

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

Decision Notice

Date: 22 December 2009

Public Authority: London Borough of Camden
Address: Camden Town Hall
Judd Street
London
WC1H 9JE

Summary

The complainant requested information about discussions relating to the Brill Place site near to the British Library. The London Borough of Camden ("the Council") initially withheld most of the information under various exceptions under the Environmental Information Regulations 2004 ("the EIR") and the Freedom of Information Act 2000 ("the FOIA"). As the Commissioner decided that the withheld information was environmental, he investigated the Council's application of exceptions under regulation 12(4)(e), 12(5)(b), 12(5)(e) and regulation 13(1). The Commissioner decided not to consider a late claim of regulation 12(5)(d). During the Commissioner's investigation, the Council mistakenly disclosed some information that it had claimed was excepted under regulation 13(1) and 12(5)(b) and it also agreed to disclose some information informally. Regarding the remaining withheld information, the Commissioner found that the Council was unable to justify reliance on 12(4)(e) and 12(5)(e) and that it had incorrectly withheld some information under regulation 12(5)(b) and 13(1). However, he found that some information was exempt under 12(5)(b) and regulation 13(1). He has ordered disclosure of all other information held by the Council falling within the scope of the complaint. The Commissioner also found that the Council had breached regulation 5(1), 5(2), 14(2) and 14(3)(a) and (b) 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 Information Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

Background

2. The information request relates to the sale of land owned by the Department for Culture, Media and Sport ("DCMS") near to the British Library and St Pancras Station in central London. In particular, the request concerns the involvement of the Council in matters concerning the development of the site. DCMS marketed the site in the summer of 2007 inviting bids by August of that year. Following a short-listing process, in December 2007 DCMS agreed to sell the site to a consortium consisting of the publicly-funded Medical Research Council, the charity Cancer Research UK, University College London and The Wellcome Trust, a charity supporting biomedical research. The Commissioner understands that the intention is to build the UK Centre for Medical Research and Innovation ("the UKCMRI") on the site. The sale was completed during 2008.

The Request

3. On 21 November 2007, the complainant sent an email to the Council requesting information in the following terms:

"I require all data qualifying under the FOIA relating to:
 1. *Discussions between Camden Officers and especially Camden planning officers and bidders and potential bidders for the Brill Place site behind the British Library.*
 2. *Discussions within the Council, by both officers and councillors, relating to the Brill Place site.*
 3. *Discussions between the Council, whether by councillors or officers, and any Government Department or agency relating to the Brill Place site".*
4. On 26 November 2007, the Council acknowledged the request and expressed the view that the information request should be handled under the EIR rather than the FOIA.
5. The complainant responded challenging the Council's position that the request should be handled under the EIR.
6. The Council provided its response to the request on 19 December 2007. It stated that it had attached a copy of the information it was able to disclose. It also stated that it believed that the request may fall within the scope of the EIR and in light of this it had considered the request under both the FOIA and the EIR. The Council explained that it had decided to refuse to provide the remainder of the information requested and applied a number of exemptions and exceptions, namely sections 21, 36, 40(2), 41, 42, and

43 of the FOIA, and regulations 12(3), ¹12(4)(e), 12(5)(b) and 12(5)(f) of the EIR. The Council also cited regulation 12(5)(e) but stated the wording relating to regulation 12(5)(d). As regards the qualified exemptions and exceptions, the Council stated that it considered that the public interest in maintaining the exemptions and exceptions outweighed the public interest in disclosing the information.

7. The complainant complained about the response on 1 January 2008. The complainant stated that he was not challenging at that time the withholding of legal advice or the redactions made by the Council relating to third party personal data, however the complainant asserted that the public interest favoured disclosure of the rest of the information being withheld by the Council.
8. The Council acknowledged the complaint on 2 January 2008 and confirmed that the request was being dealt with under the EIR.
9. On 17 January 2008, the Council completed its internal review. It stated that it had decided to uphold its original decision to refuse to provide the information. The Council stated that it disagreed with the complainant's opinion that the information should be disclosed upon application of the public interest test.

The Investigation

Scope of the case

10. On 12 February 2008, the complainant asked the Commissioner to consider whether the Council had correctly refused to provide the information. The complainant stated that he did not wish to complain about the Council's decision to refuse to provide information that it had withheld using section 21 of the FOIA and section 40(2) and regulation 12(3) of the EIR. For clarity, the Commissioner has therefore not considered the Council's decision to withhold this information.
11. During the Commissioner's investigation, the Council disclosed some of the information it had originally sought to withhold containing additional redactions under regulation 13(1). The complainant wrote to the Commissioner on 14 September 2009 to complain about the redactions made and the Commissioner has considered these redactions as part of his investigation.
12. The Council also disclosed other information that it had originally sought to withhold, achieving some degree of informal resolution. For clarity, as this information has already been disclosed, this information has not therefore been considered in the Analysis and Decision

¹ For clarity, regulation 12(3) refers to the exception under regulation 13(1).

sections of this Notice. It also mistakenly disclosed some information that it had sought to withhold using the exceptions under regulation 13(1) and 12(5)(b). The Commissioner has not therefore considered this information in the Analysis and Decision sections of this Notice apart from some of the information withheld under regulation 13(1).

Chronology

13. On 29 January 2009, the Commissioner wrote to the complainant to set out his understanding of the complainant and on 4 February 2009, the complainant replied confirming that his complaint had been correctly understood.
14. On 10 February 2009, the Commissioner wrote to the Council asking it to provide copies of the withheld information falling within the scope of the complaint. He asked the Council to indicate which information it had withheld under each exception or exemption. The Commissioner also pointed out that it had not been clear from the Council's refusal notice whether it was applying regulation 12(5)(e) or 12(5)(d) and he asked for clarification.
15. The Council responded on 16 March 2009 following a warning of the Commissioner's powers to issue an Information Notice. It apologised for the delay and stated that the requested information would be posted to the Commissioner. Later on the same day, the Council telephoned the Commissioner. It explained that essentially the withheld information fell within two categories: Information that was disclosed with redactions and information that was withheld in its entirety. It explained that regarding the latter category it had kept no record of which exemptions or exceptions had been applied to the information and that it would need more time to reconsider this.
16. On 27 March 2009, the Council sent an email to the Commissioner stating that it had attached a table indicating the exemptions and exceptions relied upon for the information it was withholding. It provided a number of separate emails on the same day with the withheld information attached. This table essentially separated the information into three bundles labelled as "Information released", "Legal information not released" and "undisclosed information".
17. The Commissioner telephoned the Council on 30 March 2009 to raise concerns about the various difficulties in understanding the table and how it related to the withheld information. He sent an email later that day setting out the problems and asked the Council to respond. In particular the Commissioner asked the Council to clarify why the first bundle of withheld information had been labelled as "Information released".
18. The Council addressed the problems identified by the Commissioner on 31 March 2009 and also provided a revised table. The Council

clarified that the first bundle represented the information that had originally been released to the complainant with redactions for various exemptions. The Commissioner noted that the table did not include the exemption under section 41 or the exception under 12(5)(f) and the Commissioner therefore understood that the Council had withdrawn its reliance on these provisions. The Commissioner also noted that the Council's table cited regulation 12(5)(e) and not 12(5)(d) and he therefore understood that the Council was not seeking to rely on 12(5)(d).

19. The Commissioner wrote to the Council on 29 April 2009 explaining that it was his intention to consider the request under the EIR. The Commissioner asked a number of questions to help him to assess whether the Council had correctly refused to provide the information.
20. When the response did not arrive, the Commissioner contacted the Council on various occasions from 10 June 2009 until 26 June 2009 to try to secure the Council's response after the Council failed to meet multiple deadlines that it had proposed. During this time, the Commissioner was advised that the officer dealing with the case had left the authority's employment and a new case officer had been appointed. The Commissioner had begun to prepare an Information Notice when the Council provided a partial response on 26 June 2009 and its final response on 30 June 2009. The Council stated that it was able to disclose some of the information it had been withholding and that it had provided a new table setting out what information it now wished to withhold. It also agreed that the request should be handled under the EIR.
21. On 15 July 2009, the Commissioner telephoned the Council to discuss the difficulties in understanding the table and how this related to the bundles of information it had provided. The Commissioner also highlighted that although the Council had agreed with the Commissioner that the request should be dealt with under the EIR in its letter of response, it had listed exemptions under the FOIA in the table. The Council stated that this had been a mistake. The Commissioner also explained that the page numbers in the table did not clearly relate to the bundle of withheld information which had been provided to the Commissioner. The Council agreed to reconsider its response.
22. The Council sent an email to the Commissioner the next day stating that it had attached a revised table and provided a new bundle of withheld information with pages numbered from 1-211.
23. On 17 July 2009, the Commissioner sent an email to the Council pointing out that it had not attached the table referred to.
24. The Council replied to the Commissioner on 17 July 2009 and attached a copy of the table citing what information it wished to withhold. When he inspected the table, the Commissioner noted that the Council had

still not removed references to exemptions under the FOIA. The Council had also applied 12(5)(d) even though the Commissioner had specifically asked the Council to clarify at the beginning of his investigation whether it wished to rely on this exemption. The Council provided no explanation for this change in position.

25. The Commissioner telephoned the Council on 6 August 2009 and sent an email asking some more questions to help him to consider the withheld information. He raised more concerns about discrepancies in the Council's table. The Commissioner also asked the Council to disclose to the complainant all the information that it was no longer seeking to withhold.
26. Following a number of telephone calls when the Council did not respond on time, on 26 August 2009 the Commissioner received an emailed copy of a letter that the Council had written to the complainant dated 21 August 2009. This letter stated that some more information had been disclosed. Some documents were attached containing black marks where information had been redacted. The Commissioner also received another email from the Council the next day stating that it had attached copies of all the documents provided to the complainant. Another bundle of redacted documents was attached.
27. The Commissioner telephoned the Council on 27 August 2009 pointing out that the Council had still not responded to the queries raised by the Commissioner on 6 August 2009. The Council informed the Commissioner that it could not recall whether it had responded and would call the Commissioner back later that day to confirm. When the Council did not return the call, the Commissioner telephoned the Council again on 2 September 2009. The Council confirmed that a response had been prepared and emailed it to the Commissioner.
28. On 4 September 2009, the Commissioner wrote to the complainant stating that he understood that the Council had provided some more information to him and asking him to confirm that this had been received.
29. On 11 September 2009, the Commissioner telephoned the Council to raise concerns about the extent of the information disclosed to the complainant. He stated that it was his understanding that the only information that the Council wished to withhold is that specified in the table provided to the Commissioner on 17 July 2009. The Council agreed that this was the case. It also confirmed that all other information could be disclosed. It advised the Commissioner that it had only disclosed material containing regulation 13(1) redactions and that it had yet to disclose the other information that it no longer wished to withhold.
30. On 14 September 2009, the Commissioner sent an email to the Council asking it to confirm that the additional information that it was no

longer seeking to withhold had now been disclosed to the complainant. The Council replied on the same day confirming that the information had been sent to the complainant at the end of the previous week.

31. On 14 September 2009, the Commissioner also received a letter from the complainant confirming receipt of redacted information. He noted that every document had names removed and that the Council had not provided any explanation for this. He asked the Commissioner to consider these redactions as part of his complaint.
32. The Commissioner wrote to the Council on 24 September 2009 stating that it was his understanding that it had now disclosed all of the information that was originally withheld apart from that specified in the table provided on 17 July 2009. The Commissioner also explained to the Council that he had received a further complaint from the complainant about the redactions. The Commissioner asked the Council to justify the redactions in accordance with the principles of the Data Protection Act 1998 ("the DPA").
33. On 8 October 2009, the Council replied and stated that it had redacted the names of council staff acting in their professional capacity and some third party details. It stated that disclosure would not be fair or lawful but it did not explain why. The Council also attached a further copy of the table of 17 July 2009 and another bundle of redacted material which the Council stated represented the material sent to the complainant.
34. On 14 October 2009, the Commissioner wrote to the Council explaining his concerns that the Council's officer had not correctly identified all the redacted information. He pointed out that the bundle provided on 26 August 2009 had contained more documents than the bundle provided on 8 October 2009. The Commissioner also stated that the Council's justification for applying regulation 13(1) had been insufficient.
35. On 14 October 2009, the Commissioner also wrote to the complainant stating that he was investigating the redactions made. He also asked the complainant to confirm that he had received the additional information that the Council had said it had disclosed on 14 September 2009.
36. On 28 October 2009, the Council replied. It attached another bundle which it stated represented all the information that had been sent to the complainant. It attached a second bundle containing redactions and a duplicate without redactions. It also provided a list of the third party details that it had redacted. In response to the Commissioner's request for full rationale for relying on regulation 13(1), the Council simply asserted that it had redacted the names, phone numbers and emails of people from external organisations. It still did not offer any reason why it would be unfair or unlawful to disclose this information.

37. On 29 October 2009, the complainant wrote to the Commissioner stating that he had not received any information from the Council following the letter to him dated 21 August 2009.
38. On 9 November 2009, the Commissioner telephoned the Council to discuss its response. The Commissioner stated that he had considered the new redacted bundle provided on 28 October 2009 and noted that there now appeared to be fewer redactions than before. The Council clarified at this point that it had decided not to withhold the details of council staff. The Council explained that it had provided this information to the complainant on 28 October 2009 and had also provided all other information that it was no longer seeking to withhold. The Commissioner queried why the Council had sent this information again as he understood this information had been provided in September. The Council was not able to confirm that this information had in fact been sent in September and the Commissioner noted that the complainant had written to him stating no information had been received. Finally, the Commissioner highlighted that the Council had still not provided a sufficient response justifying reliance on regulation 13(1).
39. At this stage, the Commissioner reviewed the bundle of documents that the Council had provided to the complainant on 28 October 2009. As the Council had assured the Commissioner that the only information it was now withholding was set out in the table provided on 17 July 2009, the Commissioner was concerned to note that it was evidently the case that the Council had still not disclosed all of the information that had originally been provided to the Commissioner by the Council's previous officer on 27 March 2009. As noted in this chronology, when the Council's previous officer had provided information, he had provided *three* bundles of information. The third bundle consisted of 211 pages. It became apparent to the Commissioner that the new council officer had not, for reasons that are unclear, disclosed the information that was withheld in the other two bundles labelled "Information released" and "Legal information not released" as he had only disclosed information from the third bundle consisting of 211 pages. The Council's second officer had not claimed that any of the information in the other two bundles was excepted.

Analysis

Substantive procedural matters

40. As highlighted above, although the Council agreed with the Commissioner that the request should be handled under the EIR, the complainant disagreed with this position. From his inspection of the information, the Commissioner noted that it all concerns the Council's involvement in the plan to develop the site. In view of this, the

Commissioner considers that the information falls within the scope of 2(1)(c) of the EIR because it is information on a plan affecting the land.

Exceptions

41. For clarity, any references to page numbers in the following section of this Notice refer to the bundle of information provided by the Council to the Commissioner on 16 July 2009 and the table it provided on 17 July 2009.

Regulation 12(4)(e) – Internal communications

42. This exception provides that a public authority does not have to disclose information to the extent that the request involves the disclosure of internal communications. The exception is class-based which means that the information is covered by the exception if it represents internal communications. If the information can be deemed to be an internal communication, the public authority has to show that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing it.
43. In his letter to the Council dated 29 April 2009, the Commissioner explained that his view is that this exception generally applies to communications between members of staff in the same public authority and between government departments. The Commissioner explained that it will not cover communications between the Council and ward councillors (unless they were acting in their capacity as council office holders) and it will not generally cover communications with third parties. The Commissioner asked the Council to carefully consider the information it wished to withhold under this exception and confirm whether all the communications were between members of staff at the Council. He specifically asked the Council to identify those that were not between members of staff at the Council.
44. In response, the Council referred to the table it had provided along with its letter on 30 June 2009. The Commissioner noted that this contained some very brief comments in support of the exception. The Council made little or no attempt to identify the parties that the correspondence had passed between. In some cases, it simply stated that the information represented “internal communications” and in others, it stated that the information represented “discussion between officers and councillors”, making no attempt to explain what role the Councillor had and why, in light of the Commissioner’s comments, it considered that such correspondence would be an “internal communication”.
45. Although the Commissioner considers that it is likely that some of the correspondence does represent internal communications, in view of the Council’s failure to respond properly, the Commissioner decided that he was unable to support the Council’s position that the information had been correctly withheld under regulation 12(4)(e). Much of the

withheld information is correspondence sent to and copied to multiple recipients and without confirmation from the Council that all the recipients were Council employees, the Commissioner was not able to be sure that the correspondence represented internal communications. In addition, from inspecting the information, it appeared to the Commissioner that some of the correspondence consisted of the following: comments from a Residents' Association, correspondence to and from potential developers, correspondence to English Partnerships, and correspondence to Councillors.

46. As explained, the Commissioner was not satisfied that the information fell within the scope of the exception. However, even if the Commissioner had been satisfied that all the information was internal communication, he would not have been satisfied that the information could be withheld under the public interest test. He noted that the Council had made little attempt to justify how disclosure of the information could have resulted in any harm. In its refusal notice, the Council explained that it believed the release of the information would harm the frankness and candour of internal discussion in the future but it made little or no attempt to support this statement by reference to the actual information in question. Additionally, given that the information relates to the potential development of a major site in London, the Commissioner also considers that the public interest in favour of disclosure of this sort of information would be particularly weighty.
47. For the reasons above, the Commissioner concluded that he was unable to uphold the Council's application of this exception.

Regulation 12(5)(b) – Legal Professional Privilege

48. This exception provides that a public authority may refuse to disclose information to the extent that its 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.
49. The scope of this exception includes information that is covered by Legal Professional Privilege. This principle is based on the need to protect a client's confidence that any communication with his/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).
50. In its refusal notice on 19 December 2007, the Council stated that it wished to withhold some information on the basis that it attracted legal advice privilege. The Council stated the names of five in-house legally qualified persons. The Commissioner has considered the Council's claim further below.

51. On the table provided to the Commissioner on 17 July 2009, the Council had written that page 60 of the bundle it had provided contained legal advice. The Commissioner considered page 60 which was an incomplete email from a Press and PR Officer. The Commissioner can see no evidence suggesting that the purpose of this email was to seek or give legal advice, or that it records any legal advice given. He therefore does not accept that the exception has been correctly applied to the information on page 60.
52. The table also lists pages 69 to 70 as being covered by this exception. The information on these pages is a few emails, none of which are to or from the legally qualified persons named by the Council. The Commissioner can also see no evidence that they record any legal advice given. The Commissioner therefore does not accept that the exception has been correctly applied to the information on pages 69 to 70.
53. The Council applied the exception to information on page 99 of the bundle. This page consists of two emails and the top half of an email continuing on the following page. For clarity, the Commissioner has not considered the email that follows on to the next page as this email was disclosed by the Council. Having considered the two other emails, the Commissioner was satisfied that they consist of legal advice being given by two of the legally qualified persons named by the Council. The Commissioner therefore accepts that the two emails on page 99 dated 19 June 2007 are covered by Legal Advice Privilege.
54. The Council's table stated that information on pages 103 to 106 and 141 to 144 was covered by the exception. The Council advised the Commissioner that it had actually meant to cite pages 140 to 143 and the Commissioner has therefore considered this document and the one on pages 103 to 106. These documents appear to be duplicates of legal advice. The Commissioner notes that this legal advice was provided to the complainant by the Council on 28 October 2009. It appears that this information was provided in error however as this information has been disclosed, the Commissioner has not considered it any further.

Public Interest Test

55. As explained above, the Commissioner was satisfied that two emails on page 99 were covered by Legal Advice Privilege. However, regulation 12(5)(b) is a qualified exception and this means that if the information is to be withheld the Commissioner also needs to satisfy himself that in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing it.

Public interest arguments in favour of disclosing the requested information

56. The Commissioner recognises that there exists within the EIR itself a specific presumption in favour of disclosure under regulation 12(2). Some weight must therefore be attached to the general principles of achieving accountability and transparency.
57. The Commissioner notes that the advice concerns the proposed site for redevelopment. Having considered the nature of the information, the Commissioner notes that the issue being considered had clearly been of some concern to the local residents of the area. Disclosure of the information would have revealed the exact nature of the issue and the content of the advice given concerning the site. It would also have allowed the public to consider whether the legal advice given was flawed. This in turn would have helped the public to engage with the Council about the issue which promotes democracy and greater understanding of the decision-making process.

Public interest arguments in favour of maintaining the exception

58. The Commissioner's guidance 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”.

59. In light of the above, there will always be strong arguments in favour of maintaining the public interest exemption 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 case of *Bellamy v Information Commissioner* (EA/2005/0023; 4 April 2006) 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...”

Balance of the public interest arguments

60. Having considered the arguments above in favour and against disclosure of the information, the Commissioner considers that in the circumstances of this case, the public interest in maintaining the exception outweighed the public interest in disclosing the information.

61. Although the Commissioner accepts that there was some local concern about the issue in question, he notes that the issue in question was not central to the redevelopment of the site and appears not to have resulted in problems. He has therefore attached more weight on this occasion to the strong public interest in protecting the Council's right to seek confidential legal advice.

Regulation 12(5)(d) – confidential proceedings

62. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
63. As explained in the Chronology section of this Decision Notice, the Council's refusal notice to the complainant cited regulation 12(5)(e) but gave the wording for regulation 12(5)(d). For this reason, the Commissioner specifically asked the Council to clarify which exception it wished to rely on. In response, the Council produced a table citing regulation 12(5)(e) but not 12(5)(d). The Commissioner understood from this that the Council did not wish to rely on regulation 12(5)(d). However, following disclosure of some information, the Council produced another table which did cite regulation 12(5)(d) without providing any explanation to the Commissioner justifying this change in position or any rationale for its application.
64. In circumstances where exceptions are relied upon by public authorities at a late stage, the Commissioner would expect the public authority to offer good reasons for this course of action. The Council did not provide any explanation. In view of this, the Commissioner has decided to exercise his discretion not to consider the late claim of regulation 12(5)(d) in this case.

Regulation 12(5)(e) – confidential commercial or industrial information

65. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. This exception is also qualified by a public interest test.
66. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that first need to be met, namely:
- The information should be commercial or industrial in nature.
 - The information should be confidential where such confidentiality is provided by law.

- The confidentiality should be required to protect a legitimate economic interest.
 - The confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.
67. The Commissioner asked the Council to consider the information it was withholding using this exception and to explain how the first three bullet points had been satisfied in the circumstances of this case.
68. The Commissioner considered the Council's refusal notice dated 19 December 2007, its two responses to the Commissioner on 26 and 30 June 2009 and the table provided to him on 17 July 2009. Reference to this exception was made on two occasions in the table. On the first occasion, the Council stated that pages 18 and 19 of the bundle it had provided were covered by this exception and it described the information as "information obtained and advice given to interested organisations during pre planning application discussions". On these pages there are comments from a Residents' Association and a couple of emails.
69. On the second occasion, the Council stated that pages 82 to 86 had been withheld under this exception and it stated that the information was: "...commercially sensitive information as it gives details of the identity of an organisation that is considering submitting a planning application for development as part of a procurement process". The information consists of some correspondence to and from a potential developer who is named and some correspondence which appears to be between council staff members discussing an enquiry from another potential developer. However, the second developer is not named.
70. The Commissioner was not convinced that the information presented on pages 18 and 19 could be described as "commercial or industrial in nature" and he notes that despite being asked to explain why the information met this element of the criteria, the Council did not submit any arguments. The Commissioner therefore considered that the exception had been incorrectly applied to this information.
71. In relation to pages 82 to 86, the Commissioner is willing to accept that information revealing the identity of an interested developer may be described as "commercial" information. However, as the Council had only indicated that the identity of the developer alone was exempt, the Commissioner has only considered whether this information could be withheld under the exception and not whole documents as it would be possible for the Council to redact any exempt information.
72. The Commissioner then considered whether the information being withheld was confidential where such confidentiality is provided by law. In its refusal notice dated 19 December 2007, the Council stated that it held information relating to bidders and potential bidders as part of its pre-planning application service. It explained that this is a service

offered to potential developers to discuss their initial ideas and plans for a site prior to the submission of a formal planning application. The Council asserted that this service is offered on a confidential basis and that the information provided was sensitive. It also added that in the opinion of the Council, the information is covered by a common law duty of confidence.

73. When the Commissioner wrote to the Council on 29 April 2009, he specifically asked the Council to identify the third parties involved and to explain precisely why the information being withheld was confidential. He asked the Council to explain whether the third parties were given any express expectation that this would be the case or whether confidence would have been implied. If implied, the Commissioner asked the Council to explain the basis for any argument that confidence would have been implicit in these circumstances. The Commissioner also explained that for information to be confidential, it must also have the necessary "quality of confidence", meaning that it cannot be trivial or otherwise accessible. He asked the Council to confirm whether it believed that none of the information was trivial and that it was not otherwise accessible. When the Council responded on 29 June 2009, it again referred the Commissioner to the table it had provided (although the table makes no comment about confidentiality). It also simply stated that "This information was provided by the parties at the time so the confidentiality needs to be maintained".
74. In the absence of sufficient argument by the Council that the information was confidential, the Commissioner was unable to support the Council's position that the information withheld was in fact confidential according to common law. Even if the information actually was confidential, the Commissioner would still not accept that this exception was engaged for the following reasons.
75. In his letter dated 29 April 2009, the Commissioner pointed out to the Council that its refusal notice had not made specific arguments to explain why the confidentiality was necessary in order to protect a legitimate economic interest. The Commissioner drew the Council's attention to the case of *Derry City Council v the Information Commissioner (EA/2006/0014)* and he explained that in the later case, Derry City Council attempted to argue that the commercial interests of Ryan Air would be prejudiced under section 43 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 principal is transferable to information withheld under regulation 12(5)(e) and he stated that the Council needed 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 the third parties involved.

76. As described in the chronology to this Decision Notice, the Council submitted a partial response on 26 June 2009. In this response, the Council simply stated that it would need to consult the third parties in relation to the Commissioner's query. It added "If you require us to follow this up we will contact the third parties for their opinions". In the full response which was provided on 30 June 2009, this comment had been removed and now the statement read, "All information received from members of the public will be disclosed save for their name and contact details". It was not clear to the Commissioner what information this statement was referring to and why the earlier statement made about contacting the third parties had been removed. However, it was clear to the Commissioner that, despite being asked, the Council had failed to contact any of the third parties involved to ascertain their views.
77. As described above, the Commissioner did not accept that all the information withheld using this exception could be described as "commercial or industrial" in nature except for the information identifying the potential developers. In relation to this information, he did not consider that the Council had shown that the information was confidential where such confidentiality is provided by law, and even if it was, the Council had failed to present any arguments showing that confidentiality was necessary in order to protect a legitimate economic interest. He was therefore unable to uphold the Council's application of this exception.

Regulation 13(1) – personal data

78. Regulation 13(1) provides that third party personal data is exempt if its disclosure would breach any of the Data Protection Principles set out in the DPA. The Council stated that disclosure of the redacted information from the bundle it provided to the Commissioner on 16 July 2009 would breach the first Data Protection Principle because its disclosure would not be fair or lawful. It also asserted that none of the conditions in Schedule 2 of the DPA had been met. However it did not provide any explanation to justify this position.
79. The Commissioner considers that the most relevant Data Protection Principle in this case is the first which provides that personal data shall be processed fairly and lawfully.
80. The Commissioner considered the redactions made by the Council using regulation 13(1). Firstly, he did not consider that all of the redacted material actually represented personal data. Personal data is defined in the DPA as any information relating to a living and identifiable individual. The Commissioner noted that the Council had redacted the names of particular organisations or companies and their addresses. In one case, the Council had even redacted the name of a hall. This information is not personal data and is therefore not covered by regulation 13(1). The Commissioner accepts however that the

remaining information, which consists of names, job titles and specific contact details, is personal data.

81. When the Commissioner inspected the bundle of information that was disclosed to the complainant by the Council on 28 October 2009, he noted that a significant amount of the personal data being withheld by the Council had actually already been disclosed in error. Through a lack of diligence when preparing the bundle of information for disclosure, the Council disclosed some emails which had been duplicated in the bundle provided to the Commissioner on 16 July 2009. It also disclosed other emails that contained the same information that it had elsewhere redacted under regulation 13(1).
82. As it was clearly not the Council's intention to disclose the personal data it was seeking to withhold under regulation 13(1), the Commissioner has still gone on to consider whether this information could have been withheld at the time of the request in the cases where the actual email in question has not been disclosed but the information in it appears in another email that has been disclosed, for example, a name or an email address.
83. The Council advised the Commissioner that all of the names and details that had been redacted concerned "third parties" rather than Council employees; however, despite being asked to produce a list of the third parties, to specify who they were and to explain precisely why disclosure of their details would be unfair, the Council failed to do so. The Commissioner therefore considered for himself whether the disclosure of the information would have been unfair.
84. The Commissioner's view is that it would be fair to disclose the names, job titles or professional contact details of third parties working for public bodies such as English Partnerships (which is now part of the Home and Communities Agency) as the Commissioner would generally consider that people in such roles would and should expect significant public scrutiny of their role. He considers that the same would apply to any persons with public roles such as councillors or members of parliament. He also considers that there is a legitimate public interest in persons with public roles being as accountable as possible and to this end he considers that the disclosure would be necessary.
85. The Commissioner also noted that the Council appeared to have redacted the non-work email address of a councillor. The Commissioner accepts that it would be unfair to disclose such information unless it had already been put into the public domain. This is because he considers that the disclosure of such information would not be within reasonable expectations and may cause inconvenience if anybody tried to use this information inappropriately. If the information was publicly available, for the reasons stated in the paragraph above, the Commissioner considers that there would be a legitimate public interest in its disclosure and that its disclosure would be necessary.

86. As regards any persons working in a private capacity, the Commissioner considers that disclosure of their names, job titles and contact details would generally be unfair as the Commissioner considers that it would be reasonable for those persons to expect that their details would not become publicly available because they contacted a public authority even if they did so whilst acting in a professional capacity. This is with the exception of any information that had already been put into the public domain. The Commissioner has been able to find the names and contact details of some of the persons whose names and details had been redacted by the Council simply by conducting an internet search. However, it is not the Commissioner's view that disclosure of this information would be necessary to satisfy the legitimate public interest in transparency as he considers that knowing the organisations involved would bring about sufficient transparency.
87. In light of the above, concerning the redactions made under regulation 13(1) consisting of names, job titles and specific contact details, the Commissioner's view is that the only information which it would have been fair for the Council to disclose and which would have satisfied condition 6 in Schedule 2 of the DPA was the names, professional contact details and job titles of any persons acting for public authorities or otherwise acting in a public role such as MPs or councillors. He also considered that the Council could have disclosed any non-work contact information of anybody with a public role as long as this information was already publicly available. It is clear that the Council has redacted information meeting this description from the bundle it provided to the Commissioner on 16 July 2009.
88. As discussed at the end of the Chronology section of this Notice, it came to the Commissioner's attention that the Council had not disclosed information from two bundles that had been provided to the Commissioner originally on 27 March 2009. Following this, the Council did not seek to maintain that any of this information was exempted. In spite of this, the Commissioner considers that it is appropriate to consider the application of section 13(1) to this information because this exception is designed to protect personal data. For the reasons above, the Commissioner considers that the Council should also withhold the names, job titles and specific contact details of third parties acting in a professional capacity from this information. It should also withhold any non-work contact information of persons acting in a public capacity if this information was not already publicly available. However, it should disclose the names, job titles and professional contact details of any persons working for public authorities or acting in a public role as well as any non-work contact details as long as this information was already publicly available.

Procedural Requirements

89. In relation to the bundle of information provided to the Commissioner on 16 July 2009, the Commissioner finds that the Council breached its obligation under regulation 5(1) to make environmental information available upon request because it failed to disclose information requested by the complainant and was not able to justify the withholding of this information. It also breached regulation 5(2) for failing to make this information available within 20 working days of the request. This is with the exception of the information which the Commissioner considers was correctly withheld under 12(5)(b) and regulation 13(1).
90. As discussed at the end of the Chronology section of this Notice, it became apparent to the Commissioner that the Council had not disclosed all the information that it had withheld from the complainant. This information was contained in two bundles of information that were originally provided to the Commissioner on 27 March 2009 labelled "Information Released" and "Legal Information not released". The Commissioner checked on more than one occasion with the Council that it only wished to withhold information from the bundle it provided to the Commissioner on 16 July 2009 (which did not contain the information from the two bundles described above) and it confirmed that this was correct. The Council incorrectly informed the Commissioner that it had disclosed all other information. As the Council failed to disclose the information it was withholding from the two bundles described, the Commissioner finds that the Council breached regulation 5(1) and 5(2) in respect of this information for failing to provide this information within 20 working days or by the date of its internal review. This is with the exception of the information which the Commissioner found was excepted under regulation 13(1).
91. Having considered the Council's refusal notice, the Commissioner noted that the Council had not explained why regulation 12(5)(e) was engaged as it had only referred to public interest considerations. This was a breach of regulation 14(2) as this explanation should have been provided within 20 working days. The Commissioner also considers that the internal review failed to address this issue and the Council therefore breached regulation 14(3)(a) for failing to explain why the exception was engaged by the date of its internal review.
92. In its refusal notice, the Council cited regulation 12(5)(e) but it wrote the wording attached to regulation 12(5)(d). When asked to provide clarification, the Council provided the Commissioner with a table indicating that it was relying on 12(5)(e) and not 12(5)(d). However, at a later stage in the investigation, the Council attempted to rely on both 12(5)(e) and (d). The Council also claimed regulation 13(1) in relation to other information than this exception had referred to in its original refusal and internal review. In view of this, the Commissioner considers that the Council breached regulation 14(2) for failing to claim the

exceptions under regulation 12(5)(d) and 13(1) within 20 working days of the request and 14(3)(a) for failing to claim them by the date of its internal review. As regulation 12(5)(d) is also subject to a public interest test, the Council breached regulation 14(3)(b) for not setting out its considerations by the date of its internal review.

The Decision

93. 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 correctly applied regulation 12(5)(b) to the information on page 99 of the bundle provided to the Commissioner on 16 July 2009 and it correctly determined that the public interest in maintaining the exemption in this case outweighed the public interest in disclosing it.
 - Regulation 13(1) was engaged in respect of the names, job titles and specific contact details of persons acting in a private professional capacity and the non-work contact details of persons in public roles where this information was not in the public domain.
94. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The Council incorrectly withheld all the information requested by the complainant which fell within the scope of this complaint with the exception of the information that the Commissioner agrees was exempt under regulation 12(5)(b) and 13(1). It therefore breached its obligations under regulation 5(1) and 5(2) for failing to make environmental information available within 20 working days following a request or by the date of its internal review.
 - The Council did not explain why regulation 12(5)(e) was applicable in its refusal notice as it only referred to public interest considerations. This explanation had still not been provided by the date of the internal review. The Commissioner therefore considers that the Council breached regulation 14(2) for failing to explain why the exception applied within 20 working days of the request and regulation 14(3)(a) for failing to explain this by the date of its internal review.
 - As the Council sought late reliance on regulation 12(5)(d) and 13(1) during the Commissioner's investigation, it breached regulation 14(2) for failing to claim these exceptions within 20 working days. It also breached regulation 14(3)(a) for failing to claim these exceptions by the date of its internal review. In relation to regulation 12(5)(d), the Council also breached regulation 14(3)(b) because this exception is qualified by

the public interest test and it failed to set out its considerations by the date of the internal review.

Steps Required

95. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
96. Disclose all the information falling within the scope of the complaint that it has not already disclosed to the complainant, including the information from the two bundles provided to the Commissioner on 27 March 2009 labelled "information released" and "Legal information not released" discussed in paragraph 39 of this Notice. The disclosure should be made with the exception of the following information only:
 - The information withheld under 12(5)(b) on page 99 of the bundle supplied to the Commissioner on 16 July 2009 and
 - The names, job titles and specific contact details of any persons acting in a private capacity (not including the name of the organisation they work for or the organisation address).
 - The non-work contact details of any person acting in a public role that had not already been put into the public domain.
97. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

98. 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.

Other matters

99. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
100. The Commissioner was particularly concerned throughout this case about the Council's failure to respond to the Commissioner in a timely manner on a number of occasions. The Commissioner warned the Council three times during the case about his powers to issue a formal Information Notice and on the second occasion such a Notice had been prepared before the Council responded after repeatedly failing to

supply the information by the promised date. The Commissioner did not consider that the Council provided adequate explanation for the delays.

101. The Commissioner also had concerns, as will be evident from the content of this Notice, about the poor quality of the Council's responses and its request handling. He was particularly concerned about the following:
- The Council had not kept a record of what exemptions/exceptions it had applied to all of the withheld information and this caused delay.
 - When requested, the Council provided poor explanations in support of the exceptions applied without demonstrating proper understanding of the exceptions or demonstrating any real consideration of the content of the information being withheld. The Council also presented the withheld information to the Commissioner in a way which resulted in confusion in relation to which exceptions had been applied to which information.
 - Despite reassuring the Commissioner that it had disclosed all the information not listed as excepted in the table it provided on 17 July 2009, it was evident to the Commissioner that this was not the case at the end of the investigation. The Commissioner notes that the case transferred from one officer at the Council to another but he would not expect such a fundamental mistake to occur as a result of this transition.
 - The Council mistakenly disclosed a significant amount of information that it was claiming was excepted under the EIR. This is most concerning when the exception being claimed is for personal data.
102. The Commissioner wishes to emphasise that it is important that the Council ensures that its staff members are sufficiently familiar with the requirements of the EIR. Staff dealing with correspondence should also take account of any guidance issued by the Commissioner. The Council should ensure that proper training is provided in this regard.
103. The Commissioner trusts that the Council will ensure that it takes steps to ensure that it keeps records of how it has handled requests for an appropriate amount of time, and in particular where it is advised of a complaint to the Commissioner. The Commissioner also trusts that the Council will take steps to ensure that it is able to respond to the Commissioner on time in the future, that its responses are of sufficient quality and that it does not mistakenly disclose information which it is claiming is excepted or exempt.
104. The issues set out above have been logged by the Commissioner's Enforcement Team. A member of the Commissioner's Enforcement

Team will be contacting the Council in due course regarding the issues identified.

Right of Appeal

105. 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@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 served.

Dated the 22nd day of December 2009

Signed

**David Smith
Deputy Commissioner**

**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);
- (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 12 - Exceptions to the duty to disclose environmental information

Regulation 12(2)

“A public authority shall apply a presumption in favour of disclosure”.

Regulation 12(3)

“To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13”.

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
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

Regulation 13 - Personal data

Regulation 13(1)

“To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data”.

Regulation 13(2)

“The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the

exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded”.

Regulation 13(3)

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it”.

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).