

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

**Date:** 26 January 2016

**Public Authority:** Herefordshire Council  
**Address:** Plough Lane  
Hereford  
HR4 0LE

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of a report from 2014 looking into the council's options on its smallholdings policies. The council withheld sections of the report applying Regulation 12(5)(e) and Regulation 13.
2. The Commissioner's decision is that the council has incorrectly applied Regulation 12(5)(e) to some of the information which it withheld
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the contents section of part 1 of appendix 3.
  - To disclose Section 15 of the report, other than the last sentence of section 15(1)(f), and section 15(2).
  - To disclose the first paragraph in section 16, together with the leading paragraphs of (a) – (c), redacting the list of the identities of the smallholdings/areas concerned and the recommendation for

following each area named. Also redacting the estimated realisation valuation data which ends each of the paragraphs (a)-(c).

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 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 20 October 2015 the complainant wrote to the council and requested information in the following terms:

*"Please could you provide a copy of the policy review of the Herefordshire County Smallholdings estate, conducted by Fisher German in June 2014.*

*We do not believe that our request contains any personal data, but in the event that any of the relevant documents do include personal data, we would be happy to receive documents in a redacted form."*

6. The council responded on 30 November 2015. It stated that the information was exempt under Regulation 12(5)(e) (commercial confidentiality).
7. Following an internal review the council wrote to the complainant on 19 February 2016. It upheld its initial decision.
8. On 23 December 2015 the complainant made a second request for the same information (given the time which had then passed and changes in circumstances surrounding the report). This time the request was worded as:

*"We would be grateful if you could provide us with a copy of the report which was produced by Fisher German as part of the Herefordshire Council's Smallholdings Policy Review and which was submitted to the council in July 2014 (the 'Report').*

*In accordance with the statutory presumption in favour of disclosure and guidance issued by the Information Commissioner's Office, we suggest that the Council redacts any information which it considers to be commercial information (for example valuation figures), such that the Report may be disclosed. We are also aware that the Report may contain personal data which, of course, we are happy for the Council to redact."*

9. The council responded on 14 January 2016. It provided a redacted copy of the report but withheld sections under Regulation 12(5)(e) and Regulation 13 (personal data).
10. The complainant's requested an internal review on 1 March 2016 on the basis that the redactions made by the council were too heavily for it to be simply valuations and personal data which had been redacted.
11. The council responded on 29 April 2016. It went in detail through the reasons for the redactions in various sections of the document and maintained its position for the majority of the document, although it did decide to provide two further sections of information to the complainant.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 26 July 2016 to complain about the way their request for information had been handled. Their view was that the redactions have been applied too widely and that it was evident that not all of the information would fall within the scope of the exceptions claimed.
13. The Commissioner therefore considers that the complaint is that the exceptions have been applied to sections of the information which do not fall within the scope of the exception.

### **Reasons for decision**

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#### Background to the case

14. Herefordshire Council states that the report was initially drafted in 2014 with a view to informing a decision on its policy as regards its smallholdings. The complainant says that in December 2015, the Council made the decision to undertake a structured sale of its smallholdings estate and revised its Smallholdings Policy accordingly.
15. On 4 December 2015 the council released its decision of 3 December 2016. In the FAQ section it stated:

*"A task and finish group was formed on 10 June 2015 by the general overview and scrutiny committee to identify options for the long term future of the council's smallholding estate. The committee reviewed the report and findings of this group on 27 October 2015.*

*Recommendations were put forward to the cabinet after this meeting. The cabinet met on 03 December 2015, and after thorough discussion within the cabinet, the decision was taken to approve a new policy which included selling the entire smallholding estate and possible development on appropriate sites."*

16. The decision to sell the smallholdings has been criticised and challenged by many parties. The Herford Times, on 1 February 2016<sup>1</sup> stated that the decision was taken in spite of other options put forward by the General Overview and Scrutiny Committee to retain a reduced estate via partial sales, and despite challenges from the National Farmers Union (the NFU) and the Tenant Farmers Association. A member of the Green Party who was on the General Overview and Scrutiny Committee is reported as saying that she considered that the options it provided were not properly considered by the council. She is reported as stating that *"cabinet never had any intention of even acknowledging GOSC's recommendation and that the decision to sell had already been made."*
17. The complainant, who acts on behalf of the NFU, argues that some sections of the report, in particular the recommendations and options in the report have been withheld incorrectly. The NFU argues that the Fisher German Report may have been ignored by the council when it took the decision to sell the smallholdings, and in failing to do this it may have left the decision open to be judicially reviewed.

Regulation 12(5)(e)

18. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

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[http://www.herefordtimes.com/news/14245813.Herefordshire\\_Council\\_criticised\\_for\\_handling\\_of\\_tenant\\_farms/](http://www.herefordtimes.com/news/14245813.Herefordshire_Council_criticised_for_handling_of_tenant_farms/)

19. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
20. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council 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.

Is the information commercial or industrial in nature?

21. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
22. The report was produced by Fisher German in 2014 and provides an overview of the council's smallholdings and potential options as to what the council may wish to do with these and how it might best manage them. A large section of it considers the potential sale of some or all of the smallholdings and the benefits to the council of doing this.
23. The council has now made a decision to sell its interests in some of the properties and is currently in the process of negotiating, or beginning discussions regarding this move.
24. The Commissioner is therefore satisfied that the information relates to commercial transactions (namely the sale, or potential sale of land) for the purposes of profit. The information is therefore commercial in nature.

Is the information subject to confidentiality provided by law?

25. Paragraph 19 of the Commissioner's guidance<sup>2</sup> on Regulation 12(5)(e), states:

*"In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute."*

26. The council said that the report has been given a restricted disclosure, even within the council itself. The information that has been redacted in the report has also not been made public and has not been widely disseminated internally within the council – the majority of officers and councillors have only had access to the redacted copy of the report. The withheld information is not therefore within the public domain, and the Commissioner accepts that it is not trivial in nature.
27. The council argues that the Commissioner has previously considered (in a decision notice for Kent County Council (FER0546440)) that, where information relates to the sale of land, particularly where such processes are incomplete and where other contingent factors would be affected by such disclosure, it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence
28. The Commissioner recognises the sensitivity of information. She considers that employees of the council would understand that the redacted information would clearly be considered confidential by their employers at this stage in the sale process. They would also understand that they may be subject to sanctions from their employer should they disclose that information without permission to do so.
29. The Commissioner therefore considers that the information is subject to confidentiality provided by law.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

Is the confidentiality provided to protect a legitimate economic interest?

30. The council argues that the report contains sensitive commercial information gathered from the current tenants of its smallholdings, relating both to the value of the smallholdings and details of the value of their businesses.
31. It argues that the commercial sensitivity relates to the fact that the council is now preparing to sell the land, and it is also in commercial negotiations with some individual tenants on lease termination. The valuation advice given to the council could undermine those negotiations if that information was shared with the tenants. For these reasons the council believes the information has a commercial value, as it relates to the negotiations on sale of land and surrender of the tenancy lease.
32. It has broken down the redactions and the reasons for the applicability of the exception as follows:

*“Section 6.3 – 6.6 considers the valuation of different sites. Release of this information would have an effect on the final sale purchase figure for the sites if their value were to be published.*

*Section 8.2 considers any justification for investigating mineral deposits on the land. Revealing specific sites where minerals may be located would again affect the value of the sites.*

*Section 10.2 contains a market evaluation with the estimated realisation values of the estate, release of which would affect the value of the sites.*

*Sections 11.2, 11.4 and the redacted part of Section 11.5 and Section 12 give a forecast on land growth movement and return on investment, release of which would affect the value of the sites.*

*Section 13.3 gives the potential value of the site, release of which would affect the value of the sites.*

*Section 15, although headed “Recommendations”, again gives the realisation values for different options on the sale of the estate, release of which would affect the value of the estate.*

*The redacted part of Appendix 3 contains information about the financial impact of residential development on the value of the estate, release of which would affect the value of the sites.*

*Appendix 4 contains information about the financial impact of renewable energy development on the value of the estate, release of which would affect the value of the sites.*

*Appendix 5 contains information about the financial impact of mineral development on the value of the estate, release of which would affect the value of the sites."*

33. The Commissioner has considered each of the above redactions and notes that the areas of concern listed by the council do relate to the information within the sections of the document itself.
34. The council argues that a disclosure of the information would adversely affect the council's economic interests as the council would not be able to achieve as high a price for its land if the valuations were disclosed. In the sales negotiations the council's bargaining power would be adversely affected by release of the information. Equally, negotiations with some of the tenants would be adversely affected for termination of the tenancies.
35. The report was drafted in 2014 and it could therefore be argued that many of the values and figures provided in the report may have changed significantly by the time of the second request for information on 23 December 2015. The council however addressed this point by stating that *"Although the values are now historic there is sufficient evidence in the public domain of sale price trends, for third parties to reach their own conclusions over the anticipated realisation values in the current market."*
36. The Commissioner accepts this point however he considers that the majority of developers considering purchasing land would obtain their own valuations done prior to making or completing an offer. Additionally valuations themselves are only an indicator of the actual value of land on the open market. The council considers that the seller of land should be entitled to receive advice in confidence, as would the tenants.
37. The exception is only applicable where a disclosure of the information 'would' have an adverse effect upon the legitimate economic interests of the council. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:



*“Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors”.*

38. Having considered the above the Commissioner is satisfied that a disclosure of the information would have an adverse effect upon the economic interests of the council. It is clear that a disclosure of the council's own valuation figures would be taken into account by current tenants or other potential purchasers who were in the process of negotiating figures for a purchase of the land from the council. Effectively it would 'reveal the cards' of the council, causing an imbalance in the negotiations. If the council were to disclose the redacted information the council would find it much more difficult to achieve the potential price on sale it might otherwise have done.
39. However the Commissioner notes that part 1.2 of appendix 3 was disclosed in response to the complaint, and this included a list of the areas/smallholdings. In Part 1 of appendix 3, the contents section, the same list was redacted. The contents section of appendix 3 should therefore be disclosed as this information has already been disclosed elsewhere in the document

Would the confidentiality be adversely affected by disclosure?

40. The Commissioner has accepted that a disclosure of the information would adversely affect the economic interests of the council in regards to the ongoing and future negotiations with third parties.
41. It is inevitable therefore that a disclosure of the information would adversely affect the confidentiality under which the withheld information has previously been held by the council.
42. The Commissioner therefore considers that the council was correct to apply Regulation 12(5)(e) to the information. He must therefore carry out a public interest test as required by Regulation 12, taking into account the presumption towards the disclosure of the information expressed in Regulation 12(2).
43. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest

The public interest in the exception being maintained

44. The central public interest arguments for maintaining the exception are those relevant to the application of the exception itself. Essentially, disclosing information which could adversely affect the council's ability to obtain the best price when selling the land is not in the public interest. The loss of funds which the council would take is a loss of funds which could otherwise have been used to provide other services to the county.
45. The council argues that as the decision to sell the smallholdings has been taken there is a public interest in protecting the information in order to provide the best chance of obtaining best value for the resources it has decided to sell. Conversely, undermining this potential is not in the public interest and would result in less value being achieved to the detriment of the community. The council argues that the use of the income for investment into the wider community was a key factor in the decision to sell the land in the first instance.

The public interest in the information being disclosed

46. The complainant argues that there is a strong public interest in the information being disclosed. It says that the Council owns a smallholdings estate in Herefordshire comprising of approximately 4,800 acres, with 47 individual holdings and 45 farming tenants. Its decision to sell its interest in the smallholdings was strongly opposed by the National Farmers Union; Herefordshire is a rural county and its Council-tenant farmers now face the loss of their homes and livelihoods. The complainant is acting on behalf of the National Farmers Union.
47. The complainant argues that she is not interested in details of the individual tenants or information on the valuation of their business. Nor is she interested in obtaining commercially sensitive information. She has made this clear to the council in her requests for information.
48. The complainant has stated that her central concern is to obtain a copy of the recommendations made in the report:

*"We do not accept that the entirety of the redacted sections of the Report (in particular, the sections entitled "Reasons for Option 1" and "Recommendation") fall within the exemption set out at 12(5)(e) of the EIR 2004. That is not a realistic or reasonable explanation of the Council's unwillingness to disclose the information we have requested."*

49. The decision to sell the councils interests in its smallholdings has been made, and the question is whether the information which has been requested should be disclosed in response to the request. This information would inform the public as to the reasons for the council's decision to sell the smallholdings. For its part the council recognises that there is a strong onus upon it to disclose the information as it recognises that the decision will affect the livelihoods of tenant farmers. It argues however that if the information is disclosed at the current time, with negotiations ongoing, it may not be able to achieve the best value returns for the sale of the smallholdings.
50. One of the main factors in the decision has been the reasoning of the council in making the decision it did. The complainant raised the fact that the options and recommendations (section 15 of the report), had been almost completely redacted. The council argues that these sections contain valuation data which, as noted above, would engage the exception in Regulation 12(5)(e) for the reasons outlined. The complainant however questions whether that is the case.
51. The Commissioner accepts that the sections do contain valuation data, however there is a strong public interest in creating a greater understanding of the reasons why the council made the decisions it did. The redaction of the section in its entirety prevents the public from understanding this and removes the ability of the public to understand the reasons why a particular option was highlighted, which option was highlighted as most favourable, and whether the council chose to make an alternative decision to the recommended option. Again there is a strong public interest in this being disclosed.
52. Section 15 contains very few actual valuation figures. Some sections do elaborate upon the council's plans regarding its negotiations and the reasons for taking such an approach however there is little in the way of valuation figures themselves. However these sections do name specific areas/smallholdings and the intentions regarding these as well as forecasting the overall recommendation from the options which were available to it. Clearly disclosing this information at the time of the request would affect the potential value of those sites as the council would effectively be highlighting its intentions regarding the specific properties as well as its prospective returns overall.
53. Having considered the council's arguments the Commissioner considers that the council was correct to apply the exception to the valuations within the recommendations and options sections, leaving the remainder of the information to be disclosed.

54. She considers therefore that the last sentence in para 15(1)(f) and the recommendations from paragraph 15(2) contain information which the council was correct to apply Regulation 12(5)(e). The remainder of section 15 should be disclosed
55. As regards paragraph 16 the Commissioner considers that the initial paragraph in section 16(1) together with the headings/initial sentences for sections (a) – (c) should be disclosed. However, the council was correct to redact the list of identities/areas of the smallholdings and the valuation data ending each section under Regulation 12(5)(e).
56. As regards the other redactions the Commissioner considers that the council was correct to apply Regulation 12(5)(e) and the public interest rests in the exception being maintained at the current time.

### Regulation 13

57. As noted above, the complainant said that she is not interested in receiving personal data from the report. Her central concern was the recommendations in sections 15 and 16. In her request for review dated 1 March 2016 she stated to the council:

*"At the risk of sounding repetitive, the NFU is not interested in the values or details of each individual smallholding; we are interested in the overall recommendation presented to the council by Fisher German. Is the council seriously suggesting that the entirety of that recommendation is commercially sensitive information which relates to individual and identifiable smallholders? That, to us, is simply not a realistic or reasonable explanation of the Council's unwillingness to disclose the information requested."*

58. The report does go into some detail on the value of each of the holdings and on the businesses of individual tenants, however these sections were not provided to the Commissioner, presumably due to the complainant excluding them from the scope of her request by stating that she was happy for this information to be redacted.
59. The Commissioner notes that the working copy of the HCC valuation master was redacted in full from disclosure. For the absence of doubt the information contained within this document includes detailed valuations together with the addresses and the ages of specific tenants,

together with details of the type of tenancy agreement which the individual has with the council.

60. The Commissioner also notes that some employee names were redacted from correspondence between Fisher German and the council.
61. However given the complainant's clear statement to the council that such details were not required the Commissioner has not considered the application of Regulation 13 further in this instance.

## Right of appeal

62. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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**  
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