

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

Decision Notice

Date: 5 August 2010

Public Authority: Chichester District Council
Address: East Pallant House
East Pallant
Chichester
West Sussex
PO19 1TY

Summary

The complainant requested information about a planning application made on behalf of the council on land associated with Chichester City Football Club. The council provided some information, stated that other information was not held, and withheld other information on the grounds that section 43 of the Act applied. The complainant asked the council to review its decision, and stated that the information should have been considered under the Environmental Information Regulations 2004. The Council reviewed its decision and refused the request under regulation 12(5)(e). However it stated that the information for 2 parts of the request was not environmental and again refused the request under section 43 of the Act.

The Commissioner's decision is that the information is all environmental information and that the council should have responded to all parts of the request under the Regulations. His decision is that regulations 12(5)(e) and 12(4)(d) are not applicable to the information. He has also decided that regulation 12(4)(e) applies to the majority of the information, however the public interest in maintaining the exception does not outweigh the public interest in the disclosure of the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the

requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

2. 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

3. On 18 May 2009 the complainant wrote to the council and requested:

"Would you please direct me to or provide photocopies of documents relating to planning application 08/00554/OUT as set out below.

I wish to see the documents that contain Chichester District Council's and/or their agent's calculation of the estimated costs that will be incurred if this planning application is successful. Amongst these estimated costs would be (but not exclusively)

1. Building of new roundabout and other road alterations.
2. Moving the river and culverting it under the new roundabout.
3. Felling the trees on Westhampnett Road and the mitigation measures required by the Environment Agency (including the work on the River Lavant near Waitrose).
4. Providing a new junior pitch as required by the Sports Council.
5. The sum to be given to Chichester City United Football Club for improvements to the Oaklands Park pitch.
6. Mitigation measures that may be required by your own Ecology Officer and Environmental Officer.
7. Works to ensure that the contaminated land to the north of the River Lavant do not contaminate either the River Lavant or any other water sources.

8. Any other costs that might be incurred as a direct result of this application.

It is anticipated that some of these costs will be borne by the purchaser of the land. I wish to know how much this will reduce the amount of money the Council anticipate they will have received from the sale of the Portfield site.

I also wish to be directed to (or have photocopies) of those documents which will show me CDC's (or your agents) calculations and conclusions of the sum of money CDC estimate they will receive on the sale of this land for housing, assuming outline planning permission is granted."

4. The council replied on 29 May 2009. It provided the following response:

1) Building of the new roundabout and other alterations – the council stated that it holds estimates but that it would not disclose them as they are commercially sensitive.

2) Moving the river and culverting it - the council stated that it did not hold information on this.

3) Felling trees on Westhampnett Road and mitigation measures required by the Environment Agency – the council stated that it held no information for this.

4) Providing a new junior pitch as required by the Sports Council - the council stated that it holds estimates but that it would not disclose them as they are commercially sensitive.

5) The sum to be given to Chichester City United Football Club for improvements to its pitch - the council stated that it holds estimates but that it would not disclose them as they are commercially sensitive.

6) Mitigation measures that may be required by the councils Ecology Officer and Environmental Officer. Information was provided regarding the cost of meeting the requirements of the Environment Agency and the complainant was provided with directions as to where she could obtain that information online.

7) Works to ensure that the contaminated land to the north of the river does not contaminate other water sources - The council stated that it did not hold information relevant to this.

- 8) Any other costs that might be incurred as a result of the application - the council stated that it holds estimates but that it would not disclose them as they are commercially sensitive.
5. It further stated that the site would be put up for open disposal should planning permission be obtained, and that the costs estimates and the estimates the council held for land receipt were likely to influence the actual level of receipt obtainable and therefore disclosure was not in the public interest.
6. It also found that disclosure would not be in the public interest because the council's duty to obtain the best possible price for the land might be prejudiced by the release of the information in advance of a tender or contract negotiations. It added that the public had already had the ability to comment on the development proposal through the normal planning processes.
7. On 1 June 2009 the complainant wrote back to the council and asked it to review its decision. She highlighted that she believed that the council's refusal notice was inadequate for various reasons, including that the information should have been dealt with under the Environmental Information Regulations 2004 (the 'Regulations'). She asked the council to reconsider its decision.
8. The council responded on 19 June 2009. It acknowledged the complainant's argument that the information should have been considered under the Regulations rather than the Act. It reconsidered the majority of the information under the Regulations however it stated that the information in relation to questions 4 & 5 was not environmental information and so it was correct to consider it under the Act in those instances. It therefore applied Regulation 12(5)(e), but continued to rely upon section 43 of the Act for information withheld from questions 4 and 5.

The Investigation

Scope of the case

9. On 30 June 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the whether the information which she had requested should have been disclosed to her.

10. During the course of the Commissioner's investigation in respect of question 5 the complainant found details of the information she required in publicly available council minutes. The Commissioner has not therefore considered this part of the complainant's request further.

Chronology

11. The Commissioner wrote to the council on 7 July 2009 indicating that a complaint had been received and that he considered that complaint to be eligible. He asked the council to provide the relevant information to him together with any arguments which the council chose to rely upon.
12. The council responded on 10 July 2009. It asked why the Commissioner would need a copy of the relevant information as it was clear what the information was and the reasons for it being withheld from the refusal notice. On 19 August 2009 the Commissioner wrote again stating that the case was being prepared for investigation. He again therefore asked the council to forward the information and to provide any further arguments it might wish to rely upon. On 19 August 2009 the Commissioner wrote specifically confirming that he required sight of the information and gave assurances that that information would be held securely.
13. On 7 September 2009 the council provided a copy of the information to the Commissioner for his consideration, however it redacted a number of individual figures from that information to ensure those figures remained secure. The Commissioner considers that these redactions do not compromise his ability to make a decision in this instance and so he did not request an unredacted copy of the information.
14. On 2 December 2009 the Commissioner wrote to the council stating that in his view the council had not provided arguments clarifying the reasons why it believed Regulation 12(5)(e) applied. He allowed the council 10 working days to provide this information or stated that he would find that the exception was not engaged. The council responded on 15 December 2009 providing further arguments in support of the view that the exception was engaged. It also stated that it believed that regulation 12(4)(d) (unfinished documents or incomplete data) applied.
15. On 22 February 2010 the Commissioner wrote to the council stating that the arguments it had submitted were not adequate to engage Regulation 12(5)(e) because the necessary criteria were not met. He stated that it was possible that Regulation 12(4)(e) might be applicable

and asked the council to consider its position and submit arguments to that effect if it believed that that exception was applicable.

16. On 4 March 2009 the council submitted further arguments in relation to both Regulation 12(5)(e) and Regulation 12(4)(e).
17. On 12 March 2010 the Commissioner wrote to the council asking it to clarify one aspect of its reliance on Regulation 12(4)(e). The council responded to that request on 17 March 2010 providing that clarification.

Analysis

Substantive Procedural Matters

Procedural matters

18. The Commissioner notes that the council initially refused the request for the information because it considered it exempt under section 43 of the Act. However the complainant stated that the information was environmental information and should have been considered under the Regulations. The council agreed with this and so in the review it correctly provided a refusal notice highlighting the exception it chose to rely upon. However it did not agree with this view for parts 4 & 5 of the request and restated its decision that this particular information was exempt under the exemption in section 43 of the Act.
19. The Commissioner's decision however is that the information is environmental information falling within Regulation 2(1) of the EIR and he had therefore considered this information with the exceptions below.
20. Regulation 2(1)(c) provides that –

“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 -

(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’

21. The factors referred to in (a) include -

' 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'

22. The Commissioner is satisfied that the information falls within the definition of environmental information as provided in Regulation 2(1)(c). The information is financial figures relating to a new junior sports pitch, the development of which is likely to affect the elements of the landscape as described in Regulation 2(1)(a). The construction of the sports pitch was required by the Sports Council as a result of a wider development proposal which will also affect the elements as described in regulation 2.

23. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

Exemptions

Regulation 12(5)(e)

24. The council applied Regulation 12(5)(e) to the information. 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 subject to a public interest test where the exception is engaged.

25. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that need to be met, namely:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

26. In this case the Commissioner has firstly considered whether the information is confidential. The Commissioner considers that the term "provided by law" in the exception will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. The council has provided no specific details of any contracts which would provide a duty of confidence to the Commissioner and so the Commissioner has restricted his considerations to whether any of the other two options might be present.

The Common law

27. The Commissioner's view is that a duty of confidence under common law is owed by one party to another. This means that the party in receipt of the confidential information cannot disclose it without the permission of the other party. Doing so would breach a duty of confidence it owes to the confider of the information.
28. There is no specific requirement for the information to have been obtained from another person under Regulation 12(5)(e) as there is under section 41 of the Act. The exception can therefore also cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party. However, no confidentiality can attach to information generated by the public authority itself if it has not been shared with a third party under the common law.
29. In this case, the council received advice and estimates from its own officers and, for one estimate, from a third party engineering company which was acting on its behalf.
30. The council has also confirmed that the information has not been shared with other parties who might consequently owe it a duty of confidence. The Commissioner's decision must therefore be that no common law duty of confidence exists between the council and any third party recipient of this information.
31. However in the case of the estimate provided by a third party the Commissioner must consider further whether any common law duty of confidence might apply to this information. The council stated that it considers that the contractor owes it a duty of confidence under the Common Law for this information.
32. The Commissioner accepts that it is conceivable that the council would have sought to protect its projected costs from disclosure as it would consider this to be commercially sensitive for the reasons it has

provided. He also accepts that it is conceivable that a contract for services of this nature might have been made with an expectation that the estimate would be confidential to the council, and that the third party contractor would consider itself bound by that duty. However the common law test for a duty of confidence expressed by Megarry J in *Coco v AN Clark* [1969] RPC 41 is:

“if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence”

The Commissioner is satisfied that the council was the recipient of the information, and that therefore any common law duty of confidence that might potentially exist would actually be owed by the council (as recipient) to the third party contractor (as confider), rather than the other way around. The Commissioner considers that the scenario in this case is therefore not sufficient to impose an equitable or common law duty of confidence upon the third party contractor as was argued by the council. Whilst the Commissioner would accept in principle that a duty of confidence might be owed by the third party contractor to the council by virtue of a contractual obligation, the council did not provide any arguments that there was a separate contractual duty of confidence.

33. The council also argued that at common law the notion of commercial confidentiality or trade secret have been widely recognised. It says that if it is therefore accepted that the information is commercial or industrial in nature and has an innate quality of confidence then there is reasonable justification for its protection. The Commissioner's decision is however that for the purposes of the regulations information is not able to be simply designated as being held in confidence simply because it is commercially sensitive – Regulation 12(5)(e) refers to information more formally recognised as being held under a duty of confidence rather than simply being designated as confidential because it is commercially sensitive.

In light of the above the Commissioner concludes that the council has not demonstrated that the information is protected by law by virtue of the common law of confidence.

Is there a statutory duty of confidence?

34. The council argued that Schedule 12(a) of the Local Government Act 1972 (the 'LGA') overrides any duty under the Regulations. Schedule 12(a) is provided in the legal annex to this Decision Notice.
35. The Commissioner does not recognise this as a valid reason for information not being disclosed to a complainant under either the Act of the Regulations. He notes that Regulation 5(6) provides that: *"Any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply."* The Commissioner's view is therefore that unless a specific exception is applicable under the Regulations, no enactment will suffice on its own to prevent a requestor's access rights.
36. Although Regulation 5(6) disapplies any statutory bars on disclosure for the purposes of the Regulations, a statutory bar will still mean that confidentiality is provided by law for the purposes of this exception. In this case however the Commissioner considers that Schedule 12A of the LGA is not a statutory bar on disclosure but a discretionary power to withhold 'exempt' information. He considers this for the following reasons:
- i) Schedule 12A lists the information that is exempt from the requirements of Part V of the LGA, and not information that is exempt from disclosure under any other regime. A consideration of disclosure under the Regulations requires the application of the exceptions to the information and not the Schedule 12A descriptions of exempt information.
 - ii) Nothing in Part V or Schedule 12A actually prohibits the disclosure of information. At no point is it provided that such information should not be disclosed, merely that it is not subject to the Part V requirement to disclose. The Commissioner does not therefore consider that it introduces a statutory bar to disclosure.
37. The council also argued was that Schedule 12A provides a general duty of confidence to the information. Following the above arguments however the Commissioner considers that schedule 12A is not intended to impart a statutory law duty of confidence to information. The Commissioner's decision is that this schedule does not impart the necessary duty of confidence in order for Regulation 12(5)(e) to apply.
38. The Commissioner finds that the council has not demonstrated that this information is subject to confidentiality provided by common law,

contractual obligation or statute. The Commissioner therefore concludes that the information has not been shown to engage the exception in Regulation 12(5)(e).

39. It is not therefore necessary to carry out a public interest test as regards the application of Regulation 12(5)(e).

Regulation 12(4)(d)

40. The Council also argued that as the information was only estimated costs and valuations that it was 'unfinished' or 'incomplete' for the purposes of Regulation 12(4)(d). Regulation 12(4)(d) provides:

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

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data”

41. The Commissioner has considered this argument. It is clear that estimated costs are linked to the state of the market conditions at the time they are valued and that, dependent upon the volatility of the market they will only be valid for a short duration. Where an estimated cost is held and is used to inform a decision or the development of policy then this information constitutes a completed figure for council purposes at that time. That figure will however change if it is recalculated or a final figure is provided. The new figure then becomes the relevant information however the policy or decision still relied on the initial estimates when it was made. It is these figures which the complainant requested in order to better understand the council's reasons for making the decision it did. The Commissioner therefore considers that the figures were complete for the purposes of the council's decision making at that time.
42. The Commissioner does not therefore accept that the information was incomplete for the purposes of the exception. Although the figures may evolve and be updated as circumstances change, at the time of the request they were the figures which had been relied upon by the council to reach its decision. The Commissioner therefore considers that Regulation 12(4)(d) is not applicable to the information.

Regulation 12(4)(e)

43. The Commissioner initially outlined his view that Regulation 12(5)(e) and Regulation 12(4)(d) could not be applicable to the council. He advised the council that it was possible that Regulation 12(4)(e) might

apply, but that he would need further arguments from it before he would consider the application of that exception further. Regulation 12(4)(e) provides an exception to the disclosure of internal communications.

44. The estimated costs and valuations provided to council members considering the proposal were, for the most part, drafted and communicated internally at the council, and for information which was subject to this process it is clear that the exception is therefore engaged. The council therefore provided arguments that the majority of the information is subject to Regulation 12(4)(e).
45. Regulation 12(4)(e) is subject to a public interest test. Where the exception is engaged then the authority (and the Commissioner) must ascertain whether the public interest in disclosing that information equals or outweighs the public interest in maintaining the exception. Regulation 12(2) provides a presumption of disclosure. It is therefore inherent within the regulations that the authority should start from a basis that the requested information should be disclosed, and it must then demonstrate that the public interest in maintaining the exception overrides the public interest in disclosing the information.

The public interest in the exception being maintained

46. The council stated that it took the purpose of the exception to be to allow policy and decision makers to consider confidential or sensitive information in facilitating the decision making process, safe from concern that that information would subsequently be disclosed.
47. The council argued that a disclosure of the information would incur a considerable risk to the council if all of the information which officers who formulate policy or assess council strategy over the disposal of land was made available to the public on request.
48. It added that if officers cannot advise local authority decision making bodies on a confidential basis it would be difficult to understand how advice of that nature could be given in the future.
49. The Commissioner therefore understands the council argument to be that if advice were no longer able to be given in this manner (due to the potential for commercially sensitive information to subsequently be disclosed, this may discourage full details being provided, or the council may have to change its procedures to no longer require the submission of commercially sensitive information). If that were to occur then its decision making and its policy formulation would be

inhibited and damaged by the inability to properly consider all relevant information when making decisions.

50. The basis of this argument is that the information is so commercially sensitive that its disclosure would damage the council's own and others commercial interests. This would in turn either discourage sensitive information from being submitted in future cases for fear of disclosure, or would lead the council to change its procedures so that it no longer required such information to be submitted. The Commissioner has therefore considered if the information is as commercially sensitive as the council contends.
51. The council argued that a release of the information would damage its ability to get the best price for the land and for the services which it contracts for.
52. This was on the basis that the withheld information provides cost estimates and valuations which, if disclosed, could give an inherent advantage to companies tendering for development works or for the purchasing the land itself. A disclosure of this sort of information could undermine the council's ability to obtain the best value possible from the deals it intends to carry out.
53. The council also argued that if developers and tendering companies are aware of the estimates used for the proposal by the council then there is a possibility that they would use these figures as a basis for their tenders, potentially undermining the true value of the land or overestimating the price of the actual development work to be carried out to meet the figures budgeted for the work by the council. Therefore tenders would be less likely to undercut these figures to any great degree. Service contractors would also base their tendering figures close to the estimates which the council has budgeted for.
54. The council contends that the disclosure of such potentially sensitive information will discourage commercially sensitive information being submitted in future cases, which will mean that it will not be fully able to consider financial facts about developments in such a way in the future. It therefore states that it considers that the balance of public interest lies with withholding the information because of the absence of any other real benefit to the public in disclosing the information when compared against the damage that disclosure would cause to its ability to properly consider information of this nature when making decisions or formulating policy.

The public interest in favour of the information being disclosed

55. Countering this, the Commissioner considers that the following factors have significance in this case.

i) There is a public interest in allowing scrutiny of the council's decision to dispose of the land and to obtain outline planning permission on it to increase its worth. This is a different consideration to the public interest in allowing proper consultation on the planning application proposal. It refers more specifically to the council's decision to go ahead with the project in the first instance. Although the full price cannot be known until a sale is completed the council made its decision based on the estimates which are the subject of this request. Therefore knowing this information would provide a clearer understanding of the council's financial decision making in this case.

ii) A clearer understanding of the council's financial decision making is needed to properly understand and balance all of the other considerations relevant to its decision to obtain outline planning permission and to dispose of the land. Outline planning permission on the land will be likely to equate to a loss of green space for the local community when it is sold. On the counter side there is a recognised need to provide more affordable housing. A careful balance between the two factors is required, and at present a potentially important factor which the council took into account when deciding to go ahead with the project has not been made available to the public. Again this is a separate consideration to whether planning permission should be awarded as it specifically refers to the decision to go ahead with the project with outline planning permission, not whether planning permission should be awarded.

iii) Following on from this there is also a strong public interest in allowing the electorate to hold its elected members to account for its decision to allow the sale and potential development of part of the limited green space in the area. There are suggestions that the development will disrupt traffic, cause widespread environmental damage to the area, and that the land has been wrongly designated as a brownfield site in order to better facilitate the likelihood of planning permission being allowed.

56. The council also commented on the public interest in disclosure of the information in this case. It argues that the requestor wrongly considers that if the information were to be released it would enable her and associates to include an argument that the accommodation works necessary to achieve a sale substantially reduces the capital receipt the Council would achieve in disposing of the land as part of their

representations to the planning committee. The council however clarified that the capital receipt is not a valid planning consideration. Withholding the information does not therefore prevent those opposed to the Council's planning applications from disputing the application on proper planning grounds, e.g. the impact of development on traffic, loss of an amenity etc. It therefore argues that the public interest in favour of disclosure is not as strong because of the flawed view of the complainant.

57. The council also argued that the public interest in disclosure is reduced as the costs and valuations are estimates and they would provide misleading figures to the public which would not accurately reflect the current values of the land or the costs of developing it

The balance of the public interest

58. The Commissioner notes that the council's arguments about the public interest inherent in maintaining this exception are dependent upon an acceptance that; the information is commercially sensitive, disclosure of commercially sensitive information on one case would discourage the submission of commercially sensitive information in future cases, and, failure to consider full submissions would damage the quality of the council's decision making. The Commissioner has considered more closely the argument that the requested information is commercially sensitive as disclosure of the estimated land value and costs would be used by tendering companies or purchasers to undermine the potential or real value of tenders or sale negotiations.
59. The council, by its own admission, states that estimates will not remain static or relevant as the market evolves over time - hence its argument that the figures were "unfinished" information. The Commissioner also notes that the estimates are dated to September 2007, whilst the request was made in 2009.
60. The Commissioner recognises that it is the state of the market at the time of sale which provides the true value of land rather than historical estimates. Increased competition for development opportunities will drive tendering prices up, and conversely a dip in market will provide lower tenders or valuations. Demand plays an important role in the value which can be placed on a piece of land at any given time.
61. The Commissioner also recognises that tendering companies or individuals are able to obtain expert opinions on the value of land under the market conditions of the day, and that these are more likely to be the relevant base figure which would be used by tendering companies when evaluating tendering opportunities. Any attempt by a

tendering company to use historical estimates as a basis for a tender risks losing out to a company placing a more current value on the tender. The prior estimates of the council might provide some basis for commercial valuers' considerations however it is the market at the time which will provide the ultimate steer on the estimates they produce, and hence on the tenders which are submitted. The historical estimates will therefore only be one factor in that consideration.

62. In light of the above the Commissioner concludes that the council has overstated the commercial sensitivity of the information in this case.
63. The Commissioner notes that the council also argued that as the costs and valuations are estimates they would provide misleading figures to the public which would not accurately reflect the current values of the land or the costs of developing it. The Commissioner dismisses this argument as a reason for reducing the public interest in disclosure. He considers that there is a public interest in the public being as fully informed as possible, including in relation to estimated costs. He also notes that it would be possible for the council to issue a statement setting the estimates in context and explaining that they will not reflect current valuations or costs.
64. The Commissioner also considered the argument that the public interest in disclosing the information is lessened because the information would not be suitable for the purposes which the council believes the complainants wish to use the information. In the first instance he notes that under the Act and the Regulations requests should be considered 'purpose blind'. The reason for request should not be considered a factor in its considerations. In *PriceWaterhouseCoopers v IC and HMRC* it was said at paragraph 50:

"Each request made under FOIA reflects a general right subject to certain exemptions enjoyed by every person to have disclosed to the public, all information legitimately disclosable within the terms of the request held by the requested public authority, irrespective of the requesting person's interest in the information and irrespective of the subject matter of the information".

65. The Commissioner does not therefore place any weight on the council's argument that the information could not be used for the purposes intended by the complainant.
66. Even if the Commissioner were to consider the above appropriate, the council's arguments still holds little weight. The figures provide the basis upon which the council chose to take forward the proposal to sell the land with outline planning permission in order to increase its

commercial value. Works need to be carried out in order to obtain that permission. The information therefore provides a means by which the community can assess the financial acumen of the council when it made its decision to go ahead with the project. As the public would then understand the estimates which the council was working to at the time the decision was taken it can more accurately balance this consideration against the damage to the environment which will be caused if development goes ahead. The public's ability to scrutinise the council's decision is therefore greatly enhanced by a disclosure of his information.

67. The Commissioner therefore places little weight on the council's arguments that the cost estimates are irrelevant to public participation in decision making. Although planning laws have allowed comments and consultation on the project, the strongest argument towards a disclosure of this information lies in allowing the public to scrutinise the financial decision making of the council and balance this against the environmental damage that will be caused. This balance may be one of the factors relevant to any decision to argue against the proposal in the first instance, (i.e. whether the estimated profits to the public purse achievable through the development tip the scales when balanced against the likely environmental and social damage which might be caused). The Commissioner also notes that although the planning process may not be able to take into account arguments regarding the likely profit the council will make on the land, the electorate can still hold its decision makers to account for the decision, and ultimately individuals may act upon these findings during elections and by-elections.
68. Given all of the above, the Commissioner considers that the damage which the council argues to the quality of its decision making is far weaker than the council suggests. The Commissioner considers that there will be little commercial damage from the disclosure of the information because it is market forces which will ultimately decide the price of the land or of any services which are sought. If there is little commercial damage likely from the disclosure of the information then the council would not need to make changes to its procedures in order to protect that information and the argument that full submissions in future cases would be discouraged is weakened. Where there was likely to be such damage from disclosure the Commissioner would accept the arguments put forward more readily and give the argument more weight. As it stands the Commissioner places due weight on the arguments, but finds greater weight rests in the public interest in the information being disclosed.

69. In conclusion, the Commissioner has decided that the council has failed to show that the public interest in maintaining the exception outweighs that of disclosing the information in this instance.

The Decision

70. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
71. The council incorrectly sought to rely upon both section 43 of the Act and on Regulations 12(5)(e), Regulation 12(4)(d) and regulation 12(4)(e).
72. It breached regulation 5(1) by not making the information available to the complainant.
73. It breached regulation 5(2) by not making the information available to the complainant within 20 working days.
74. As regards the councils application of the Act to part 4 and 5 of the request the Commissioner has also decided that the following was also not dealt with in accordance with the regulations:
- The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
 - In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.

Steps Required

75. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose the information to the complainant

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

Failure to comply

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

Right of Appeal

78. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 5th day of August 2010

Signed

**Lisa Adshead
Group Manager**

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

Legal Annex

The Environmental Information Regulations 2004

Regulation 2 states:

"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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 12(4) states:

For the purposes of paragraph (1)(a) above, a public authority may refuse to disclose information to the extent that -

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

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

Regulation 12(5)(e) states:

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

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

Local Government Act 1972; Schedule 12A

ACCESS TO INFORMATION: EXEMPT INFORMATION

PART 1

DESCRIPTIONS OF EXEMPT INFORMATION: ENGLAND

1. Information relating to any individual.
2. Information which is likely to reveal the identity of an individual.
3. Information relating to the financial or business affairs of any particular person (including the authority holding that information).
4. Information relating to any consultations or negotiations, or contemplated consultations or negotiations, in connection with any labour relations matter arising between the authority or a Minister of the Crown and employees of, or office holders under, the authority.
5. Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
6. Information which reveals that the authority proposes—
 - (a) to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or
 - (b) to make an order or direction under any enactment.
7. Information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime.