

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 September 2007**

**Public Authority:** Redcar and Cleveland Borough Council  
**Address:** Redcar and Cleveland House  
Kirkleatham Street  
Redcar  
Yorkshire  
TS10 1YA

### Summary

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The complainant requested information relating to a planning application to demolish property used by Redcar & Cleveland College (the "College") for redevelopment purposes. Redcar and Cleveland Borough Council (the "Council") claimed that most of the information sought was already available for public inspection. It asserted that the remainder consisted of "pre-application discussions" carried out with the College in confidence. It refused to supply this information, citing exemptions at section 41 and section 43 of the Freedom of Information Act 2000 (the "Act"). The Information Commissioner considered that the Environmental Information Regulations 2004 (the "EIR") was the appropriate access regime in respect of the information, but agreed with the Council's re-assessment that the non-disclosure exception at regulation 12(5)(f) applied.

### The Commissioner's Role

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1. The Environmental Information Regulations (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 Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

### The Request

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2. On 14 February 2005 the complainant wrote to the Council regarding the proposed demolition and redevelopment of a site owned by the College. The

complainant asked a number of questions about the public consultation on the proposed development and asked for:

“...copies of all correspondence between the applicant, the local authority staff and the elected members with regard to this present proposal by the College, in accordance with the Freedom of Information Act 2000 and within a time scale of 10 days of the allotted 21 days for reply to the proposal.”

3. The Council acknowledged the request on 16 February 2005. It clarified that it did not hold information held by elected members in their capacity as representatives of residents (as opposed to when they acted as part of the Council, for example, in Committee) and that it was permitted up to 20 working days in which to process the request for the remaining information, although it would try to do so sooner.
4. The Council then responded in full on 17 February 2005.

“The major part of the correspondence entered into in relation to this application has been made available for public inspection. The balance consists of what is known as “pre-application discussions” which are carried out in confidence. Disclosure of such information might expose the Authority to action for breach of confidence and might also prejudice the commercial interests of the applicant. The Authority, therefore, claims exemption from disclosure under Sections 41 and 43 of FoIA”
5. The Council provided details of how the complainant could challenge the decision.
6. The complainant replied on 19 February 2005 advising that he required the information so as to better understand and participate in the debate on the formal planning proposal. He did not consider that the Council had satisfactorily demonstrated that the exemptions applied or that the public interest favoured withholding the information and asked for the decision to be reviewed.
7. The Council replied on 23 February 2005, stating that the pre-application discussions were entered into on the understanding that they were confidential and that it therefore stood by its decision that the exemption at section 41 applied. It also clarified that as section 41 was an absolute exemption the Council was not required to consider the public interest in reaching its decision. Turning to section 43, it confirmed its view that the commercial interests of the College might be prejudiced by the disclosure of the information and that the public interest favoured withholding it. It reiterated the complainant's right to complain via the Council's complaints procedure or to the Commissioner.
8. The complainant replied on 27 February 2005, explaining that he required the pre-application information to assist his understanding of the complex legal arguments set out in the formal planning application, which he was required to respond to within a very tight timeframe. He indicated his intention to refer the matter to the Commissioner.

9. The Council responded on 4 March 2005, indicating that it would welcome the Commissioner's ruling on the issue.

## The Investigation

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### Scope of the case

10. On 6 March 2005 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 Council's reliance on the exemptions at section 41 and section 43 to withhold the pre-application discussion information. However during the course of the investigation it became apparent to the Commissioner that the EIR was the appropriate access regime and it is the Council's compliance with the EIR which this Decision Notice addresses.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

12. The Commissioner acknowledged the complaint on 15 March 2005, advising that it would be investigated in due course, but that there may be some delay due to the volume of correspondence already awaiting allocation.
13. The Commissioner next wrote to the complainant on 15 April 2005, advising that his case had been allocated to a complaints officer who would be in touch in due course.
14. This letter crossed with the complainant's email of 16 April 2005, which explained that the planning application to which the request related was to be discussed by the Council on 4 May 2005 and asked for a preliminary assessment of whether his complaint had any merit.
15. The Commissioner replied by email on 19 April 2005, explaining that the case was now under investigation, but that it would not be concluded by 4 May 2005, when the planning application was to be considered.
16. The Commissioner wrote to the Council on 20 April 2005, setting out the complaint and requesting that the Council provide a detailed explanation as to why the exemptions at section 41 and 43 of the Act applied, the public interest factors that had been considered in reaching the decision to withhold information in respect of section 43 and a copy of all the information that had been withheld.
17. The Council responded on 6 May 2005, supplying a copy of the information it had withheld. The information consisted of:

- a letter from the complainant to the College, dated 24 December 2004 (which had been copied by the complainant to the Council);
  - a series of plans representing different development possibilities for the site;
  - an internal Council memo discussing the plans;
  - three emails from the Council to the College;
  - one email from the College to the Council;
  - a meeting agenda drawn up by the College;
  - a report prepared by the College.
18. The complainant emailed the Commissioner on 16 May 2005, advising that the planning permission application, heard on 4 May 2005, had been refused. He conceded that he had received much of what he felt he was entitled to, but explained that he still wished to see the pre-application information as it may be pertinent to any appeal or future application lodged by the College.
19. The Commissioner wrote to the Council on 25 May 2005, pointing out that the information sought by the complainant fell within the scope of the EIR rather than the Act and asking it to reconsider its response to the complainant's request accordingly.
20. The Council replied on 22 June 2005, advising that it considered that the exception at regulation 12(5)(f) permitted it to withhold the pre-application information. It claimed that in preparing to submit formal planning applications, developers often voluntarily supply details of a number of proposals for informal discussion with the Council in the expectation that such information will not be disclosed to other parties. The Council commented that in this case the complainant had approached the College and asked it for more information about the application, and that it had declined. Nevertheless, it advised that it would approach the College to see if permission to release the information to the complainant could be obtained. It subsequently emailed the Commissioner on 7 July 2005 to advise that permission had been denied.
21. The complainant wrote to the Commissioner on 5 July 2005, claiming that he had been offered information about the development by the College, but that he had declined it, considering that it should be provided by the Council, in line with his request. He commented that he could see no grounds for the Council claiming that release of the information would prejudice the interests of the College when the College was prepared to release it to him directly, although he conceded in the same letter that it was not clear to him whether the information that the College was offering to release was in fact the pre-application information. He commented that he thought the Council was using the matter as a test case to establish a position on the release of information under the access regimes created by the Act and the EIR, rather than because it objected to releasing the information or had anything to hide.
22. The Commissioner continued to update the complainant on the status of his complaint during the following months.
23. On 31 January 2006 the complainant wrote to the Commissioner, claiming that he had recently been involved in High Court action with the Council over the planning application, and now found himself personally liable for costs. He

requested that if there was any chance of court action being taken against him as a result of his complaint, then the Commissioner should consider his complaint withdrawn. He also advised that the College had submitted fresh development plans for the site, which had been approved.

24. The Commissioner spoke with the complainant by phone on 28 March 2006, advising that it was unlikely that he could be subject to legal action as a result of simply challenging the Council's interpretation of the EIR exceptions with the Commissioner.
25. The Commissioner wrote to the complainant on 24 July 2006 advising that his case was still under consideration. He explained that the reconsideration of the case in light of the EIR regime, when the request had been treated by the Council as having been made under the Act, was delaying the progression of his complaint. These delays were temporarily compounded by the major re-organisation of the Commissioner's complaints handling procedures. The letter thanked the complainant for his patience and assured him that the investigation of his complaint would be completed.
26. On 12 March 2007 the Commissioner telephoned the Council and established that ownership of the case had been transferred to a new case officer. The Commissioner wrote to the Council on 13 March enclosing sufficient background information on the complaint to enable the new case officer to progress the matter. The Commissioner asked the Council to explain in some detail, why the exception at regulation 12(5)(f) applied, and the factors that it had considered in reaching that decision. It was also reminded to address the public interest arguments in its response.
27. The Council replied on 17 April 2007, explaining that the complaint had been discussed with planning officers. It set out a fairly detailed explanation of its reasons for withholding the information, explaining that it was supplied voluntarily by the College, with an expectation that it would be treated confidentially and that the Council did not have consent to disclose it. It also confirmed that it had not disclosed the information to any third party.
28. The Council stressed the importance of developers being able to have free and frank preliminary discussions regarding development proposals. If the content of such discussions were to be made public it would be likely to deter future investors from engaging with the Council at an early stage of the planning process (the Council claimed that plans developed subsequent to consultation with it were more likely to result in a quick determination when formally submitted) or even from considering investment in the area at all. A downturn in investment, the Council argued, would inevitably have repercussions for the health and social wellbeing of the local populace.

29. The Council also commented that pre-application information should be held confidentially so as to manage public expectation, since release of speculative information at the pre-application stage may falsely raise public hopes about development in the area.
30. The Council argued that release of preliminary information would enable local campaigners to attempt a pre-emptive strike against a potential application by campaigning against the proposals as they stood at the time. This would be likely to prejudice negotiations related to other aspects of the proposal, such as funding.
31. The Council acknowledged that local residents had a legitimate interest in seeing all information related to developments affecting their community, and also that local government should be transparent. It countered this by arguing that the formal planning process builds in the opportunity to scrutinise and comment on formally submitted proposals and so residents' interests are not unduly prejudiced by withholding pre-application information from them.
32. The Commissioner telephoned the Council on 14 May 2007 and explained that the exception at regulation 12(5)(f) hinges on the interests of the *provider* of the information (in this case, the College) being adversely affected by its disclosure under the EIR. The Commissioner explained that the Council had not addressed this adequately in its response and advised it to do so if it wished to maintain a claim that the exception at regulation 12(5)(f) applied.
33. The Council responded on the 7 June 2007, enclosing representations from the College (which the Council supported) as to how its interests would be adversely affected by the disclosure of the information.
34. Its concern was founded on the belief that the public would make negative judgements about the plans it had formally submitted for planning permission in light of a quite different set of ideas sketched out in preliminary discussions with the Council, and that these judgements would threaten the success of the development. The College confirmed that its discussions with the Council had been conducted in the expectation that they would be confidential.
35. The College explained that the speculative plans sketched out during the pre-application stage were not indicative of the plans subsequently taken through the formal application process. The speculative plans were not drafted with an eye to compliance with current planning legislation and the release of this information, if taken out of context, would harm the status and reputation of the College.
36. The College also argued that its ability to proceed fairly through the formal planning application process would be hampered by the disclosure of the pre-application information, since the public's interpretation of the current plans would be negatively influenced by awareness of the pre-application proposals. It was particularly concerned that the pre-application information would be used by opposition groups to mobilise widespread public opposition to the submitted plans.

37. Furthermore, the College believed that any public opposition generated by the misconstruing of this information would impact on any future development of the site, affecting the College's ability to obtain the maximum financial return on its land. This would impact on the funds available to plough back into the College.
38. The College explained that any profit gained from the development of land owned by it is ploughed back into College facilities. Ultimately, any reduction in the amount that it was able to re-invest in its facilities as a result of a poor return on the sale of the property would impact on the local community, with reduced facilities resulting in fewer student numbers and a wider detrimental impact on the community of Redcar.

## Analysis

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39. The full text of the relevant regulations can be found in the legal annex, however the salient points are summarised below.

## Procedural matters

40. Although the Council treated the complainant's request as having been made under the Act, the Commissioner considers that the information requested falls within the scope of the EIR. The complainant had requested information relating to the planning application for a site owned by the College. In defining the intended scope of the EIR, Regulation 2(1)(c) clarifies that the term "environmental information" covers information on "*measures (including administrative measures), such as policies, legislation, plans... affecting or likely to affect the elements and factors referred to in (a) [the state of the elements of the environment] and (b) [factors such as substances, energy, noise, radiation or waste]...*". The Commissioner is therefore content that the requested information falls within the definition of environmental information at Regulation 2(1)(c).
41. The Commissioner asked the Council to re-consider its response to the complainant in light of this and it did so, specifying that the exception at regulation 12(5)(f) applied. It subsequently submitted arguments made by the College as to how its interests would be adversely affected by the disclosure of the pre-application information. These arguments referenced exemptions at section 41 and 43 of the Freedom of Information Act 2000 rather than the EIR.
42. The Commissioner considers that in the context of this particular case the exception at regulation 12(5)(f) of the EIR has some similarities to the exemptions at section 41 and 43 of the Act, insofar as it addresses obligations relating to confidentiality and commercial interests in respect of third parties. He is mindful of EA/2006/001 *Kirkaldie v IC and Thanet District Council* (para 44) where the Tribunal noted that where an initial refusal has been issued under the wrong legal instrument it would be reluctant to prevent a public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime. The Information Commissioner has therefore followed the

Tribunal's reasoning and treated all the Council's submissions as though they were made in respect of regulation 12(5)(f) of the EIR.

## Exception

43. When considering the exceptions the Commissioner has borne in mind the direction at Regulation 12(2) of the EIR, that public authorities should apply a presumption in favour of disclosure when considering whether to refuse to disclose environmental information.

### Regulation 12(5)(f)

44. The Commissioner has considered whether the Council was correct to apply the exception at regulation 12(5)(f) of the EIR. The exception allows that information may be withheld if its disclosure would adversely affect the interests of a third party. Sub paragraphs (i), (ii) and (iii) specify that the third party must have supplied the information voluntarily and on the understanding that it would be treated in confidence and must not have consented to its disclosure.
45. The Council explained that the information which it was withholding was supplied by the College in the course of preliminary discussions about the possible development of one of its sites. It stated that the information was supplied voluntarily by the College, with an expectation that it would be held in confidence, and that it has not given its consent to the disclosure of the information. The College has confirmed this.
46. The Commissioner looked at each item of information which the Council claims is covered by the exception at regulation 12(5)(f), in light of the specifications at sub paragraphs (i), (ii) and (iii).
47. He considers that the information in the plans, the report, the email from the College to the Council and the agenda was clearly supplied by the College to the Council. Having accepted the Council's assurances that the information was supplied voluntarily, in confidence and without consent to further disclosure, he considers that the exception at regulation 12(5)(f) applies in respect of that information.
48. He considers that the exception also applies in respect of the internal Council memo discussing the plans and the three emails to the College, which also commented on the plans. Although these are Council created documents, the comments contained in them are inextricably linked to the plans supplied by the College and to disclose them would inevitably give away information about those plans. To edit out this information and supply the remaining text to the complainant would leave him with a largely meaningless document, comprising merely connecting sentences. Again, the Commissioner accepts the Council's assurances that the information was volunteered in confidence and that the College has not consented to its disclosure.
49. The Commissioner does not, however, consider that the exception at regulation 12(5)(f) applies in respect of the letter of 24 December 2004, from the



complainant to the College. The Commissioner does not consider that this was information *provided by* the College to the Council, since the letter is clearly marked as having been copied by the complainant to the Council's Director of Development. Thus the Commissioner considers that the Council is not entitled to withhold the letter by citing the exception at regulation 12(5)(f). However, he considers that the letter falls outside the scope of the complainant's original request, which was for copies of correspondence between the College, the Council and its Councillors about the development, and that the Council is therefore not obliged to consider it for release when dealing with the complainant's request. Consequently, the letter is not considered further in this Decision Notice and this Notice contains no further directions as to how it should be treated.

50. The Commissioner then considered whether the disclosure of the information would adversely affect the interests of the person who provided it – in this case, the College. The exception requires that the Council show with certainty the harm that releasing the information in question would cause. It is not sufficient for the Council to claim that releasing the information *might* result in an adverse effect. For “would adversely affect” whilst it would not be possible to prove that adverse affect would occur beyond any doubt whatsoever, it must be at least more probable than not.
51. The Council explained that the information represents a quite different proposal to the one eventually taken forward by the College, one which was intended as a starting point in terms of planning for the redevelopment of the site, but which nevertheless would be misconstrued by the public as representing the College's true intentions for the site. It considers that should the information be disclosed the public's perception of the current proposal would be adversely influenced by it and that this would threaten the success of the development. The College's reputation would be called into question, its financial standing affected and its ability to gain a fair and impartial hearing in this and any future planning application would be harmed.
52. The Commissioner considers that the question of the pre-application information being “misconstrued” or “misunderstood” by the public could be addressed with the issuing of contextualising information which would clarify its historical significance. Nevertheless, he accepts that the College's proposal for the site changed quite significantly subsequent to its preliminary discussions with the Council, and that given the emotive nature of local planning issues it would be realistic for people's perceptions of the College and its submitted plans to be influenced by their knowledge of the College's initial plans for the site. The Commissioner therefore accepts that the outcome of this would be as described by the Council and the College.
53. The Commissioner is therefore satisfied that the Council has demonstrated that the interests of the College would be adversely affected should the information be disclosed.
54. The Commissioner has therefore reached the view that the exception at regulation 12(5)(f) applies in respect of the withheld pre-application information.

## **Public Interest**

55. Regulation 12(1)(b) specifies that each of the exceptions is subject to a public interest test. It is therefore necessary 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. Again, the Commissioner has borne in mind the presumption in favour of disclosure at Regulation 12(2) when considering the public interest arguments.

### **Public interest – factors favouring disclosure**

56. The Commissioner recognises that there is an inherent public interest in public authorities being transparent in the way they discharge their duties in order to promote accountability and public confidence. He recognises that the subject of local planning issues is an emotive one and one which often provokes a vigorous response from local residents who are understandably concerned about the impact on their homes and lives. It is therefore in the public interest that councils are as open as possible about their planning processes so as to ensure important debates are not clouded by accusations of malpractice or maladministration.
57. The Commissioner considers there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities and in them having the ability to challenge those decisions and to participate in the debate around them. In this case the complainant considers that access to the pre-application information would inform his understanding of and response to the College's formal planning application.

### **Public interest – in favour of maintaining the exception**

58. The Commissioner accepts there is a public interest in developers being able to approach the Council for frank and confidential advice on their preliminary development proposals. The Commissioner recognises that subsequently making that information available to the public could inhibit open and constructive discussions between the two. Concerns that such discussions may subsequently be open to public scrutiny would have a detrimental impact not only on the quantity of information received, but also the Council's relationships with collaborating organisations, which may become unwilling or refuse to disclose important information that they felt would be more widely released. This may have the effect of deterring development and regeneration in an economically deprived area.
59. The Commissioner accepts there is a public interest in developers being able to approach the Council for frank, confidential advice on preliminary development ideas, as the subsequent formal submission of well thought out, legally compliant plans is likely to be less burdensome in terms of the public resources expended during the planning process.
60. The Commissioner accepts there is a public interest in public bodies being able to conduct some aspects of their business away from the public gaze. In local

government, elected councillors play a representative role on behalf of local people overseeing and, where appropriate, contributing to the conduct of council business. In addition, legislation often makes specific provision for public participation in certain statutory processes for which local authorities are responsible. In this case the public's right to scrutinise and appeal against proposed local developments is preserved in the formal planning application process.

61. The Commissioner accepts there is a public interest in the College being in a position to dispose of assets acquired with public money for the best possible price, particularly where the proceeds will fund ongoing college investment. This may involve maximising the development potential of sites owned, which in turn is likely to require confidential discussions with the local planning authority prior to the submission of a formal application.

### **Balancing the Competing Considerations**

62. The Commissioner has considered the competing arguments and has reached the view that there is a strong public interest in maintaining the exception under regulation 12(5)(f) of the EIR because the public interest in protecting the interests of the College (the supplier of the information to the Council) is greater than the factors in favour of disclosure.
63. The Commissioner has considered whether the pre-application information could be released in redacted form. It is clear from the information itself and the context in which it has been requested that the identity of the College as supplier of the information is already known to the complainant. There is therefore no possibility that the information could be supplied with the identity of the College concealed. It is also clear that the Council's response to the College's initial approach is so intertwined with the information supplied by the College that it would be impossible to release this without revealing that information. The Commissioner is therefore satisfied that the Council may withhold the information in its entirety by virtue of the exception at regulation 12(5)(f).

### **The Decision**

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64. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR.

### **Steps Required**

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65. The Commissioner requires no steps to be taken.

## Right of Appeal

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66. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 17<sup>th</sup> day of September 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### **Environmental Information Regulations 2004**

**Regulation 2(1)** ...“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 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 – ...

- (f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
  - (iii) has not consented to its disclosure;

### **Freedom of Information Act 2000**

**Section 41(1)** Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

**Section 43(2)** Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).