiations would adversely affect its ability to participate in a successful negotiation with the third party.
55. The Commissioner considered the withheld information and the argument provided by the council above. The Commissioner accepts that at the time of the requests, confidentiality was required to protect the council's legitimate economic interests. The information is clearly concerned with issues that may affect the council's ability to negotiate effectively with the racecourse and if this information was disclosed, the Commissioner accepts that it would prejudice the council's position because the negotiations are still at an early stage. It is a general principle of negotiations that one side would not reveal all of its internal thinking to the other side in advance because this is likely to

prejudice its ability to get the best deal by highlighting any weaknesses in its position and revealing what it hopes to achieve. It is important, in the Commissioner's view, for the council to have a "safe space" in which to explore its position before that is exposed to the other party and the public. The Commissioner accepts that given that there is some hostility to the development, early exposure of the details may lead to attempts to interfere in the negotiations and that would lead to commercial prejudice.

56. The council also argued that the disclosure of communications between itself (or the VOA acting on its behalf) and the racecourse or the Jockey Club would prejudice the commercial interests of the latter for similar reasons. The council confirmed that it had consulted the third party about the disclosure and that the arguments it had put forward represented the genuine concerns of the third party. This is important because it was established in the Information Tribunal case of *Derry City Council and the Information Commissioner* (EA/2006/0014) that a public authority cannot speculate on behalf of a third party when considering whether the disclosure of information would prejudice its commercial interests.
57. The third party argued that prejudice would be caused to its ability to negotiate effectively with the council if the information was disclosed. It argued that the negotiations were at an early stage at the time of the request and that a safe space was necessary for it to explore the issues that may be relevant to the negotiations with the council and its valuer without undue interference from the public or other interested parties which would be likely to cause prejudice to the effectiveness of the negotiations. As evidence of the likelihood of this, the third party provided press cuttings from the letters page of a newspaper in which the lease arrangements had been questioned and criticised in some detail.
58. Having considered the information, the Commissioner accepts this argument. The information could be described generally as representing part of the "business case" being put forward by the third party. It includes details about the research conducted by the third party regarding the viability of the proposals as well as information about the status and strategy of the racecourse and the Jockey Club. There is also an email between the VOA acting on the council's behalf and the third party which clearly forms part of the ongoing negotiations taking place regarding the proposals. The withheld information contains sensitive commercial details such as discussion surrounding percentage shares and preferred hotel operators.

Public interest arguments in favour of disclosing the requested information

59. There is always some public interest in the disclosure of information for its own sake. This is because disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process. Under the EIR there is a specific presumption in favour of disclosure.
60. There is also a more specific public interest in understanding actions being taken by the council in relation to plans by a third party to undertake significant development. This is arguably even more so when the authority is both the land owner and the planning authority for the same piece of land. The negotiations will involve the council trying to secure the best deal which impacts upon public funds. Further, concerns have been raised by members of the public regarding the council's dual role as landowner and planning authority. Disclosure of the information may help to reassure the public that the authority keeps these roles separate and acted appropriately.

Public interest arguments in favour of maintaining the exemption

61. The exception under regulation 12(5)(e) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party or the public authority itself. There is a public interest in ensuring that the commercial confidences are not prejudiced in circumstances where it would not be warranted and proportionate.
62. The council said that it was not in the public interest to prejudice commercial negotiations between two parties while those negotiations are still progressing. It said that it is clearly in the public interest to encourage such negotiations and give the parties the necessary time and space so that the most desirable commercial solution can be reached. The commercial confidence in this case means that the council can fully explore issues that may impact upon its negotiations with the third party and ensure that it acts appropriately. As the landowner, it is the council's responsibility to ensure that it negotiates the best commercial terms to ensure that it manages public money as effectively as possible. The commercial confidence also encourages the third party to make information available to the council in a free and frank manner. It can, for example, share details of its business strategies which helps the council to plan ahead. It can also engage with the council to help both parties to reach solutions to problems. The Commissioner accepts that the commercial confidence allows both

parties the opportunity to try to secure the best deal and it allows the parties to progress the negotiations in a timely and effective manner.

63. Having inspected the information, the Commissioner appreciates that the information is of a sensitive nature, particularly in view of the early stage that the negotiations were at. He was satisfied that disclosure could severely impact upon the council's ability to secure the best deal possible because it reveals the council's discussions about possible issues with the proposals and what it should aim to achieve. The Commissioner also appreciates that disclosure of the third party's plans in this case could severely impact upon its ability to protect itself from competition or other outside interference and it could also severely affect its ability to communicate in a free and frank manner with the council in order to progress the negotiations productively.
64. The council also explained that it has engaged in a large amount of correspondence to provide explanations to the requester and other individuals who oppose or have concerns about the plans, particularly in relation to keeping its dual roles as landowner and planning authority separate. Certain planning information is also made public following the submissions of an application in accordance with usual procedures. The council argued that this recognises the legitimate public interest in knowing as much as possible about the plans.

Balance of the public interest arguments

65. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect the environment and concern public money. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
66. The Commissioner appreciates that concerns have been expressed by the complainant and others about the council's dual role as landowner and planning authority and how it is handling the matter. The Commissioner does not accept the council's view that disclosure of some information and its attempts to help the people who have expressed concern has fully satisfied any public interest there may be in the disclosure of the information. Disclosure of the information may help to reassure those individuals that the council is acting appropriately and would add to their understanding of the actions taken.
67. However, the Commissioner would observe that it is not a particularly unusual position for a local authority to be both the planning authority

and the landowner. Furthermore, the Commissioner has not seen any evidence demonstrating that the council had not kept its roles separate. The Commissioner notes that the council has engaged with the public to reassure certain individuals that it keeps its roles separate and that certain planning information is already made public through the normal procedures. If this had not been the case, there may have been a greater public interest in disclosure. Further, if the complainant believes that the council had acted inappropriately other forums exist in which those concerns can be considered.

68. The Commissioner notes that the timing of the request in this case has clearly had an important impact on the council's decision to refuse to provide the information in this particular case. While the Commissioner appreciates that disclosure of the information may have given the public the opportunity to influence the outcome at an early stage, ultimately, the Commissioner considered that this was outweighed by the likely prejudice that would be caused to the effectiveness of the ongoing negotiations. The Commissioner's view is that there was, at the time of the request, a stronger public interest in ensuring that the council and the third party could have the necessary safe space in which to consider and discuss their positions, without the risk of commercial prejudice that would arise if their positions were given an undue level of public scrutiny at an early stage. Given the nature of the information being withheld, the Commissioner was satisfied that the potential for the disclosure to impact upon the success and timeliness of the negotiations was significant enough to outweigh the public interest in disclosure.

Procedural Requirements

69. The Commissioner found a breach of regulation 14(2) because the public authority did not respond to the request within 20 working days in accordance with the statutory obligation under regulation 5(2). It also failed to rely on any exceptions under the EIR until during its internal review. It should have relied upon these exceptions within 20 working days of the request.
70. During the Commissioner's investigation, the council also found additional information and it subsequently sought to withhold some of that using an exception under the EIR. This was a breach of regulation 14(2) and 14(3) because the council should have identified that it wished to withhold this information within 20 working days of the request and by the time of its internal review at the latest.

The complainant also asked the Commissioner to consider the length of time taken for the council to conduct its internal review. Under regulation 11 of the EIR, a public authority has 40 working days to

conduct an internal review following receipt of a complaint. The authority was not in breach of this requirement in this case.

The Decision

71. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR

- The council did not hold any information falling within the scope of the requests that it had not identified by the end of the Commissioner's investigation.
- It correctly withheld information using the exceptions under regulation 12(5)(b) and 12(5)(e).
- It did not breach the requirement of regulation 11 to conduct an internal review within 40 working days following receipt of a complaint.

72. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The council breached regulation 14(2) for failing to respond to the request within 20 working days and failing to rely on any exceptions under the EIR until during the internal review.
- It breached regulation 14(2) and 14(3) for applying exceptions to withhold information that was identified for the first time during the Commissioner's investigation.

Steps Required

73. The Commissioner requires no steps to be taken.

Right of Appeal

74. 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@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

75. 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.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 19th day of September 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex – Environmental Information Regulations

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) 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.

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority

has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), 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.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (b) 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;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).