

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 July 2012

Public Authority: Telford & Wrekin Council
Address: Civic Offices
PO Box 215
Telford
TF3 4LF

Decision (including any steps ordered)

1. The complainant requested information relating to an agreement for the sale and development of a particular piece of land. The Council provided some information relevant to the request but withheld other information under various exceptions under the EIR. The Commissioner's decision is that the Council has correctly applied regulations 12(4)(e), 12(5)(b), 12(5)(e) and 12(5)(f) to the information. He does not require any steps to be taken.

Request and response

2. The request in this case was the subject of a previous decision notice under case reference FER0306224¹. The original complaint to the Commissioner related to parts 1 to 4 and 6 of the request. The Council originally treated the request under the provisions of the Freedom of Information Act 2000 ('the Act'). In the decision notice, issued on 7 February 2011, the Commissioner determined that the requested information was environmental information, as defined under regulation

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fer_0306224.ashx

- 2(1)(c). The Commissioner ordered the Council to reconsider the request under the provisions of the EIR.
3. On 25 September 2009, the complainant wrote to the Council and requested:
1. "a copy of the agreement for sale dated 14 August 2009 made between Telford & Wrekin Council (1) McLagan Investments Limited (2) and Asda Stores Limited (3);
 2. a copy of the report and any supporting papers presented to Cabinet at the meeting on 9 March 2009 together with any previous and/or subsequent reports to Cabinet concerning the proposed sale of the land which is subject to the agreement for sale;
 3. correspondence, including emails, notes of telephone calls and/or meetings, letters and memorandums and/or internal file notes between Telford & Wrekin Council and Asda and/or McLagan Investments Limited relating to the terms and conditions for the agreement for sale;
 4. internal correspondence including emails, notes of telephone calls, letters and memorandums and/or minutes or file notes of internal meetings/discussions within Telford & Wrekin Council about the sale;
 5. internal correspondence including emails, notes of telephone calls, letters, memorandum and/or minutes or file notes of meetings/discussions between Telford & Wrekin Council Planning and Estates departments about the sale or the planning policy allocation of the civic offices site within the existing development plan or the emerging Central Telford Area Action Plan; and
 6. any correspondence including emails, notes of telephone calls and/or meetings, letters and memorandum and/or internal file notes between Telford & Wrekin Council and Asda relating to the planning application for the new Asda store".
4. The Council complied with the decision notice on case reference FER0306224 and issued a refusal notice under the provisions of the EIR on 11 March 2011. In relation to part 1 of the request, it disclosed a heavily redacted copy of the conditional sale agreement ('the Agreement') and withheld the remainder of the agreement under regulation 12(5)(e). It also withheld information relating to parts 2 to 6 of the request under the following exemptions:
- Part 2 of the request – all information withheld under regulation 12(5)(d).

- Part 3 of the request – all information withheld under regulation 12(5)(f).
- Part 4 of the request – all information withheld under regulations 12(4)(e) and 12(5)(b).
- Part 5 of the request did not form part of the original complaint to the Commissioner.
- Part 6 of the request – all information withheld under regulations 12(4)(e) and 12(5)(f).

Scope of the case

5. On 3 June 2011, the complainant contacted the Commissioner to complain about the way its request for information had been handled. They asked the Commissioner to consider whether the Council had correctly withheld information relating to parts 1, 3, 4 and 6 of the request.
6. The Commissioner considers that the complaint relates to the application of regulations 12(4)(e), 12(5)(b), 12(5)(e) and 12(5)(f) to parts 1, 3, 4 and 6 of the request of 25 September 2009.

Reasons for decision

Regulation 12(5)(e) – confidentiality of commercial or industrial information

7. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
8. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the

information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

9. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The Council has applied regulation 12(5)(e) to parts of the Agreement which it entered into in relation to a piece of land which accommodated the Council's civic offices. The background to the Agreement is that in September 2008 the Council announced that it was seeking bidders for the development of the land in question. Following a tender exercise the Council negotiated and entered into a conditional contract with the preferred bidder for the site. On 11 March 2009 the Council announced its decision to sell its Civic Offices site to Asda Stores Limited.
10. The Agreement is a commercial document which sets out the terms for the sale and development of the land in question. In view of this, the Commissioner is satisfied that, as it relates to a business activity for commercial gain, the information is commercial in nature. He therefore considers that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

11. In relation to this element of the exception, the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. There is no need for the information to have been obtained from another party as is the case with section 41 of the Act.
12. The Council has argued that the confidentiality in this case is imposed under contractual obligation. The confidentiality clause contained within the Agreement binds parties into keeping confidential certain terms contained within the agreement.
13. The Commissioner accepts that the circumstances and contractual terms under which the information was agreed between the Council and the other parties involved in the Agreement were sufficient to create an obligation of confidence.
14. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law in view of the

contractual relationship between the Council, McLagan Investments Limited and Asda Stores Limited.

Is the confidentiality required to protect a legitimate economic interest?

15. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not".
16. The Council argues that the confidentiality is designed to protect the legitimate economic interests of itself, Asda Stores Ltd and McLagan Investments Limited ('the Developers'). The Council considers that, as the Agreement for sale is a conditional one, disclosure would have an adverse effect on its own position and that of the Developers.
17. In respect of any prejudice caused to a third party, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, the Council provided detailed submissions from Solicitors acting on behalf of the Developers. The Developers argue that disclosure would adversely affect their economic interests for the following reasons:
 - Asda currently has a store at Telford, employing around 350 staff. The Agreement contains issues regarding the timing of the closure of the existing store, and opening of the new store, which are commercially sensitive. Disclosure may impact upon obligations under relevant employment legislation and would compromise Asda's position in any negotiations on employment issues at the proposed new store.
 - Disclosure of the Agreement has implications for Asda's rights under relevant landlord and tenant legislation and would prejudice its position in any negotiations with its existing landlord.
 - The Agreement deals with issues which would impact on the construction of the new Council offices, and consequently, vacant possession of the existing civic office site. The timing of vacant

possession of the existing civic office site will have an impact on the timing and cost of the Developers entering into construction contracts for the new store.

- The terms on which Asda enter into transactions for the purchase of any property are considered to be of the utmost commercial sensitivity. Disclosure would undermine its position in negotiations for other sites (both in terms of landlord and tenant and commercial negotiations).
 - Asda considers disclosure of the confidential information contained in the Agreement and supporting documents, to be an actionable breach of confidence, which it would pursue.
 - Asda considers that disclosure would be a breach of its human rights under Article 1 Protocol 1 ECHR in accordance with recent decisions in the Court of Appeal case R(Veolia ES Nottinghamshire Limited) v Nottinghamshire County Council [2010] EWCA CN 1214 and the First Tier Tribunal (Information Rights) case of Staffordshire County Council v Information Commissioner (Sibelco UK Limited) EA/2010/0015.
18. The Commissioner has considered the arguments put forward by the Council and the Developers and accepts that the requested information consists of information which, both now and at the time of the request was of significant commercial value and which, if disclosed, may be used to competitive advantage by any party competing against the Developers. This would cause harm to the legitimate economic interests of the Council and the Developers. The Commissioner has also taken into account the fact that the Agreement is dependent on a number of conditions being satisfied.

Would confidentiality be adversely affected by disclosure?

19. As the first three elements of the test cited at paragraph 7 of this notice have been established the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the Council and the Developers. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest arguments in favour of disclosing the information

20. Regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure.
21. The complainant is of the view that, in entering a contract with a public authority, the Developers would have been aware that such agreements would be open to public scrutiny. The complainant argues that the timing of the opening of the new store is a matter of public interest and importance. The complainant believes it is relevant that, in its planning application, Asda made significant play on asserting that the new store will open in 2013 and that it would seek to ensure continuity of employment of staff working in the existing Telford store. The complainant argues that disclosure will allow the public to review whether the substance of the Agreement reflects statements Asda has made in its planning application for the new store.
22. The complainant considers there is a strong public interest in disclosure of the Agreement to increase accountability and transparency in the spending of public money and it would allow the public to understand decisions made by the Council. Whilst the Council has asserted that the monies received from the sale will pay for the provision of new Council offices, as the Council is accountable to the public for the process by which funding is secured for new offices. The complainant argues that, as there is a clear financial advantage to the Council in granting planning permission for the development, disclosure of the Agreement would increase public confidence in an impartial and objective planning process.
23. The Council accepts there is a public interest in disclosure of the requested information as it would facilitate the accountability of the Council for decisions taken by them.

Public interest arguments in favour of maintaining the exception

24. The Council has pointed out that the majority of information which it has withheld in the Agreement is subject to a confidentiality clause within the Agreement itself. The Developers have indicated that disclosure of any information in breach of the confidentiality clause would be considered actionable and would be pursued. There are also parts of the agreement that have been withheld which are not subject to the confidentiality clause, but are considered to be commercially sensitive. The Council considers that any further disclosure of information contained within the Agreement would affect the optimum level of public money that could be generated and therefore the quality of services

offered to the public. The Council states that this would not be in the public interest.

25. The Council has placed weight on the fact that the Agreement contained a number of conditions that needed to be satisfied. Disclosure would have an adverse effect on both the Council and other parties (as detailed by the third party and referred to in paragraph 17 of this notice).
26. The Council acknowledges the Commissioner's decision in case reference FER0306224, that all of the information falling within the scope of the request constitutes environmental information. However, the Council is of the view that any information on factors that would affect the land are not included in the Agreement, but rather would be dealt with under the planning regime, and information would be publicly available as part of the process.
27. The Council is also of the view that disclosure of the requested information would not:
 - (a) bring to light any information affecting public safety;
 - (b) assist in allowing individuals to understand decisions made by the Council affecting their lives;
 - (c) facilitate accountability and transparency in the spending of public money;
 - (d) further the understanding of and participation in debate of issues of the day.

Balance of the public interest arguments

28. The Commissioner has considered the above arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
29. There is a particular public interest in the subject of the request in this case because the development will have a significant impact on the local community. The Commissioner accepts that the development is a matter of significant local public interest, both in terms of the relocation of the Asda store and the relocation of the Council offices. It is therefore clear that there will be considerable weight attached to the argument that the disclosure of the disputed information will help the public engage with

the Council about plans that could ultimately affect them. The Commissioner does not, therefore, accept the Council's arguments outlined at paragraph 27(b) to (d) above. He considers that disclosure of the withheld information would to some extent meet these public interests.

30. However, the Commissioner has also taken into account that the actual Agreement, was subject to a number of conditions, including the submission of a planning application. The Commissioner has taken into account that the actual development was subject to planning approval and any environmental impact of the development would be assessed as part of that process. At the time of the request a formal planning application had not been submitted by the developer. The Commissioner considers that the public has an opportunity to consult with the Council about the proposal and air any concerns about the development itself following submission of a planning application. It is the opinion of the Commissioner that this consultation period would be the proper forum in which the public could participate in and potentially shape any decision made by the Council.
31. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching his decision, he has placed considerable weight on the conditional nature of the Agreement, and the timing of the request.

Regulation 12(5)(f) – interests of the person who provided the information

32. Regulation 12(5)(f) states that a public authority may refuse to disclose information if its disclosure would adversely affect the interests of the person who provided the information where that person-
- was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - has not consented to its disclosure.
33. The Council considers that various documents falling within the scope of part 2 and part 6 of the request are exempt from disclosure by virtue of this exception. The information which has been withheld under this exception broadly consists of communications the Council has received

from the Developers (and their professional advisors) and other documents created by the Council, for example notes of meetings between the parties which contain information or commentary which is inextricably linked to information supplied by the Developers.

34. In this case, the Commissioner accepts that the information in question was provided to the Council by a third party, specifically the Developers seeking to purchase and develop the land in question. As to whether this information was provided voluntarily, the view of the Commissioner is that the nature of this information and the circumstances in which it was provided are such that it is clear that it was supplied voluntarily; clearly the Developers were not obliged to enter into negotiations to purchase and develop the land. On the issue of whether there is, or could be, any other legal requirement to disclose this information, the Commissioner is aware of no evidence that suggests that any such requirement does exist. The Commissioner also notes that the Developers have explicitly refused consent to the disclosure of the information.
35. The Commissioner is also satisfied that a disclosure of the information would be detrimental to the interests of the persons who voluntarily provided that information. In reaching this decision, the Commissioner has taken into account the fact that the Agreement was subject to a number of conditions being satisfied, and the views of the Developers, as outlined at paragraph 17 of this notice.
36. Having viewed the content of the information, the Commissioner accepts that it includes considerable detail about the processes entered into between Council and the Developers prior to the Agreement. Of particular note is the level of detail within this information, and the strong objection to disclosure expressed by the Developers. The response of the Developers to being notified of the complainant's request included seeking legal advice. This advice was that the information in question had been supplied to the Council in confidence.
37. The Commissioner is satisfied that, in all the circumstances of the case, the exception in Regulation 12(5)(f) is engaged.

Public interest arguments in favour of disclosing the information

38. The central public interest argument in favour of the disclosure of this information rests in greater transparency and accountability for the actions and decisions taken by the Council in this case.

Public interest arguments in favour of maintaining the exception

39. The Council argues that disclosure could discourage other third parties from entering into similar negotiations, discussions and agreements in the future and this could have an inhibiting effect on future development.
40. The Commissioner is clear that the provision of the information in this case was an important step in allowing the Council to enter an agreement with the developers for the sale and subsequent development of the land in question, which included the sale of the existing Civic Offices site, which in turn would lead to the Council moving into new accommodation. The Council has shown the project to be a key priority for itself, its partners and the region as the regeneration would underpin and support growth, stimulate and attract investment and create a town centre responding to the needs of the community.
41. The Commissioner accepts that the providers of the information are likely to have been acting out of self interest in as much as the development included the construction of a new superstore. However, he notes that the Developer expressly refused to consent to the information being disclosed in response to the request. It is clear that the Developers have strong views regarding disclosure of the Agreement and associated documents as they consider the information to be of a highly confidential nature which, if disclosed, would adversely affect their interests.

Balance of the public interest arguments

42. The Commissioner accepts that arguments related to “flows of information” can be considered under 12(5)(f) as the aim of this exception is protect voluntary provision of information to public bodies. He has therefore accorded this argument weight alongside arguments about protecting the interests of the Developers.
43. The Commissioner accepts that the subject of this request is of a particular public interest because the development in question will have a significant impact on the local community, both in terms of the relocation of the superstore (and associated works) and the relocation of the Council’s main offices. There is therefore an argument that the Council’s actions and decisions should be transparent and able to be scrutinised by interested parties who may be affected by the decision.
44. The Commissioner accepts that this particular development was considered to be a key priority in the Council’s plans for the area.

However, he does not accept that other developers would necessarily be less likely to engage with a public authority about potential new developments such as this in the future as they have a vested interest in providing such information voluntarily in order that any agreements are reached on which development can proceed.

45. Having considered the arguments in favour of and against disclosure, and based on the nature of the withheld information, the timing of the request, and the views about disclosure provided by the Developer, the Commissioner's decision is that the public interest in maintaining the exception outweighs the public interest in disclosing the information in this instance.

Regulation 12(4)(e) – internal communications

46. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
47. The information that the Council has withheld under this exception comprises internal emails and correspondence between Council officers and members regarding the terms and conditions of the Agreement, which are not considered by the Council to attract Legal Professional Privilege.
48. The Commissioner has had sight of the withheld information and notes that it primarily comprises internal communications relating to discussions about the Agreement, and its terms and conditions. In relation to communications between officers of the Council and elected Councillors, the Commissioner's view is that not all communications between officers of the Council and Councillors will necessarily be internal communications. It will depend upon the reasons for each communication and its contents. In this case, officers corresponded with elected Councillors in their capacities as Council members not in relation to private, political or representative issues. The Commissioner is therefore satisfied that these communications are internal communications for the purposes of the EIR. The Commissioner is therefore content that the exception is engaged.

Public interest arguments in favour of disclosing the information

49. The arguments in favour of disclosure are in essence the same as for the exceptions under regulation 12(5)(e) and 12(5)(f), outlined earlier in this notice, and refer primarily to increasing transparency and accountability and public involvement in the decision making process.

Public interest arguments in favour of maintaining the exception

50. The Council argues that, as under the section 36 exemption under the Act, it is established that officers should be able to discuss internal matters secure in the knowledge that such discussions will remain confidential unless the public interest is sufficient that disclosure is appropriate (the "safe space" concept).
51. Again, the Council considers that disclosure of the requested information would not:
- (a) bring to light any information affecting public safety;
 - (b) assist in allowing individuals to understand decisions made by the Council affecting their lives;
 - (c) facilitate accountability and transparency in the spending of public money;
 - (d) further the understanding of and participation in debate of issues of the day.

Balance of the public interest arguments

52. Inherent in the exception provided by regulation 12(4)(e) is the argument which says that a public authority should be afforded private space for staff, in which issues can be considered and debated away from the hindrance of outside external comment and interference.
53. The Commissioner recognises the strong public interest in maintaining a private space for staff in which issues can be considered and debated, advice from colleagues may be sought and freely given and ideas may be tested and explored to protect the integrity of the deliberation process. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies or opinions free from outside interference. However the Commissioner has to consider the specific information in dispute in this particular case in order to determine whether this safe space is still relevant and important.
54. While recognising the importance of protecting a public authority's thinking space, the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure once a decision has been made and, accordingly, the need for space in which to operate is no longer required by a public authority. In this case, whilst a decision had been made to sell the land in question, the Agreement was

subject to a number of conditions, including submission of a planning application, requiring planning approval.

55. Having considered the arguments in favour of and against disclosure, the Commissioner is satisfied that the balance of the public interest arguments favour maintaining the exception. He has given particular weight to the need to preserve the 'safe space' in this case and accepts that the loss of that 'safe space' is a real possibility should the information be disclosed. Having reviewed the withheld information, he is satisfied that disclosure whilst the issues were still recent, current and live at the time of the request would have a detrimental impact on the Council's ability to debate and discuss issues of this nature in an open manner

Regulation 12(5)(b) – Legal professional privilege

56. Under this exception, a public authority can refuse to disclose information to the extent that 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
57. Regulation 12(5)(b) is a broad exception which encompasses any adverse affect on the course of justice, the ability to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. It is now accepted that information subject to LPP will be covered by regulation 12(5)(b).
58. The success, or not, of an application of regulation 12(5)(b) will turn on three principal questions –
- (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

59. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice

privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

60. The information which the Council has withheld under regulation 12(5)(b) in this case consists of legal advice requests and responses between the Council and its legal advisers (both internal and external), and other documents or parts of documents which reveal or record discussions between the Council and its legal advisers. The Council believe that the information is covered by legal advice privilege and/or litigation privilege. The Council is claiming that litigation privilege may also be applicable because, whilst proceedings were not instigated at the commencement of the project, due to the nature of the project and the implications for interested parties, it was anticipated at an early stage that litigation would be instigated in the future. The Commissioner understands that, since the request was received a number of legal challenges have been made by third parties in respect of the planning application for the development.
61. Having viewed the withheld information, the Commissioner is satisfied that it records the seeking and giving of legal advice by professional practitioners and is therefore subject to LPP.
62. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the legal advice was not publicly known at the time of the request and there is therefore no suggestion that privilege had been lost.

Would disclosure have an adverse effect on the course of justice?

63. The Commissioner accepts that disclosure of information that is subject to LPP would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's ability to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the Council's ability to defend itself in the event of a legal challenge in connection with this issue. The Council should be able to defend its position and any claim made against it without having to reveal its position in advance.
64. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant legal advice.

Public interest arguments in favour of disclosing the information

65. The central public interest arguments in favour of the disclosure of this information rests in creating greater transparency and accountability on the actions and decisions taken by the Council in this case and increasing the knowledge of members of the public regarding issues involving the development of land at an early stage.
66. Some weight must be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. In this case, the Commissioner notes that disclosure of the legal advice may assist the public in understanding more fully the actions and decisions taken by the council in this particular case.

Public interest arguments in favour of maintaining the exception

67. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind LPP. In the Bellamy case, the Information Tribunal described LPP as, "a fundamental condition on which the administration of justice as a whole rests".
68. The Council has argued that disclosure of legal advice would be detrimental to the relationship between lawyer and client. It says that it should be able to obtain full and frank legal advice in the knowledge that such advice will not be subject to disclosure. The prospect of disclosure would be likely to lead to reluctance to seek such advice. This would adversely affect the quality of the Council's decision-making as it would not be able to make fully-informed decisions on the basis of the best advice available, and with a full appreciation of relevant facts.

Balance of the public interest arguments

69. In considering the balance of the public interest the Commissioner accepts that there is a strong element of public interest inbuilt into LPP in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.

70. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
71. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. Disclosure of the information in this case may reassure the public that decisions had been made about the sale and development on the basis of good advice and information and thus increase public confidence in how the Council will deal with similar matters in the future.
72. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain such advice in a timely fashion in the future and have the confidence that advice is given freely without consideration of potential disclosure. The Commissioner believes that there must be reasonable certainty relating to confidentiality and the non-disclosure of legal advice. If there were a risk that it would be inappropriately disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.
73. It is also important that if a public authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice. At the time of the request, the Council believed that there was a considerable likelihood that the matter would be subject to litigation. The Commissioner notes that a number of legal challenges in relation to the planning application (submitted in line with the Agreement) were subsequently made after the request was received. Further, at the time of the request, the planning application had not been determined. The information was therefore still "live" at the time of the request.
74. The Commissioner would observe that it is not a particularly unusual position for a local authority to be both the planning authority and the landowner. Furthermore, the Commissioner has not seen any evidence demonstrating that the Council had not kept its roles separate. The Commissioner notes that certain planning information is already made public through the normal procedures. The Commissioner has seen no evidence of unlawful activities or evidence that the council has misrepresented any of the legal advice it received. Further, if the

complainant believes that the Council had acted inappropriately other forums exist in which those concerns can be considered.

75. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the timing of the request and the status of the advice. The Commissioner has given significant weight to the general public interest in preserving the principle of LPP. In addition, he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would harm the candour between the Council and its legal advisors. The advice related to a live matter in that the Agreement was a conditional one, subject to a number of conditions, including planning permission for the development.
76. In view of the above, the Commissioner has concluded that the public interest in maintaining the exception outweighs the public interest in disclosure of the information, and regulation 12(5)(b) applies.

Aggregation of the public interest test

77. All exceptions under regulation 12(4) and 12(5) are subject to a public interest test. Under Regulation 12(1)(b) information may only be refused if an exception applies and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) explains that the public authority must apply a presumption of disclosure when considering the information. This means that in the event the weight of public interest is balanced, the information should be disclosed.
78. It is also important to stress that the "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public.
79. In light of the Court of Appeal decision of *Office of Communications v Information Commissioner* the Commissioner is also obliged to ensure that:

"where more than one exception is found to apply, they must at some point be considered together for the purpose of the public interest balancing exercise; that is to say, the aggregate public interest in maintaining the exceptions must be weighed against the public interest in disclosure."

80. In this case, the Council has argued that it has considered the public interest test both individually in relation to each exception it has claimed and cumulatively. The Council believes that, "when looked at cumulatively, the information withheld is commercial and not environmental and that any public interest in disclosure of the environmental information is addressed by the EIA [Environmental Impact Assessment] being available which covers all aspects of development of the land. There is little if any public interest, under the Directive [European Directive 2003/4/EC] and therefore EIR, in disclosing the withheld information which is not environmental in nature. Further the adverse effect of disclosure outweighs any public interest in disclosure"
81. The Commissioner accepts that the information is of a commercial nature as it relates to the sale of land, which is in essence a commercial transaction. However as outlined in his decision notice on case FER0306224 the Commissioner concluded that the information requested constituted environmental information and the request should have been handled under the EIR. He does not therefore accept the Council's view that the withheld information is not environmental in nature.
82. The Commissioner notes the Council's views regarding aggregation of the public interest for each exception it has claimed. However, as he has found that the balance of the public interest in respect of each exception assessed as at the time of the request results in a decision not to require disclosure, the aggregation argument is not relevant.

Other matters

83. The Commissioner notes that a significant period of time has elapsed since the request was submitted on 26 September 2009 to the date of his decision as to whether the requested information should be disclosed. This is due to a number of factors, including the Council treating the request under the wrong access regime and delays on the part of both the Council and the Commissioner himself. The Commissioner notes that during this period, various legal challenges have been raised in relation to the planning application for the development. However, the Commissioner understands that litigation between the parties has now concluded.
84. The Commissioner accepts that at the time of the original request the public interest favoured non disclosure of the requested information. As such he has not ordered disclosure of the requested information.

However, given the passage of time, and the current changed circumstances surrounding the subject matter, the Commissioner would like to encourage the Council to revisit the public interest considerations, with a view to disclosing additional information to the complainant.

Right of appeal

85. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

86. 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.

87. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF