

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

Decision notice

Date: 27 January 2016

Public Authority: The Howard of Effingham School
Address: Lower Road
Effingham
Surrey
KT24 5JR

Decision (including any steps ordered)

1. The complainant has requested copies of any correspondence between the Howard of Effingham School (the school) and Berkeley Homes in relation to the plans to build a new school and use the existing school site for new housing.
2. The school disclosed some information but withheld approximately 600 emails under regulation 12(4)(b) of the EIR and a number of documents, some in full some in part, under regulations 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR.
3. In relation to the application of regulation 12(4)(b) of the EIR, the Commissioner has decided that this exception is not engaged. Concerning the application of regulations 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR, the Commissioner's decision is that each exception has been applied correctly in part but there is information the school holds to which these exceptions do not apply.
4. The Commissioner requires the school to take the following steps to ensure compliance with the legislation:
 - In relation to the estimated 600 emails, the school should issue a fresh response under the EIR to the complainant not relying on regulation 12(4)(b) of the EIR.
 - Disclose the following documents to which regulations 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR do not apply –

Howard of Effingham Accommodation Schedule

Berkeley Homes Draft Guarantee Bond

Draft Effingham Question and Answers

5. The school 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 18 December 2014, the complainant wrote to the school and requested information in the following terms:

"I wish to make a request under the FOIA/EIR of the Howard School as follows:

- a. Please provide any recorded information between the Howard and Berkeley Homes over plans to rebuild/relocate the School and associated house building since June 2013.
 - b. According to your website the Howard is a charity? Please provide any recorded information between the School and Charity Commission regarding the proposed arrangements with Berkeley Homes. In particular the disposal of land currently held by the School - to Berkeley Homes.
 - c. Are any members of senior staff in the Howard Group on personal service contracts (IR35). If so which roles are remunerated in this manner and since when?
 - d. Any communications with Guildford Borough Council and vice versa over your plans to rebuild/relocate the school and associated plans for house building."
7. The school responded on 28 January 2015. In relation to question (a), it stated that it was unwilling to disclose the requested information, as it considered it was exempt from disclosure under section 43 of the FOIA. The school then provided a response to question (c) and informed the complainant that it does not hold any recorded information falling within the scope of questions (b) and (d).
 8. The complainant requested an internal review on 3 February 2015. He stated that he disagreed with the application of section 43 of the FOIA and felt the public interest rested in disclosure. The complainant also questioned further the school's response that it holds no

communications with Guildford Borough Council and the Charity Commission.

9. The school carried out an internal review and notified the complainant of its findings on 9 March 2015. It informed the complainant that it was satisfied with the way in which it had handled his request and considered no further action was necessary.

Scope of the case

10. The complainant first contacted the Commissioner on 3 March 2015 to complain about the way his request for information had been handled. At this time, his complaint was that he had not received a response to his internal review. This issue was resolved quickly and on receipt of the internal review the complainant raised further concerns about the school's application of section 43 of the FOIA and its response that it does not hold some of the requested information.
11. At the beginning of the Commissioner's investigation it was agreed that the request should have been considered under the EIR. The request clearly relates to plans to build a new school and use the existing site for housing. This is a plan or measure (as defined in regulation 2(1)(c) of the EIR) which will affect the elements of the environment such as the land, landscape and soil (as defined in regulation 2(1)(a) of the EIR). The school reconsidered its position and agreed that the EIR was applicable in this case and that it now wished to rely on 12(4)(b), 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR.
12. During the Commissioner's investigation, the complainant accepted the Commissioner's view that on the balance of probabilities the school does not hold any communications with Guildford Borough Council or the Charity Commission, so elements (b) and (d) of the complainant's request were resolved. Element (c) was also dealt with by the school prior to the Commissioner's investigation. So, the Commissioner's investigation has focussed on element (a).
13. In relation to element (a) of the request, it was also agreed with the complainant that all information accessible by other means or which had already been in the public domain could be scoped out. In addition, the complainant confirmed that he did not wish to challenge the application of regulation 13 of the EIR. Further information within this element of the request was also disclosed to the complainant during the investigation, as the school accepted the Commissioner's preliminary assessment in part. This then left an estimated 600 emails which the school maintained throughout the investigation were exempt from disclosure under regulation 12(4)(b) of the EIR and a number of

documents which had been withheld in full or in part under regulations 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

14. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information if the request is 'manifestly unreasonable'. There is no definition of manifestly unreasonable under the EIR, but the Commissioner's view is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
15. This exception is also subject to the public interest test. So in addition to demonstrating that the request is manifestly unreasonable, the school must demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.
16. A request can be manifestly unreasonable for two reasons; firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources to provide the information. This is not a charge to the requestor, but a consideration of the cost to the authority in searching for and providing the information.
17. In this case, the school has said that it has identified approximately 600 emails falling within the scope of this element of the complainant's request and the task of going through these making necessary redactions, in addition to the time already spent on this request, would be manifestly unreasonable in terms of cost.
18. The EIR does not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOIA. Under section 12 of the FOIA a public authority can refuse to comply with a request if it estimates that the costs of compliance would exceed the 'appropriate limit'. This limit is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600.00 for central government and £450.00 for all other public authorities, such as the school in this case.
19. The Act allows a public authority to consider the above amount by charging for the following activities at a flat rate of £25.00 per hour of staff time:
 - Determining whether the information is held;

- Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
20. Although the Act is not directly analogous to the EIR, in the Commissioner's view it can provide a useful starting point for public authorities wishing to argue that complying with a particular request would cause a disproportionate diversion of its resources and is therefore subject to regulation 12(4)(b) of the EIR.

Is this element of the request manifestly unreasonable?

21. The school stated that it would take at least two minutes per email to review the contents and decide how best to disclose the information to the complainant. It has therefore estimated that it would take in excess of 20 hours to review these emails and disclose them to the complainant. This is in addition to the 15 hours the school has already spent dealing with the request so far.
22. In terms of the value of the information sought, the school confirmed that it is highly likely that much of the information contained in these emails would be exempt from disclosure under regulation 12(5)(e) of the EIR. This is because the contents are more than likely going to relate to ongoing commercial negotiations between the relevant parties and it is highly likely that the public interest test would rest in maintaining this exception. On that basis, it is likely that there will be very limited information in these 600 emails which could be released to the complainant over and above the information that has already been made available about the development.
23. Considering the time it would take it to review the emails and the limited information that would be available following the review, it considers this element of the request is manifestly unreasonable based on cost and the diversion of resources away from its public functions.
24. The Commissioner notes that initially the school refused element (a) of the complainant's request under regulation 12(4)(b) of the EIR. However, further on in the Commissioner's investigation the school decided to comply with part of this element of the request releasing redacted versions of the documents it identified to the complainant. In relation to the 600 emails, the school maintained its original position and provided the reasons given above for its continued reliance on regulation 12(4)(b) of the EIR.

25. The school advised that it would take 20 hours to review and provide the 600 emails to the complainant based on its estimation that it would take around two minutes to review each email.
26. Usually the Commissioner will only take account of the time it would take to comply with the tasks outlined in paragraph 19 above – therefore the tasks of determining whether it holds the information, locating, retrieving and extracting the requested information. Considering the nature of the complainant's request the Commissioner considers it is reasonable to assume that all correspondence the school holds between itself and Berkeley Homes will relate to this project. He does not envisage that the school would be in correspondence with a housing developer for any other reason and the school has provided no evidence to the contrary.
27. As the complainant's request was broad in nature and asked for "any correspondence", the Commissioner is of the view that all identified information held between the school and Berkeley Homes will be within the scope of the request. The Commissioner considers the school would have known immediately on receipt of the request that it does hold recorded information of the nature specified, so the first permitted task of determining whether it holds the information or not would take no time to complete. As the Commissioner considers the school would not be in correspondence with Berkeley Homes about anything else, he also considers the task of locating and retrieving the information would be a relatively straightforward task and not overly time consuming. And similarly there would be no need to extract relevant information from non-relevant information because the complainant asked for "any correspondence".
28. The Commissioner notes that the school's main concern is with the task of reviewing and redacting the 600 emails. However, this is not normally a task that can be taken into account when considering the cost of compliance.
29. The Commissioner has accepted in a small number of cases that the task of redaction is so burdensome that the request is manifestly unreasonable. However, this has only been accepted in cases where the public authority has provided evidence to the Commissioner that it is certain the information contains exempt information and the request itself concerns volumes and volumes of exempt information which needs extracting from other information that can be disclosed. No such evidence has been provided by the school in this case. The school in fact stated that it had estimated from the sample it had reviewed that 4/5ths were general emails arranging meetings, simply copying documents to other recipients or general everyday conversation. If this is indeed the

case it is estimated that only 1/5th of the 600 emails potentially contain exempt information.

30. Even if the school could provide proof that all 600 emails do definitely contain exempt information, the Commissioner does not consider the task of redacting these emails would be manifestly unreasonable. The school has estimated that it would take 20 hours. The Commissioner notes that this is just over the cost limit threshold prescribed by the FOIA. Although regulation 12(4)(b) of the EIR and section 12 of the FOIA are similar, the Commissioner considers the cost estimation permitted under the FOIA is only a starting point when considering regulation 12(4)(b) of the EIR to environmental information, suggesting therefore that under the EIR it must be demonstrated over and above the 18 hour threshold prescribed by the FOIA that the request is so burdensome in terms of time and cost that it is manifestly unreasonable.
31. In the Commissioner's view an estimation that it would take just two extra hours is not sufficient to demonstrate that the request is manifestly unreasonable despite the fact that the school is a small public authority with very limited resources.
32. The Commissioner notes that the school has also stated that it has already spent 20 hours of school time dealing with this request. While this may be the case, the Commissioner does not consider the time already taken to comply can be taken into account when considering the application of regulation 12(4)(b) of the EIR to the 600 emails. This is not a permitted task for the purposes of calculating the cost to comply, as outlined in paragraph 19 above.
33. For the above reasons, the Commissioner has decided that regulation 12(4)(b) of the EIR is not engaged. As the Commissioner does not agree that regulation 12(4)(b) of the EIR applies there is no need to go on to consider the public interest test.
34. The Commissioner will now address the remaining withheld documents and the application of the other exceptions cited, as they have been applied.

HoE [Howard of Effingham] Accommodation Schedule

35. The school has applied regulation 12(4)(d) of the EIR to this document.
36. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. This exception is also subject to the public interest test. So, in addition to demonstrating that the exception applies the school must also demonstrate that the public interest in favour of

disclosure is outweighed by the public interest in favour of maintaining this exception.

37. The school argued that this document was still in draft form at the time of the request and has been superseded now by another version, which is available on Guildford Borough Council's website. At the time of the request the document was still subject to further discussions and negotiation and the school considers that at this time it required the safe space in which to develop its thinking and ideas for the new development. The document contains the starting point of negotiations and since the request it has changed as the project has developed. It considers disclosure would hinder the school's ability to consider its options free and frankly at a time when the information was only at draft stage and subject to further negotiation and change.
38. In terms of the public interest test, the school decided that the public interest rests in maintaining the exception. It stated that it is not in the public interest to disclosure information which is in draft form, particularly at a time when its contents were still subject to further discussion and consideration. To the contrary the school considers it is in the public interest to allow the school the private thinking space to consider its options and how it envisaged the accommodation progressing within the project. Disclosure at the time of the request would have hindered the school's ability to consider its options freely and frankly and it does not consider such consequences are in the interest of the wider public.
39. The Commissioner is not convinced from the school's submissions that this document was in draft form at the time of the request. He has reviewed its contents and it appears the document was complete and represented the school's accommodation requirements and aspirations at that time. The Commissioner does not consider it is a draft but rather an earlier version of a document that superseded it, as and when the project changed. The school has stated itself that this is an earlier version of the Accommodation Schedule and it was used in this form as a starting point for negotiations. Although the school's plans changed the contents of this document were what the school was acting upon at that time.
40. For the above reasons, the Commissioner is satisfied that regulation 12(4)(d) of the EIR does not apply.

BH [Berkeley Homes] Draft Guarantee Bond

41. The school argued that this document is exempt from disclosure under regulation 12(5)(e) of the EIR.

42. Regulation 12(5)(e) of the EIR states 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.
43. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the school must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
44. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the school must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
45. Addressing the first two requirements outlined above, the Commissioner is satisfied that the requested information is commercial in nature and has the necessary quality of confidence. The information relates to the school's plans to build a new school and allow Berkeley Homes to build new housing on the existing site. The information quite clearly relates to a commercial relationship and transaction between the school and the housing developer. The information itself is not trivial in nature and not otherwise publically available and so has the necessary quality of confidence.
46. Turning now to bullet points three and four, the school confirmed that disclosure of this information would adversely affect the commercial interests of Berkeley Homes. It would reveal to the public the commercial approach it takes to this type of contract, how it negotiates and the final contractual positions and terms that are acceptable to the company. It believes disclosure of this information would be detrimental to Berkeley Homes. It would prejudice future negotiations, would distort true competition and could be used by Berkeley Homes' competitors.
47. In further correspondence from Berkeley Homes direct, Berkeley Homes stated that this information is a pro forma document in a very simplistic form, containing no information relating to this development or the land

in question. It argued that such a simplistic form would never be acceptable to it as a guarantee provision in such a complex situation or any scenario it could envisage and so disclosure would be misleading. It believes disclosure of this form in its current state could put the company under pressure to accept such guarantees in the future.

48. The Commissioner does not accept that the information contains information of a sensitive commercial nature. Berkeley Homes has stated itself that it is very simplistic and it appears to be an almost blank template to which specific details relating to a given development would be entered. It has confirmed that it does not contain any information about this development. Unless the very fact that a guarantee bond is being contemplated in this situation and it not often used in such developments and, is therefore novel in this case, he cannot see how disclosure of this information would adversely affect Berkeley Homes' commercial interests. The Commissioner wishes to point out that he has not received any arguments of this nature from either the school or Berkeley Homes and if indeed these were the school or Berkeley Homes' reasons for applying this exception they would have been brought to his attention early on in his investigation.
49. The Commissioner considers the argument that disclosure would be misleading is insufficient to engage this exception. If there are genuine concerns that a template document with no specific details contained in it could mislead the public or result in the company being pressurised into accepting bonds in this format, the document could be disclosed with an appropriate explanation to alleviate such concerns.
50. The Commissioner is satisfied in this case that regulation 12(5)(e) of the EIR does not apply to this document.
51. He notes that Berkeley Homes wishes the Commissioner to consider the application of regulation 12(5)(f) of the EIR in the alternative and he will now proceed to do so.
52. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure.

53. Neither the school nor Berkeley Homes provided any further submissions in support of this exception. Berkeley Homes simply stated that it considers this exception applies for the same reasons it considers regulation 12(5)(e) of the EIR applies.
54. Although it can be potentially argued that Berkeley Homes was under no legal obligation to provide this information to the school and in fact it has been suggested that it has only come to hold this information as a result of an error made by Berkeley Homes' operating company; Berkeley Homes (Southern) Limited. And it can be argued that Berkeley Homes has not consented to its disclosure. It is the Commissioner's view that for the same reasons outlined in paragraphs 48 and 49 above disclosure of this information would not adversely affect Berkeley Homes' interests.
55. He has therefore concluded that regulation 12(5)(f) does not apply to this information.

Draft Effingham Key Questions and Answers

56. The school applied regulation 12(4)(d) of the EIR to this document (full description of this exception can be found in paragraph 36 above). The school confirmed that at the time of the request this document was still very much in draft form and likely to change considerably before it would be published.
57. The school stated that the trustees had not had sight of the draft document and nor had they had the opportunity to debate it, refine it and review it. It stated that the draft was still subject to significant debate and change and the trustees required the free and frank space to discuss its contents and ensure the final version for the public reflected the most up to date position and was accurate.
58. The Commissioner has reviewed the document supplied and it is evident that some questions and answers had been drafted but others were blank to be filled in at a later date. He is therefore satisfied that it was in draft at the time of the request and incomplete and so regulation 12(4)(d) of the EIR is engaged.
59. In terms of the public interest test, the school concluded that the public interest rests in maintaining this exception. It felt there was limited public interest in the document at this stage, as it represents the line the governors and trustees should take when asked questions from the public. It stated that some of the information is in the public domain but there are elements that are not which were subject to further debate and agreement at the time of the request. It argued that the trustees and governors should be afforded the safe space to debate and finalise

the remaining elements of this document and if disclosure were ordered it would render this process pointless and the purpose of the document as irrelevant.

60. The Commissioner considers the arguments for disclosure are fairly strong in this case. The information relates to the potential relocation of the school, the development of a new school and the use of the existing site for new housing. At the time of the request a formal application had been submitted to the local planning authority but it had not been considered or determined. The Commissioner considers there is a public interest in accountability, openness and transparency, particularly for projects such as this which involve education provision for the local area and the use of existing public assets for new housing involving a well-known housing developer. A project of this nature will attract local interest and possibly opposition and there is a public interest in making as much information available to the public to help them understand more clearly why such decisions are being made and why it is believed such developments are required for the local area.
61. As this document has always been intended for public dissemination in that it is a question and answer aid for the school to assist it with likely questions from the public, there appears few public interest arguments in support of maintaining the exception. The school has stated itself that much of its contents are already in the public domain and so there can be little sensitivity over the majority of its contents.
62. It is accepted that there are blank sections for some questions, as the answers to these questions had not been finalised yet. The Commissioner does not consider the disclosure of the questions and answers that had been formulated by this point would hinder the school's ability to complete the blank sections at a later date. It would still maintain the safe thinking space it requires to formulate the outstanding answers.
63. For these reasons, the Commissioner has decided that the public interest in favour of maintaining the exception is outweighed by the public interest in favour of disclosure.

Two documents containing the initial costings for the new build

64. The first document is a letter dated 6 March 2014 which has been released to the complainant in a redacted format. The second document is a Cost Plan Summary dated 21 March 2014 which has been withheld in its entirety. Both have been withheld in part or in full under regulation 12(5)(e) of the EIR.

65. Paragraph 43 and 44 of this notice explain this exception and what it entails so it will not be repeated here.
66. The Commissioner considers the first two elements of this exception are met for the same reasons he explained in paragraph 45 above. The requested information is commercial in nature as it relates to an ongoing commercial transaction between the school and Berkeley Homes relating to the provision of a new school and new housing on the existing school site. The requested information is the initial costings for the new school. It is not trivial in nature or accessible to the public by other means and so has the necessary quality of confidence.
67. Turning now to the third and fourth element of this exception, the school argued that the disclosure of this information would adversely affect the legitimate economic interests of Berkeley Homes. The two documents contain sensitive financial information relating to the project which could be used by future contractors or by competitors wishing to compete for the site to the commercial detriment of Berkeley Homes.
68. The school explained that the information could be used by future contractors wishing to bid for the contract to build the new school when the time comes. It confirmed that the school would not be built by Berkeley Homes but put out to tender as a Design and Build Contract for prospective contractors in this line of work. If such contractors knew up front how Berkeley Homes had priced the build and of its profit margins it would enable the contractors to tailor their bid accordingly and prevent Berkeley Homes from securing the best deal. It would damage Berkeley Homes' bargaining position and stifle true competition which would result in loss of revenue for Berkeley Homes.
69. Similarly, this information would be useful to Berkeley Homes' competitors. At the time of the request the project was still in the early stages. The Heads of Terms had not been finalised and was still subject to further debate and negotiation. If this information was available to Berkeley Homes' rivals prior to the Heads of Terms being finalised and agreed it would enable its competitors to compete for the site and offer potentially a more favourable deal to the school. Disclosure of this information would therefore adversely affect Berkeley Homes' commercial interests for these reasons.
70. The Commissioner is satisfied that disclosure of this information would adversely affect the commercial interests of Berkeley Homes. It is clear from the school's submissions that the project was still at the early stages at the time of the request. There were areas that required further discussion and negotiation, the Heads of Terms was still under review and no formal contracts had been signed. This information contains Berkeley Homes' costings for the project and potential profit margins. If

this information was disclosed it could be used by rival housing developers to undercut Berkeley Homes and attract the business anyway from it. Additionally, the information could be used by future contractors wishing to bid for elements of the project. Potential contractors would know up front how Berkeley Homes had costed the project and what profit margins they anticipated. Such information would be useful to contractors submitting their bids; they would be aware of what Berkeley Homes is hoping to achieve and tailor their bids accordingly. This would create an unlevelled playing field, stifle true and fair competition and hinder Berkeley Homes' ability to negotiate.

71. The Commissioner will now consider the public interest test. The school has stated that it considers the public interest rests in maintaining the exception. It argued that it considers the public interest lies in allowing all parties the private thinking space to debate and consider its options and also ensure that all parties' commercial bargaining position is not prejudiced.
72. The Commissioner considers there is a public interest in accountability and transparency. He also notes that this project will have attracted a lot of local interest from concerned residents and parents and that disclosure of information will aid public debate and public understanding.
73. However, in this case, the Commissioner considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exception. Considering the circumstances at the time of the request the Commissioner considers disclosure of this specific information would adversely affect the commercial interests of Berkeley Homes and he does not consider such consequences are in the wider public interest. It is not in the public interest to stifle true competition and the ability of third parties to compete and negotiate fairly.

Draft Head of Terms

74. The school has applied regulations 12(4)(d) and 12(5)(e) of the EIR to this document. The Commissioner will first consider regulation 12(4)(d) of the EIR (he will only go on to consider regulation 12(5)(e) of the EIR if it is found that regulation 12(4)(d) does not apply).
75. Paragraph 36 above describes regulation 12(4)(d) of the EIR in more detail. It will not be repeated here.
76. The school advised that the Heads of Terms were in draft at the time of the request and were still subject to further discussion, debate and negotiation. The version it has supplied to the Commissioner shows the specific stage of this document; it contains tracked changes and

comments showing that it was in draft, incomplete and subject to further negotiation between the school and Berkeley Homes.

77. The Commissioner is therefore satisfied that regulation 12(4)(d) of the EIR applies to this document.
78. Concerning the public interest test, the school has stated that it considers the public interest rests in maintaining the exception. It stated that the Heads of Terms was in the early stages of development at the time of the request and the version it has supplied to the Commissioner highlights that many areas were still subject to negotiation. It believes it is in the public interest to allow the school and Berkeley Homes the space to debate the terms in private without the fear of public intrusion at a time when it is still considering and negotiating terms.
79. The Commissioner has already highlighted the public interest arguments in favour of disclosure in paragraphs 60 above. However, in this case the Commissioner considers the public interest rests in maintaining the exception. The school has stated that the project was in its early stages at the time of the request and there were areas still to debate and negotiate; the Heads of Terms being just one area. The Commissioner accepts that it is in the public interest to allow public authorities the private thinking space to consider its options freely and frankly and this free space was still required at the time of the request. It promotes good decision making and enables those parties in negotiation to secure the best possible outcome for their requirements. It would not be in the wider public interest to hinder the school's ability to secure the best possible terms it can with Berkeley Homes, as this would inevitably impact upon the new school it requires and the value it obtains for the existing site.

Pre-application response from Guildford Borough Council

80. This document contains pre-planning advice Berkeley Homes obtained from the Council in July 2014 and has been withheld in its entirety under 12(5)(f) of the EIR.
81. Regulation 12(5)(f) of the EIR is described in more detail in paragraph 52 above.
82. The school stated that disclosure of this information would adversely affect the interests of Berkeley Homes. Berkeley Homes was under no obligation to supply it to the school and they supplied it on the understanding that it would not be released. Berkeley Homes has also not consented to its disclosure.
83. In the First-tier Tribunal hearing of Paul Windmill v ICO and Staffordshire County Council (EA/2014/0299) ('the Windmill case') the

tribunal considered the application of regulation 12(5)(f) of the EIR to pre-planning advice and agreed, based on the circumstances at the time of the request, that the exception applied.

84. At paragraphs 11 and 12 of its decision the tribunal explained how the proposed development was only a proposal at the time of the request and how disclosure of the developer's pre-planning advice would have benefited the developer's competitors and caused it damage.
85. Although all requests are considered on their own merits, the Commissioner considers the request the subject of this notice and the withheld information being considered here are very similar to the Windmill case. At the time of this request the plans to build a new school and use the existing site for housing were in their early stages. Pre-planning advice had been sought by Berkeley Homes and a formal planning application had been put in to Guildford Borough Council. But the formal planning application had not been considered or determined. The school and Berkeley Homes were also still in discussions about the proposals, debating and considering their options.
86. In line with the tribunal's decision in the Windmill case, the Commissioner considers disclosure of this information at the time of the request would have been useful to Berkeley Homes' competitors. It would have enabled them to review the proposals so far and possibly put in a bid of their own for the plans, causing Berkeley Homes commercial damage.
87. For these reasons, the Commissioner is satisfied that regulation 12(5)(f) of the EIR applies to this information.
88. In terms of the public interest test, the tribunal stated at paragraphs 14 and 15 of the Windmill case that:

"It was accepted by the Council that there is a general public interest in the transparency of the planning process, but it relied on the public availability of all documents relevant to the planning application itself to satisfy that interest. On the other side the Appellant accepted that a developer would be entitled to expect a degree of confidentiality in respect of preliminary discussions with the relevant authorities before a decision was made to proceed with a planning application. However, he argued that the importance of knowing how recommendations were made to the Council and how the Council reached the decision it did in this particular case should be regarded as equalling or exceeding that expectation. The Council, on the other hand, argued that the effective operation of the planning processes would be undermined, and developers would be discouraged from participating in the pre-planning discussions (to the detriment of competition in the public interest), if it

was not possible to float plans with an assurance that publicity would only be given to those that went forward to the next stage (which many might not).

On balance we were satisfied, on the basis of the submissions made and our examination of the materials in the closed bundle, that the public interest in maintaining the exception in this particular case outweighed the public interest in disclosing the withheld information."

89. Although, again, each case is considered on its own merits, the Commissioner considers the tribunal's summary of the public interest test in the Windmill case is equally applicable here. The public interest in this case rests in maintaining the exception. Disclosure of this information would discourage developers and private individuals from seeking pre-planning advice and this would reduce the efficiency and current operation of the planning process. Developers and private individuals should be able to request pre-planning advice on a confidential basis knowing that if they make a formal application it is at this time that details will be made public and the details that are made public reflect the formal application submitted rather than pre-application discussions.

Right of appeal

90. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

91. 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.
92. 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

Rachael Cragg
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Information Commissioner's Office
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Water Lane
Wilmslow
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SK9 5AF