

**Freedom of Information Act 2000 (the Act)**  
**Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 6 December 2011

**Public Authority:** West Berkshire District Council

**Address:** Council Offices  
Market Street Offices  
Market Street  
Newbury  
Berkshire  
RG14 5LD

**Decision**

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The Commissioner requires West Berkshire District Council to reconsider the request under the EIR and to either disclose the information to the complainant under Regulation 5 or issue a refusal notice under Regulation 14.

1. The complainant has requested:

*'...the report presented to and approved by the Executive Committee on 22 July 2010'.*

2. The Commissioner's decision is that the information requested is environmental within the meaning of the EIR and West Berkshire Council (the council) was wrong to consider it under the Act.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Reconsider the request under the EIR and to either disclose the information to the complainant under Regulation 5 or issue a refusal notice under Regulation 14.

4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply 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.

## Request and response

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5. On 6 August 2010 the complainant wrote to West Berkshire District Council (the council) and requested information in the following terms:

*'Please could you supply and/or provide a link to: -*

*1. Dates, attendees, agendas and minutes of all council meetings with Sovereign Housing relating to the provision of an extra Care facility in Hungerford, including the report approved by the Executive Committee on 22<sup>nd</sup> July.*

*2. Details of the 'Putting People First' Programme.*

*3. Dates, attendees, agendas and minutes of all pre-application planning meetings relating to the Priory/Platt Court in Hungerford'.*

6. The council responded on 9 August 2010. It provided a link to the Putting People First Programme in response to question 2 of the request and stated that it would answers the remaining questions 1 and 3 within twenty working days.
7. On 2 September 2010 the council wrote to the complainant again with its response to questions 1 and 3 of her request.
8. In relation to the first part of question 1 concerning its meetings with Sovereign Housing, the council stated that to provide this information would exceed the appropriate limit under section 12 of the Freedom of Information Act 2000 (the Act). Accordingly, it invited the complaint to revise her request to include a smaller amount of information. In relation to the second part of question 1 concerning the Part II report presented to the Executive Committee, it stated that it was withholding this information under section 43 of the Act on the grounds that disclosure would prejudice its interests and those of Sovereign Housing.
9. In response to question 3, the council stated that the information requested was covered by the Environmental Information Regulations 2004 (the EIR) and would be withheld under Regulations 12(5)(d) and 12(5)(e) on the grounds that disclosure would adversely affect its business interests and those of Sovereign Housing and also prejudice its position in any future negotiations or discussions with possible economic loss.

10. On 15 September 2010 the complainant requested an internal review in relation to the council's response to questions 1 and 3 of her request.
11. On 14 October 2010 the council wrote to the complainant with the outcome of the internal review. In relation to question 1 it stated that it was upholding its initial decision to withhold the first part of the requested information under section 12 of the Act and the second part under section 43. With regard to question 3, it said that the only recorded information it held was the notes of a meeting it had with Sovereign Housing on 14 July 2009 which it duly disclosed to the complainant.

### **Scope of the case**

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12. On 5 April 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled. In particular she said that she was unhappy with the council's response to questions 1 and 3 of her request.
13. On 5 May 2011 the Commissioner requested the withheld information together the details of the exemptions under the Act or exceptions under the EIR which the council had applied to each part of the information requested.
14. The council responded on 5 May 2011 and indicated that it might be possible to disclose some of the information previously withheld as the planning application to which it related had been since been approved.
15. On 28 June 2011 the council sent the Commissioner a copy of the withheld information.
16. On 5 July 2011 the Commissioner invited the council to reconsider its position in relation to the withheld information in view of the fact that events had changed since the request was made on 6 August 2010. In particular, he pointed out that the planning application relevant to the matter under reference [10/01928/FULEXT](#)<sup>1</sup> had since been approved with conditions.

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<sup>1</sup> <http://publicaccess.westberks.gov.uk/online-applications/applicationDetails.do?previousCaseType=Application&previousKeyVal=LTD8IBRD02K00&activeTab=summary&previousCaseNumber=11/02128/COND2&keyVal=L71JVURD0CH00>

17. On 17 August 2011 the council responded. It said it was prepared to release the pre-application documentation into the public domain via its website. However, it said that it was not prepared to disclose the Part II report (even on a redacted basis) on the grounds that it was commercially sensitive and confidential.
18. On 19 August 2011 the Commissioner phoned the council to discuss the matter further during which it reiterated its position in relation to the Part II report.
19. On 22 August 2011 the Commissioner phoned the complainant to discuss her complaint. During this discussion she said she accepted the council's application of section 12 of the Act in relation to the first part of question 1 of her request but added that she still wished to see the Part II report. Also, she pointed out that question 3 of her request was for information on *all* pre-application planning meetings not just those with Sovereign Housing. She expressed her belief that the council may have met with another organisation regarding the proposed planning application.
20. On 23 August 2011 the Commissioner contacted the council again and requested any recorded information it held in relation to question 3 of the complainant's information request. In particular, he referred to the complainant's belief that the council may have met with organisations other than Sovereign Housing.
21. On 31 August 2011 the council wrote to the complainant direct (with a copy to the Commissioner) with note of a meeting between its highway department and another organisation. Although it said that it did not believe this meeting constituted a pre-application one it none the less agreed to disclose the details.
22. On 9 and 12 September 2011 the complainant contacted the Commissioner to say she did not believe the council had disclosed all the recorded information it held in relation to the pre-application planning meetings and gave reasons for her belief.
23. On 13 September 2011 the Commissioner contacted the council and invited it to make further enquiries and searches in response to the complainant's comments that it might hold additional recorded information in relation to pre-application planning meetings.
24. On 30 September and 7 October 2011 the council wrote to the Commissioner with details of the further searches and enquiries it had carried out. It said that the results of these were that it did not hold any

additional recorded information in relation to pre-application planning meetings apart from that already disclosed.

25. On 11 October 2011 the Commissioner advised the complainant of the results of the further searches and enquiries carried out by the council and said any decision as to whether additional recorded information was held would be based on a balance of probabilities in accordance with the Information Tribunal's decision in the case of Bromley and the IC and Environment Agency (EA/2006/0072).
26. On 11 October 2011 the complainant contacted the Commissioner to say she noted his comments in relation to the further searches and enquiries carried out by the council but remained a little sceptical that no further recorded information was held. However, for the purpose of the Commissioner's investigation she said she was prepared to limit the scope of her complaint to the second part of question 1 of her request which was for the Part II report.
27. On 11 October 2011 the Commissioner contacted the complainant and confirmed that he would issue a Decision Notice in respect of the only outstanding issue; namely, the council's refusal to disclose the Part II report presented to and approved by the council's Executive Committee on 22 July 2010 which was requested in the second part of question 1 of the complainant's request dated 6 August 2010.

## **Reasons for decision**

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### **Is the requested information environmental within the meaning of the EIR?**

28. The first matter for the Commissioner to decide is whether the information requested by the complainant covered by the Act or the EIR.
29. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the Act, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information.
30. Environmental information is defined in Regulation 2 of the EIR which 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 elements of the environment referred to in (b) and (c);”*
31. Regulation 5(1) of the EIR creates a duty on public authorities to make environmental information available upon request.
32. In this case the withheld information consists of an ‘Extra Care Housing Development, Hungerford’ Part II report submitted to and approved by the council’s Executive on 22 July 2010 the purpose of which was:
- ‘To seek an agreement to establish a pre planning cost risk sharing agreement with Sovereign South & West (SSW), in the context of a*

*partnership working to deliver a key Supported Living Development project, as part of the Putting People First Programme of work.*<sup>2</sup>

33. The Putting People First Programme is the council's strategy for transforming adult social care in West Berkshire.<sup>3</sup>

34. The Supporting Living Development project referred to in the Part II report has the lead responsibility for the delivery of associated projects one of which was submitted by Sovereign Housing on 22 July 2010 for the:

*'Demolition of existing buildings redevelopment to provide 74 residential apartments (Use Class C3) for persons either over 55 years of age or receiving extra care, and with associated access, car parking and landscaping at The Priory And Buildings Known As Platt Court Priory Road Hungerford Berkshire RG17 OAP'.<sup>4</sup>*

35. The Part II report seeks approval for the council to establish an arrangement with Sovereign Housing to share the risk of any pre planning development costs for the proposed development of Priory and Platt Court in the event of the planning application being unsuccessful.

36. The council believes that the withheld information, comprising of the Part II report, is covered by the Freedom of Information Act 2000 (the Act) and has withheld it in its entirety under section 43 of the Act.

37. The Commissioner has seen the withheld information and has concluded that it is environmental within the meaning of Regulations 2(1)(a) and 2(1)(c) of the EIR in that it is information on measures (including administrative measures) plans and activities, affecting or likely to affect the elements of the environment, namely, land and landscape.

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<sup>2</sup> See the Agenda for the Executive Meeting held on 22 July 2010 at pages 167 to 176.  
<http://decisionmaking.westberks.gov.uk/Data/Executive/20100722/Agenda/Agenda,%20Minutes%20of%20previous%20meetings%20&%20Reports%202010-07-22.pdf>

<sup>3</sup> <http://www.westberks.gov.uk/CHttpHandler.ashx?id=14582&p=0>

<sup>4</sup> See planning application 10/01928/FULEXT which has since been granted with conditions.  
<http://publicaccess.westberks.gov.uk/online-applications/applicationDetails.do?previousCaseUpnr=100081228481&previousCaseType=Property&previousKeyVal=IKWMNKRDA1000&activeTab=summary&previousCaseNumber=001SSZ00BU000&keyVal=L71JVURDOCH00>



38. The Commissioner finds that the development of The Priory and Platt Court will have an impact on the elements of the environment, namely land and landscape to such an extent that information relating to it will fall within the definition of environmental information under Regulation 2(1) of the EIR.
39. The proposed risk sharing agreement is an attempt by the council to help it fulfil its strategic objective of providing affordable housing for older people by mitigating some of Sovereign Housing's financial concerns in relation to its pre planning costs of the development of The Priory and Platt Court and thereby encouraging the project to proceed. The Commissioner concludes that the cost risk sharing agreement is an integral part of The Priory and Platt Court development and its viability. He therefore concludes that it is environmental information within the meaning of the EIR. See the Information Tribunal's decision in the case of Mersey Tunnels Users Association and the Information Commissioner and Halton Borough Council (EA/2009/0001)
40. The Commissioner's conclusion is that, as the information is environmental it is exempt under section 39 of the Act and therefore should have been considered by the council under the EIR.



## Right of appeal

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

First-tier Tribunal (Information Rights)

GRC & GRP Tribunals,

PO Box 9300,

LEICESTER,

LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

42. 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.

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

**Signed** .....

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