

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

Decision Notice

Date: 17 May 2010

Public Authority: Elmbridge Borough Council
Address: Civic Centre
High Street
Esher
Surrey
KT10 9SD

Summary

The complainant requested the viability figures and reports that were submitted by the applicant for a particular planning application. Elmbridge Borough Council ("the Council") identified that it held a viability report submitted by the applicant but it stated that the exemption under section 41 of the Freedom of Information Act 2000 ("the FOIA") applied. It also stated that disclosure would be likely to prejudice the applicant's commercial interests and asserted that this was an exemption under the FOIA and the EIR. The Information Commissioner ("the Commissioner") considered that the request should have been handled under the Environmental Information Regulations 2004 ("the EIR"). As a result, the Council stated that it wished to apply the exceptions under regulation 12(5)(e) and 12(5)(f). It stated that the public interest in maintaining both of the exceptions outweighed the public interest in disclosing the information. The Commissioner investigated and was not satisfied that the Council had adequately justified its position. He has therefore decided to order disclosure of the withheld information. He also found that the Council breached regulation 5(1), 5(2), 14(2) and 14(3) of the EIR.

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 complainant's request relates to a planning application (reference 2008/1600) concerning development at Hampton Court Station and the Jolly Boatman, Hampton Court Way. The application was received by the Council on 11 June 2008. The applicants were Gladedale Special Projects Limited ("Gladedale"), Network Rail and The Royal Star and Garter Homes ("The Royal Star and Garter"). The application was considered by the Council on 28 October 2008 and 26 November 2008. On 18 December 2008, the Council resolved to grant planning permission subject to the completion of a "Section 106 Agreement" under the Town and Country Planning Act 1990. The Council has explained that the parties have now agreed terms and a decision notice has been issued approving the application.

The Request

3. For clarity, the complainant's correspondence with the Council in relation to this particular planning application has been voluminous and he has made various requests for information. The Commissioner has summarised below only the relevant parts of the correspondence relating to the request that is the subject of this particular complaint.
4. Following correspondence with the Council about the planning application, on 20 February 2009, the complainant submitted a request to the Council in the following terms:

"1. All the applicants [sic] viability figures and reports for the above planning application".
5. On the same day, the complainant sent another email to the Council's Chief Executive. The complainant stated that the above request was a repeated request for information and the Council was obliged to supply the information within 20 working days under the FOIA. He stated that as he had already requested an internal review, he had decided to take further action.
6. On the same day, the complainant sent an email to the Commissioner asking for the Commissioner's assistance in obtaining the information

he had requested. He referred to his email to the Council's Chief Executive above.

7. Having considered the complainant's email above, it appeared to the Commissioner that the nature of the complainant's complaint was that the Council had failed to respond to a request for viability information that had been made prior to the request on 20 February 2009. Therefore, on 23 February 2009, the Commissioner wrote to the Council to ask it to respond. The Commissioner also enclosed a copy of the most recent request dated 20 February 2009 noting that the time limit for a response to that particular request had not yet expired.
8. In response, the Council sent an email to the complainant dated 24 February 2009 in which it made the following comments. Please note for clarity that the comments also related to other requests not within the scope of this particular complaint):

"...I am going to set out in this email the Council's responses to your questions that have been answered (claimed by you not to have been in your communication to the Information Commissioner), provide information in relation to new requests and to carry out, so far as I am able, an internal review of the handling of those requests".

9. The Council went on to refer specifically to a request for viability figures that had been submitted on 23 December 2008. Referring to a response it had provided on 31 December 2008, the Council explained that it considered that the viability report was exempt under section 41 of the FOIA and would be likely to prejudice the commercial interests of the applicant. The Council stated that this was an exemption under both the FOIA and the EIR. The Council also pointed out that it was able to disclose a letter from Allsops Property Consultants ("Allsops") dated 12 December 2008 who had been asked to undertake an independent review of Gladedale's viability report. It stated that this set out Allsop's conclusions without breaching the commercial confidentiality of the information. The Council added that having reconsidered this response, it remained of the view that the viability report was exempt and it provided further rationale in support of its reliance on section 41 of the FOIA.

The Investigation

Scope of the case

10. Following a telephone conversation with the complainant, the Commissioner wrote to the complainant on 6 March 2009 confirming that a complaint had been accepted in relation to the requests for information reviewed by the Council in its email dated 24 February 2009.
11. In correspondence dated 7 July 2009, the Commissioner wrote to the complainant stating that he understood that the complainant wished to complain about the requests for information made in his email dated 20 February 2009. The Commissioner was able to informally resolve the complaint about the other requests in this email leaving only the request referred to at paragraph 4 of this Notice concerning the applicant's viability figures and reports dated 20 February 2009.
12. In relation to the request for viability figures and reports, the Commissioner stated that he understood the complainant wished him to consider whether the Council had correctly refused to provide the information he had requested. No correspondence was received from the complainant stating that he did not accept the scope of the complaint as outlined above and the Commissioner has therefore proceeded to investigate the complaint on this basis.
13. The Commissioner also clarified with the complainant that when he requested the applicants' reports, he was only referring to viability reports and not reports of any other nature concerning the planning application.
14. During the Commissioner's investigation, the Council stated that it held three items of information relevant to the request as follows:
 - A viability report produced by Gladedale entitled "Development Appraisal"
 - Letter from Gladedale dated 15 September 2008
 - Letter from Allsops dated 12 December 2008
15. In relation to the three items of information above, the Council advised the Commissioner that the complainant had already been provided with copies of the two letters. The Commissioner's investigation therefore only concerns the viability report.

Validity of the complaint

16. Before accepting a complaint, the Commissioner would usually expect a complainant to have exhausted the public authority's internal review procedure. Having considered the Council's comments made in its email dated 24 February 2009, it appeared to the Commissioner that the Council intended this correspondence to comprise its response to the request dated 20 February 2009 for viability figures and reports as well as its internal review of that request. Given the repeated nature of the request in question, the Commissioner decided to accept this correspondence as comprising both the Council's response and its internal review.

Chronology

17. The Commissioner telephoned the Council on 6 July 2009 to discuss the case. The Commissioner established during this conversation that the only outstanding issue appeared to concern the request for the viability figures and reports.
18. On 7 July 2009, the Commissioner wrote to the complainant setting out his understanding of the complaint. In this letter, the Commissioner stated that he would only be considering the request for the viability figures and reports as he considered that the complaint about the other requests made in the email dated 20 February 2009 had been informally resolved.
19. The Commissioner also wrote to the Council on the same date explaining that the investigation would be limited to the Council's handling of the request concerning viability figures and reports.
20. On 4 August 2009, the Commissioner sent a standard letter to the Council asking for arguments supporting the exemption of the information. In this letter, the Commissioner stressed that he generally assumes that it is appropriate to disclose withheld information unless he is presented with detailed and appropriate rationale in support of withholding it.
21. On 11 August 2009, the Council replied to the Commissioner. The Council provided a copy of the withheld viability report. The Council reiterated that it considered the information was exempt under section 41 of the FOIA and it stated that it was not of the view that the information should have been considered under the EIR.
22. On 19 November 2009, the Commissioner wrote to the complainant confirming the scope of the investigation. He asked the complainant to

confirm that the letter accurately described the nature of the complaint.

23. The complainant replied on 20 November 2009 stating simply that the wording of the request reflected his wishes and he quoted the request for the viability figures and reports. The complainant also stated that he believed the Council held a "revised report" by Gladedale dated 12 December 2008. He stated that he wished the Commissioner to consider whether this information was held. The complainant highlighted that this report was referred to in a letter from Allsops Property Consultants dated 12 December 2008 which stated the following:

"Gladedale confirmed that the viability report reflected an earlier version of the scheme and have subsequently issued a revised report (12 December 2008)".

24. On 23 November 2009, the Commissioner wrote to the Council. The Commissioner specifically asked the Council to confirm whether it held a copy of the revised report dated 12 December 2008 referred to above. Regarding the withheld viability report, the Commissioner stated that he did not agree that the information did not fall within the scope of the EIR. In view of this, he asked the Council to consider the request again under the terms of the EIR and provide full rationale if it considered that the information was excepted.
25. The Council replied in a letter that was incorrectly dated 8 March 2009 (received by the Commissioner on 23 November 2009). The Council confirmed that it had never held a copy of a revised report from Gladedale dated 12 December 2008. It stated that this may have been a communication between Gladedale and Allsops which had not been seen by the Council. Regarding the withheld report, the Council stated that if the request was considered under the EIR, it would wish to apply the exceptions under regulation 12(5)(e) and 12(5)(f). The Council stated that it considered that the public interest in maintaining the exceptions outweighed the public interest in disclosing the information. It supplied some limited rationale in support of the application of the exceptions.
26. On 4 January 2010, the Commissioner wrote to the Council. The Commissioner asked some questions designed to help him to consider whether the Council held any more information relevant to the request on the balance of probabilities.
27. The Commissioner also explained what information he would need to support the case that regulation 12(5)(e) applied. In particular, he

- pointed out that in *Derry City Council v the Information Commissioner (EA/2006/0014)*, Derry City Council attempted to argue that the commercial interests of Ryan Air would be prejudiced under section 43(2) of the FOIA if information had been disclosed but the Information Tribunal refused to accept this because there was no evidence that the arguments made genuinely reflected the concerns of Ryan Air. The Commissioner stated that he believes this principle is transferable to information withheld under regulation 12(5)(e) and the Council therefore needs to show the Commissioner evidence that any arguments it makes about why confidence was necessary in order to protect legitimate economic interests genuinely reflect the concerns of Gladedale.
28. In relation to the exception under regulation 12(5)(f), the Commissioner stated that it appeared that the Council was seeking to rely on this exception because it considered that disclosure of the information would adversely affect Gladedale's commercial interests. He asked the Council to let him know if it wished to rely on any other arguments in relation to this exception.
 29. On 7 January 2010, the Council replied to the Commissioner. The Council continued to maintain its position that it did not hold any other information. It provided supporting arguments in relation to this. The Council provided some further arguments in support of its application of regulation 12(5)(e) and it confirmed that it had contacted Gladedale about the request. In relation to regulation 12(5)(f), the Council stated that as the exception concerned an adverse effect to Gladedale, it considered it best to await Gladedale's response concerning how disclosure of the report would affect its commercial interests.
 30. On 26 January 2010, the Council sent an email to the Commissioner confirming that it had received a response from Gladedale's solicitor. The solicitor stated that the viability report includes commercially sensitive information relating to commercial arrangements between Gladedale, Network Rail and Royal Star and Garter. It explained that this information is still relevant to discussions between these parties and it would still be potentially prejudicial to their interests for the information to be in the public domain.
 31. On 27 January 2010, the Commissioner wrote to the Council. He pointed out that the response provided by Gladedale's solicitors was too brief to convince the Commissioner that the information had been appropriately withheld. He again stated that he assumed the Council was relying on regulation 12(5)(f) because it considered that Gladedale's commercial interests would be adversely affected and he asked the Council to let him know if this was incorrect. He pointed out

- to the Council for the second time that he would order disclosure of the information if he was not presented with detailed and appropriate rationale supporting the application of the exception to the information.
32. On 11 February 2010, the Council replied. It stated that it had attached more detailed responses from Gladedale and The Royal Star and Garter.
 33. On 1 March 2010, the Commissioner telephoned the Council. He asked the Council to confirm that it accepted all of the arguments presented by the third parties. The Council confirmed that this was the case. The Commissioner discussed the responses provided to him by the third parties and indicated that he still did not consider that he had been provided with sufficient arguments supporting the application of either exception under the EIR. The Commissioner pointed out the response from Gladedale in particular appeared to be relying on the Commissioner making a lot of assumptions about the line of argument it would wish to make. The Council stated that it disagreed with this and, having considered the responses provided, felt that they were clear. It also stated that it did not feel it was in a position to question whether the third parties interests would genuinely be prejudiced by disclosure. The Commissioner explained that it was for the Council to satisfy itself that it could justify reliance on the exceptions and he did not consider that it had done this.
 34. On 3 March 2010, the Commissioner sent an email to the complainant to check that his request was only limited to viability reports and did not cover reports of any other nature that may have been submitted by the applicant.
 35. On the same day the complainant replied confirming that he was only interested in viability reports.
 36. The Council wrote to the Commissioner on 3 March 2010 following the telephone conversation referred to above. The Council argued that the arguments presented were detailed, clear and persuasive. It asserted that disclosure would make it more difficult for Gladedale to obtain best value in procurement and would also benefit its competitors. However, the Council offered no specific further arguments in support of this being the case apart from making a reference to a decision made by the Information Tribunal (EA/2009/0001 – 11 January 2010). It highlighted that in that case, the Tribunal had accepted that information such as values and cost predictions was excepted under regulation 12(5)(e) and that the public interest favoured withholding it.

Analysis

Substantive Procedural Matters

Is the information environmental?

37. The Council initially handled the request under the terms of the FOIA rather than the EIR. However, the Commissioner considers that the request should have been handled under the EIR. The viability report clearly concerns a large redevelopment involving works that would have a significant impact upon the environment including the building of new homes, retail units, a hotel and care home. In view of this, the Commissioner is satisfied that the information is information on a plan affecting one of the elements of the environment (i.e. land) and it therefore falls within the scope of regulation 2(1)(c).

Did the Council hold a revised viability report?

38. The complainant specifically asked the Commissioner to consider whether the Council held a revised report by Gladedale dated 12 December 2008 (referred to in Allsop's letter of the same date). The Council confirmed that it had never held this information. It stated that it had checked with the Head of Town Planning at the Council and it had been confirmed that the revised report referred to in the letter had never in fact been provided to the Council. The Council offered the following explanation for why it would not have needed to see the revised report:

"I am told that the Council did not need to see it because we could work out what it would have said. Allsops were making an arguably pedantic point about the original report. The construction costs and revenues had been based on the floor areas in an earlier version of the scheme. But the revised scheme that formed part of the application had amended these areas, so the precise figures in the original report were wrong.

However, the changes were only small, much less than 5%. That may have been important for Allsop's professional assessment but for the Council's purposes it was irrelevant. The planning authority only needed figures with an accuracy of + or - 10% or so".

39. In view of the above, the Commissioner accepts that on the balance of probability the Council never held a copy of the revised report mentioned in Allsop's letter because there was no business need for it.

He notes that a senior member of the Council's staff has also confirmed that the revised report was never provided to the Council.

Exceptions

Regulation 12(5)(e)

40. 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?

Is the information commercial or industrial in nature?

41. 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 viability report deals with the financial elements of a large development by a private developer. In view of this, the Commissioner is satisfied that the information is clearly commercial in nature.

Is the information subject to confidentiality provided by law?

42. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

43. 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 confidences 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.

44. Having considered the withheld report and the circumstances of this case, the Commissioner is satisfied that the information is not trivial and is not in the public domain. He therefore concludes that the information has the necessary quality of confidence.
45. The Council explained to the Commissioner that the information was passed to the Head of Town Planning at the Council by an employee of Gladedale who gave explicit instructions that the information was to be treated in confidence. In view of this, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

46. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

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

47. As already described, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, the Council asked Gladedale to provide arguments to the Commissioner. Gladedale, it appears, also contacted The Royal Star and Garter who submitted separate arguments.
48. Gladedale and The Royal Star and Garter argued that the entire report should be withheld. In Gladedale's letter dated 11 February 2010, Gladedale listed the specific information that it considered would prejudice its legitimate economic interests. For clarity, the Commissioner has adopted the same list below and set out the

statements presented by the third parties. In relation to each, the Commissioner has explained why he cannot accept that the disclosure of the information would harm the third parties' legitimate economic interests.

Royal Star and Garter revenue paid to Gladedale

49. In Gladedale's letter dated 11 February 2010, Gladedale stated that the viability report contains details of the deposit, land payment, management fee, build costs and contractor's profit paid by The Royal Star and Garter to Gladedale. Gladedale did not present any arguments concerning harm to its own interests in relation to this particular information. Instead it referred to the letter that had been provided by Royal Star and Garter dated 8 February 2010. The Commissioner has considered this letter and notes that the argument made by Royal Star and Garter was as follows:

"If the Council was compelled to release commercially sensitive information into the public domain, our future ability to do business economically with property developers and builders could be seriously compromised. In extremis, such organisations may not wish to do business with us (at any price) if we were associated with the disclosure of such commercially sensitive information".

50. The Commissioner was not satisfied with the above argument. Firstly, the argument does not establish that the information was actually commercially sensitive at the time of the request. Secondly, the Commissioner does not accept that property developers and builders would be put off doing business with The Royal Star and Garter simply because some information relating to one project was disclosed. The disclosure of information is considered on a case by case basis and where it can be shown that information would genuinely cause harm there are appropriate exceptions under both the EIR and the FOIA.

Land payment to Network Rail

51. Gladedale stated that the amount it pays Network Rail for the land adjoining the Jolly Boatman site is contained within the viability report. It stated that as Network Rail is exempt from the FOIA and would not otherwise be required to disclose this information, it would be detrimental to Network Rail to disclose the figure.
52. The Commissioner was unable to accept the above. Firstly, an argument is being made that there would be detriment to Network Rail but it appears that no contact has been made with Network Rail to establish whether this genuinely reflects its concern. In any event,

there is no suggestion here that there would be any financial loss or harm to Network Rail's commercial interests.

Gladedale residential sale values

53. Gladedale stated that the residential sale values in the viability report were based on market research and transactional evidence at that point in time. It argued that as the report was created 17 months ago, these figures may not now represent an accurate assumption in today's market. It argued that disclosure may therefore promote misrepresentation of the document (presumably the viability report).
54. This argument is inherently flawed because we must consider the circumstances at the time of the actual request. The fact that the figures may now be out of date and may "promote misrepresentation" is therefore irrelevant. Further, there is no line of argument concerning how any misrepresentation would cause commercial harm or financial loss. Even if misrepresentation was a genuine problem, the information could be disclosed with a statement putting the information into its appropriate context.

Gladedale Hotel sale value

55. Gladedale stated that the hotel has not yet been sold to an owner or operator. It stated that disclosure of the assumed revenue would severely affect the marketability of the hotel which would be prejudicial to Gladedale's commercial interests.
56. The Commissioner notes that no argument was presented to him by Gladedale regarding why the marketability of the hotel would be prejudiced. However, the Commissioner notes that the Council has referred in general to harm to Gladedale's ability to secure best value and he assumes that this is the argument Gladedale wished to make. The Commissioner's view is that, based on the information presented to him, it is not possible to conclude that disclosure of the information would have caused harm to the extent that this would have been "more probable than not". For this to be the case, the Commissioner would have to be satisfied that the figure would still be relevant at the time of marketing the hotel. No argument or evidence has been presented to the Commissioner in support of this being the case.

Major construction costs

57. Gladedale stated that the viability report contains lump sum figures for major infrastructure works such as an underground car park. It stated that as these costs were collated some 17 months ago, they would

need to be revisited in today's market. It explained that according to Network Rail's requirements, these works must be undertaken by an NR Approved Term Contractor. It explained that due to the scale and nature of the works, there are a limited number of suitable contractors. It expressed the view that disclosure of these costs would prejudice the competitive tender process which has yet to be undertaken which would clearly prejudice its commercial interests.

58. The Commissioner was not persuaded by the above. He notes that again, no argument has been presented concerning why prejudice would occur however the Commissioner assumes that Gladedale would wish to argue that its ability to secure best value would be prejudiced. By Gladedale's own admission, the figures are out of date and the Commissioner was not satisfied that they would still be relevant to negotiations in the current market.

General construction costs

59. Gladedale stated that the viability report contains "empirical Gladedale cost estimates". It explained that these are based on current and previously completed developments of a similar scale and complexity. It added that these figures may be different to published industry standard and the disclosure may therefore lead to misrepresentation.
60. The Commissioner was unable to accept this argument because there is no clear indication of how any misrepresentation would cause commercial harm or financial loss. As already stated, even if misrepresentation was a genuine problem, the information could be disclosed with a statement putting the information into its appropriate context.

Professional Fees Assumptions

61. Gladedale explained that all work up to and including the submission of planning permission has been instructed and paid for however "the balance of work required post planning has yet to be instructed". It therefore concluded that disclosure of the cost assumptions would prejudice its commercial interests as it would limit its ability to achieve best value when tendering the remaining work.
62. The Commissioner was not persuaded by the above. The Commissioner notes that Gladedale did not attempt to justify its statement that its ability to achieve best value for the remaining work would be prejudiced. In particular, it has not addressed when it expects to conduct the future tender process and if the figures would still be relevant by then. It also did not provide any argument that disclosure

would have prejudiced any earlier tender process based on the circumstances at the time of the request.

Station refurbishment costs

63. Gladedale stated that the viability report contains a lump sum figure for the refurbishment of the Network Rail owned Railway Station. It added that these costs were collated some 17 months ago and would need to be revisited in today's market. It also explained that in accordance with Network Rail's requirements, the works would need to be undertaken by a NR Approved Term Contractor. Due to the nature of the works, there are a limited number of suitable contractors. Gladedale therefore concluded that disclosure of the costs would prejudice the competitive tender process which has yet to be undertaken which in turn would prejudice Gladedale's commercial interests.
64. The Commissioner was not persuaded by the above. He notes that again, no argument has been presented concerning why prejudice would occur however the Commissioner assumes that Gladedale would wish to argue that its ability to secure best value would be prejudiced. By Gladedale's own admission, the figures are out of date and the Commissioner was not satisfied that they would still be relevant to negotiations in the current market.

Overhead, finance and profit

65. Gladedale stated that overhead is calculated as a percentage of build costs and is specific to Gladedale's business operation. It expressed the view that disclosure to Gladedale's competitors could be commercially damaging when bidding for new land and development opportunities. It added that the cost of Gladedale's development finance is confidential between Gladedale and its lenders. It also stated that the viability report calculates and states a rate of return i.e. profit margin. It explained that given the comments it had made, this figure could not be relied upon at the current point in time and therefore may encourage misinterpretation of the document.
66. The Commissioner was unable to accept that disclosure of the information would damage Gladedale's commercial interests when bidding for new land and development opportunities because no argument was presented to him explaining why this would be the case. Likewise, the fact that the cost of Gladedale's development finance is considered to be confidential is not an argument that disclosure would result in any commercial prejudice or financial loss. Finally, regarding the argument concerning misrepresentation, the Commissioner was

unable to accept this argument because there is no clear indication of how any misrepresentation would cause commercial harm or financial loss. As already stated, only the consequences at the time of the request are relevant and even if misrepresentation was a genuine problem, the information could be disclosed with a statement putting the information into its appropriate context.

Public interest test

67. As the Commissioner was not satisfied, based on the above arguments, that regulation 12(5)(e) was engaged, he did not go on to consider the application of the public interest test to the information.

Regulation 12(5)(f)

68. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information in circumstances where the person:

- Was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority
- Did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it and
- Has not consented to its disclosure

69. As stated in the Chronology section of this Notice, the Commissioner understood that the Council was seeking to rely on this exception because it considered that the information would cause commercial damage to the third parties concerned. The Council did not offer any alternative arguments to the Commissioner or contradict this. As the Commissioner has already described, he considers that the arguments presented to him on this point were insufficient. In view of this, the Commissioner considers that regulation 12(5)(f) was not engaged.

Public interest test

70. As the Commissioner was not satisfied that regulation 12(5)(f) was engaged, he did not go on to consider the application of the public interest test to the information.

Procedural Requirements

71. As the Commissioner has found that the exceptions claimed were not engaged based on the arguments presented to him, he considers that

the Council breached regulation 5(1) and 5(2) because it failed to provide the information to the complainant.

72. The Council should have handled the request under the terms of the EIR rather than the FOIA. As it only sought to rely on exceptions under the EIR during the course of the Commissioner's investigation, the Commissioner considers that the Council breached regulation 14(2) and 14(3).

The Decision

73. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the EIR:

- It did not breach the EIR by failing to identify that it held a revised viability report dated 12 December 2008 because this information was never in fact held by the Council.

74. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR.

- It breached regulation 5(1) and 5(2) for failing to provide the information that was requested
- It breached regulation 14(2) and 14(3)(a) for failing to cite exceptions under the EIR until after the Commissioner's investigation had commenced

Steps Required

75. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR:

- Disclose a copy of the withheld viability report to the complainant

76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

77. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

78. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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 17th day of May 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

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);

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 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(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 –

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - a. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - b. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - c. has not consented to its disclosure

Regulation 14 - Refusal to disclose information

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).