

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 October 2018

Public Authority: Woking Borough Council
Address: Civic Offices
Gloucester Square
Woking
GU21 6YL

Decision (including any steps ordered)

1. The complainant has requested information held by Woking Borough Council (the council) that relates to the redevelopment of Victoria Square.
2. The council refused to provide some of the information, citing the exception for commercial confidentiality (regulation 12(5)(e)) under the EIR.
3. The Commissioner's decision is that regulation 12(5)(e) has been correctly applied to only some of the information but where the exception is engaged, the public interest in maintaining the exception outweighs the public interest in disclosure.
4. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - The council shall disclose to the complainant a copy of the Ernst & Young financial model document and the 'Victoria Square Financial Implications' presentations slides provided to Members before a briefing held on 2 November 2016.
5. 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.

Background

6. In 2013 the public were made aware of a proposal to redevelop Victoria Square in Woking Town Centre. The estimated cost of the redevelopment at that time was set at around £150 million, with the council financing half of this.
7. The project itself was to be delivered by Bandstand Developments Limited (BDSL), now Victoria Square Woking Ltd (VSWL). BDSL was a joint venture between Moyallen, Surrey County Council and the council. The details of the council's interest in BDSL is set out in the council's Executive Summary dated 24 November 2016.¹
8. On 8 December 2016, Members approved an increase in the loan finance to £460 million to cover the cost of a much larger regeneration project. The council's finance was to be raised by accessing loans through the Public Works Loan Board (PWLB).
9. The Victoria Square redevelopment is currently due for completion in 2020/21.

Request and response

10. On 19 December 2016 the complainant wrote to the council and requested information in the following terms:

'Woking Borough Council-Victoria Square Development-Freedom of Information Act

As a Woking Borough rate payer I am deeply concerned about the above development and would ask under the Freedom of Information Act, I with other rate payers are allowed to view ALL the public domain papers (with the exception of planning papers) on this development up until and including the Woking Borough Council (WBC) meeting of the 8th December 2016 when the full Council voted for this project. We do not seek links from the WBC portal but actual hard copy papers.

Particularly of interested [sic] is the financial trail including the cost analysis, breakdown of agreed expenditure by WBC and loan repayment terms. Also a breakdown of site acquisition costs and the value of the

¹ http://cl-assets.public-i.tv/woking/document/6_Victoria_Square.pdf

site today. Please confirm that BSDL is to instruct Moyallen Holdings Limited as the project manager for the development.'

11. In a letter dated 16 January 2017 the council advised the complainant that it had enclosed some of the information in paper form as he had requested. It then went on to advise that some information had been withheld as it was subject to the Local Government (Access to Information) Act 1985 and was never intended to be published.
12. The council went on to say that it regarded section 43 of the FOIA to be engaged and it was considered that the public interest in withholding the information outweighed the public interest in disclosing it in this instance.
13. The complainant contacted the council on 19 January 2017 to advise that his original request had not been addressed and that the information which the council had supplied to him was already in his possession. He went on to say that his original request was for:

'The financial trail including the cost analysis, breakdown of agreed expenditure by WBC and loan repayment terms. Also a breakdown of site acquisition costs and the value of the site today.

As a resident I challenge the decision to withhold what would seem to be large amounts of public information as confidential.

Please regard this as a complaint or kindly give me the information which I have requested.'

14. On 21 February 2017 the council confirmed it had carried out an interim review. It stated that as the original request was specifically for '*public domain papers*' it was clear that the complainant had anticipated that certain papers were confidential and could not be released in response to an FOIA request. The council advised that the issue between the two parties appeared to be the extent of those confidential papers.
15. The council confirmed that it considered that the public interest was satisfied in this case. It stated that both its interests, and that of BSDL (and third parties with whom BSDL is contracting), would be adversely affected should confidential information in respect of their commercial activities be released at that time. It believed it was therefore correct to apply section 43 to the withheld information.
16. The council also responded to that part of the complainant's original request which asked for confirmation that BSDL was to instruct Moyallen Holdings Limited as the project manager for the development. It advised that it is for BSDL to determine this, and not the council. However, the council did then go on to say that '*subject to that proviso*' it was of the

understanding that *'a Moyallen company will be appointed as project manager for the Victoria Square development (and that this won't necessarily be Moyallen Holdings Limited)'*.

17. The council also confirmed to the complainant that if any of the information requested was regarded to be environmental information, and therefore subject to the Environmental Regulations 2004 (EIR), it was satisfied that regulation 12(5)(e) would apply to the withheld information.
18. On 26 February 2017 the complainant sent a further email to the council. He referred to the council's interim review response and advised that both he, and others, were still concerned about the Victoria Square development and the level of growing debt which he believed the council was committing rate payers to.
19. The complainant also expressed his concern that certain information had been withheld by the council arguing that as the *'deal is done'* then the commercial confidentiality referred to by the council in relation to the project *'drops away.'* He went on to request the following information:
 - *Kindly inform me of the tender process carried out by WBC to select suppliers/ contractors.*
 - *Please specify the Public Works Loan Board (PWLB) process of lending to local authorities and due diligence.*
 - *Will the PWLB permit lending to a local authority (LA) if funds are then passed on to a third party which the LA does not control? Whilst the LA may hope to repay, it may be outside its control to do so: an obligation on an LA clearly binds the LA and I believe in the event of default the PLWB has first charge upon the rates. Thus residents could bare the brunt of any default.*
 - *Would you confirm that the Council's auditors, KPMG have agreed/authorised these cashflow deficits for this project and has KPMG as the Council's auditors done an in depth review of the fiscal implications to the Council given the size of the loans for the Victoria Square project from the Public Works Loan Board?*
 - *Was this review shared with Councillors by Council Officers and if so, as a matter of public interest can WBC council tax payers see this report?*
 - *What arrangements are being made to audit Bandstand Square Developments Limited (BDSL) and to monitor the project manager? This appears essential to ensure the proper application of funds lent to WBC by the PWLB and to avoid default.*

- *I am surprised at this stage there seems to be no appointed Project Manager therefore how are substantial works already being carried out around Bandstand Square etc being controlled/audited if nobody is in charge?*
 - *My understanding is that the Council Meeting of the 8th December 2016 resolved to proceed with a specific project as set out by Councillors. Thus a whole list of papers should then have become available to the public. Where are these documents?*
20. The complainant subsequently contacted the Commissioner to complain that the council had not responded to his correspondence of 26 February 2017.
 21. On 5 May 2017 the Commissioner asked the council to provide a response to the complainant's request of 26 February 2017, if it had not already done so.
 22. On 23 May 2017 the council then responded to the complainant, supplying the information requested by way of a full answer to each of the questions set out in his letter of 26 February 2017.
 23. On 30 June 2017 the complainant advised the council that its response '*still does not answer my questions*' adding that he '*began this request back on the 22nd December 2016.*' He subsequently contacted the ICO again on 2 August 2017 to complain that he had still not received a satisfactory response from the council.
 24. On 3 August 2017 the council advised the complainant that he had not yet exhausted the council's complaints process. It went on to request that he confirm if he now wanted matters to be considered as a formal complaint.
 25. The complainant subsequently explained to the council that he had already made it clear in his correspondence of 19 January 2017 that he had wanted to complain about the council's handling of his request.
 26. The Commissioner, unaware of the above interaction between the two parties, then wrote to the council on 8 August 2017 making direct reference to the complainant's request of 26 February 2018. She advised the council that the content of the complainant's correspondence of 30 June 2017 was sufficient to be construed as written expressions of dissatisfaction with the response to his request and asked the council to conduct an internal review within 20 working days, unless it had already done so.
 27. On 13 October 2017 the council confirmed the outcome of the internal review. It has subsequently advised the Commissioner that this review

was in respect of the complainant's request of 19 December 2016 (see paragraph 10).

28. The council informed the complainant that its original decision to withhold information under section 43(2) of the FOIA was viewed to be correct and that the balance of the public interest lay in favour of withholding the information.
29. The council also confirmed that its invitation to meet with the council's Chief Executive to discuss the Victoria Square development, as set out in its correspondence dated 16 January 2017, remained open.

Scope of the request

30. The complainant had first contacted the Commissioner about the way in which the council was handling his requests on 30 March 2017.
31. Following the council's internal review response of 13 October 2017, the complainant confirmed to the Commissioner that he was not satisfied with the council's response, believing that additional information should be disclosed to him.
32. In this instance there was a period of some 10 months between the complainant's request of 19 December 2016 and the council's internal review decision of 13 October 2017. Within this time, the various sets of correspondence sent between the two parties about matters relating to the Victoria Square project have created some confusion as to what was considered to form part of the original request, what was viewed (or should have been viewed) to be a new request for information, and what was considered to be neither.
33. Given the somewhat protracted and convoluted way in which this case progressed, the Commissioner, at the initial stage of her investigation, took the unusual step of inviting the complainant to provide details of that information which he believed to form part of the requests that he had made, and which he still required. The following information was provided in response (the numbers have been added for ease of reference):

'I am asking for the following, none of which, despite several requests to WBC have been forthcoming:

1. *The original Ernest [sic] and Young financial model for the scheme shown to Councillors prior to them voting on it.*

2. *The financial trail, cost analysis and risk assessment done by WBC officers presented to Councillors prior to them voting on the scheme.*
 3. *The breakdown of financial expenditure and loan repayment terms presented to Councillors prior to them voting on the scheme.*
 4. *A breakdown of the original site acquisition cost and what the site is valued at today.*
 5. *Confirmation of which company today is project managing the scheme.*
 6. *Confirmation of which private company is the developer of the scheme which is financed by WBC and the share holding WBC has in that company.*
 7. *Confirmation of the open tender process which I understand is required under EU rules before WBC can agree a contract as a developer.*
34. The complainant went on to advise the Commissioner that he believed all of the above to be *'public domain information as it was voted on in Council by Councillors at the 8th December 2016 meeting.'*
 35. The Commissioner took the list above to be a refinement of the complainant's original requests and informed both the complainant and the council that she intended to focus only on information relevant to this list when conducting her investigation.
 36. The Commissioner has firstly considered whether the information held relevant to the complainant's requests to the council falls under the scope of the EIR or the FOIA.
 37. She has then gone on to decide what information set out in paragraph 33 (the 'refined' request) falls within the scope any requests that were contained within the correspondence that the complainant submitted to the council between the period 19 December 2016 and 26 February 2017.
 38. The Commissioner has then gone on to determine whether the council was entitled to withhold any of this information in response to the complainant's requests.

Reasons for decision

Correct Access Regime

39. The council has referred to both the FOIA and EIR in its responses to the complainant. The Commissioner is satisfied that the EIR, rather than the FOIA, is the correct access regime in this instance.

40. The definition of environmental information is set out at regulation 2(1) of the EIR. In the Commissioner's opinion regulations 2(1)(a) and (c) are most relevant in this case:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements:

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements:

41. The information requested relates to information held that is connected to the redevelopment of land and property. Primarily the information that falls within the scope of the request relates to the plans and the various costings of a regeneration project and is integral to a measure (that is the Victoria Square redevelopment) which will, or will be likely, to affect the environment.

42. The Commissioner therefore considers that the withheld information is environmental under regulation 2(c) of the EIR and the request should be considered under this access regime.

Information which falls within the scope of the request

43. The Commissioner has excluded some of the withheld information provided by the council for her consideration as she regards it to fall outside the scope of her investigation. This is either because it did not exist within the relevant time parameters under consideration, and, or, because it does not fall within the description of information set out in paragraph 33 of this notice.

44. The Commissioner also accepts that the council only has a responsibility to consider that information which was held at the time the requests were received. This is particularly relevant to point 4 and 5 of the complainant's refined request which asks for current data. The complainant would need to submit a new request to the council for such information.
45. The Commissioner would add that, with regards to the complainant's request for the value of the site in point 4 of the refined request, the council has confirmed that this information is not held. It goes on to say that it has already been confirmed publicly within the various reports that have been released that, upon completion, the likely market value of the development would be below cost. It states that it is a regeneration project and is deliverable only because the council took a long term view and enabled the financing over 50 years post completion as part of the regeneration of Woking town centre.
46. With regard to point 6 of the refined request, whilst the Commissioner does not agree with the council's assertion that this did not form part of the complainant's original requests, she does accept that this information was included within the reports that were made publicly available at the meeting held in December 2016 (the Executive Summary dated 24 November 2016 referred to in paragraph 7 of this notice is of particular relevance). The reports include details of the council's shareholding in VSWL at that time, and the proposed increase in its share at a later date. Therefore, the Commissioner regards this information to already be in the public domain.
47. The Commissioner also accepts the council's argument that it provided a satisfactory response to point 7 of the refined request on 23 May 2017 when it advised the complainant that:

'The suppliers/contractors will not be appointed by Woking Borough Council, they will be appointed by Victoria Square Woking Limited (VSWL) in which the council owns a 48% shareholding. The loan finance will be provided by Woking Borough Council to VSWL.'
48. The Commissioner has therefore decided that no further consideration of points 5-7 of the list set out in paragraph 34 of this notice is required, either because the information falls outside the scope of the requests the complainant made to the council, it has already been responded to satisfactorily, or because it is information that is already in the public domain.
49. The Commissioner has gone on to consider whether the council was correct to withhold information relevant to points 1-4 of the refined request.

Regulation 12(4)

50. The council has very recently provided the Commissioner with a recording of the briefings given to Members on 27 October 2016 and 2 November 2016 in relation to the redevelopment of Victoria Square.
51. The Commissioner notes that comment is made in the briefings that they were to be recorded for the sole purpose of enabling any Members who were not able to attend the presentations the opportunity to view them at a later date.
52. The council has advised that it regards the exception at Regulation 12(4) to apply to the recording of the briefings. Whilst the council has not gone on to explicitly state what subsection of the exception it believes to be applicable, it has advised that this information should be withheld to ensure the protection of internal deliberation and decision making processes. The Commissioner has therefore assumed on this basis that the council has applied regulation 12(4)(e) to the information (internal communications).
53. The Commissioner is aware that Members were provided with a bundle of documents (information pack) which set out what was to be discussed at the briefings.
54. The council has advised that it has withheld the information contained within the information pack, believing the exception at regulation 12(5)(e) of the EIR to be engaged.
55. The Commissioner notes that the briefing held on 27 October 2016, and the documents contained within the information pack relevant to this briefing, relate to more general matters concerning the Victoria Square project and the plans for the redevelopment, rather than the financial elements. She does not regard this information to be relevant to points 1-4 of the complainant's refined request and has therefore excluded this from her consideration.
56. With regard to the recording of the briefing held on 2 November 2016, and the documents contained within the information pack relevant to this briefing, the Commissioner is satisfied that some of this information falls under points 1-4 of the complainant's refined request.
57. The Commissioner understands that the briefings were held in order to ensure that Members were fully informed of the details relating to all aspects of the project before they voted on whether to approve its funding.
58. With regards to the council's decision to withhold the recording of the briefing held on 2 November 2016, the Commissioner understands that

statute allows for the council to protect confidentiality or privilege of the information upon which it relies. Therefore, she would not wish to undermine the council's authority in relation to the decision taken to provide briefings to Members 'behind closed doors'. She also accepts that there is a degree of confidence expected when participating in such briefings, although this is not necessarily sufficient to withhold information in response to an information request.

59. However, in this particular instance, having given careful consideration to the complainant's refined request, the Commissioner is of the view that the recording does not contain any substantive additional information (that is deemed to be relevant to the request) to that which was either contained within the information pack provided to Members, or which is already in the public domain.
60. Given the above, the Commissioner does not see any merit in considering the recording of the briefing held on 2 November 2016 further. This is because, in her view, it would not provide any opportunity for the complainant to access any additional information of value to that which is already being considered as part of her investigation.
61. The Commissioner has therefore not considered the recordings, or the council's application of regulation 12(4)(e) to such information, further.
62. The Commissioner has gone on to consider whether the council was correct to have withheld certain information under regulation 12(5)(e) of the EIR in response to the complainant's refined request.

Regulation 12(5)(e)-confidentiality of commercial information

63. The council has confirmed that the information that it has withheld relates to points 1-4 of the complainant's request.
64. However, it should be noted at this point that the council has argued that the 'risk assessment' set out in point 2 of the complainant's refined request did not form part of his original requests.
65. After consideration, the Commissioner is satisfied that information relating to a risk assessment would fall within the final bullet point of the complainant's request of 26 February 2017 (set out in paragraph 19 of this notice), if held.
66. Having considered the withheld information, the Commissioner has not been able to identify any specific 'risk assessment' document that falls within the date parameters of the complainant's requests. However, she has identified information relating to 'risks' associated with the financing element within the documents contained within the Members'

information pack and which formed part of the briefing on 2 November 2016. She has therefore considered this as part of her investigation.

67. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
68. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
- 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?
69. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because if the information was disclosed under the EIR, it would cease to be confidential.
70. The Commissioner has considered each point of the above test.

Is the information commercial or industrial in nature?

71. 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 a profit.
72. The withheld information under consideration relates primarily to the proposed costs and financing of the redevelopment of Victoria Square and how income/profit will be generated to repay these costs. It also includes some detail of the planned redevelopment itself and the council's shareholding within VSWL.
73. The Commissioner considers the information is of a commercial nature as it relates to commercial activity - namely the redevelopment of a site (a business activity) which will achieve a commercial return for the development partners, including the council.

Is the information subject to confidentiality provided by law?

74. With regard 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.
75. The Commissioner has not been made aware of any statutory duty of confidence in this instance. She has therefore gone on to consider the common law of confidence, which has two key tests:
- Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
76. The information that has been withheld in this instance is primarily that which was presented to councillors for their consideration before they voted on the council's proposal to provide a loan facility for the redevelopment of Victoria Square.
77. The Commissioner therefore considers that the information, in the main, is not trivial. However, she has identified that some of the information which the council has claimed to be confidential is already in the public domain.
78. The Commissioner has found that the majority of the information set out within the Ernst & Young financial model document requested by the complainant in point 1 of his refined request is included in either the 'Executive Summary (Agenda Item no.6)' document dated 24 November 2016 (originally referred to in paragraph 7 of this notice), or the 'Victoria Square Financial Implications (Appendix 1)' document², albeit, in part, in a different format. Both of these documents are in the public domain.
79. The remainder of the information contained within the Ernst & Young financial model is, in the Commissioner's view, standard detail commonly found in the financial models of such schemes. The information is not unique to this project and the Commissioner has had

² https://cl-assets.public-i.tv/woking/document/6a_Victoria_Square_Appendix_1.pdf

some difficulty in determining how this particular information could be regarded to be commercially sensitive.

80. The Commissioner has therefore concluded that the Ernst & Young financial model document cannot be regarded to have the necessary quality of confidence in this instance.
81. With regard to the 'Victoria Square Financial Implications' presentation slides which were also contained within the information pack and formed part of the briefing of 2 November 2016, the Commissioner is satisfied that most of this information is also included within the same public documents already referred to in paragraph 78 of this notice. Indeed, where the information is not directly replicated, the same points are relayed in a different format.
82. The Commissioner has therefore concluded that the majority, if not all, of the information set out in the 'Victoria Square Financial Implications' slides are already in the public domain and therefore cannot be regarded to have the necessary quality of confidence required for the exception to be engaged.
83. It is therefore the Commissioner's decision that both the Ernst & Young financial model document and the 'Victoria Square Financial Implications' slides should be disclosed to the complainant.
84. The Commissioner has gone on to consider the remainder of the withheld information that has been provided by the council that is relevant to the refined request.
85. The Commissioner views it to be the case that such information was shared with the council on a confidential basis in order for Members to be fully aware of the Victoria Square redevelopment proposals before deciding whether to approve the finance for the project.
86. The Commissioner is satisfied that the common law of confidence applies to that information that has been withheld which is not already in the public domain.

Is the confidentiality required to protect a legitimate economic interest?

87. 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.
88. 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 that on the balance of probabilities, 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'.

89. The council has argued that the disclosure of the information would adversely affect the commercial interests of VSWL, and the contractors who have been commissioned to carry out the works.
90. The council has argued that some of the information that has been withheld contains highly sensitive commercial costings. It goes on to say that (at the time of the requests) the project was in its early stages and had not been due for completion until 2020 at the earliest.
91. The council explains that some of the elements of the project have yet to be tendered and disclosure of the withheld information at this stage would prejudice the relevant parties' commercial interests in any future processes and negotiations. It believes that VSWL's negotiating position would be significantly weakened and that future negotiations to do with the development, and its competitive position in the market place, would also be adversely affected.
92. The council has confirmed that VSWL is not agreeable to the disclosure of the information, believing its disclosure would prejudice its commercial interests.
93. The Commissioner has considered the arguments presented by the council and the fact that the project was in its early stages at the time of the requests. She has also taken into account the fact that the project is still ongoing.
94. The Commissioner accepts that the disclosure of the withheld information would have an adverse effect in the legitimate economic interests of VSWL, and other parties who are involved in the project and that this part of the test is engaged.

Would confidentiality be adversely affected by disclosure?

95. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it inevitable that this element will be satisfied.
96. Aside from the Ernst & Young financial model and 'Victoria Square Financial Implications' presentation slides it is the Commissioner's view that the first three elements of the tests cited at paragraph 62 of this notice have been established in respect of that information which has been withheld.

97. The Commissioner is satisfied that disclosure of this information into the public domain would adversely affect the confidential nature of that information making it publicly available, and would consequently harm the legitimate economic interests of VSWL.
98. She has therefore concluded that the exception at Regulation 12(5)(e) is engaged in respect of the withheld information. She 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 the disclosure of that information which falls within the scope of the exception.

Public interest arguments in favour of disclosing the information

99. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
100. The council states that it recognises that there is a strong case for openness and transparency in public affairs when balancing public interest arguments. It has advised that disclosure of the information would enable the public to better scrutinise the public monies spent and provide accountability for the spending of public money.
101. The council has also acknowledged that if residents have a better understanding of how public money is spent, then this may give them more confidence in the integrity of the public authority and in its ability to effectively allocate public funds. It states that, alternatively, it may enable them to make more informed challenges to the spending of public money. The council goes on to confirm that this the largest development scheme within Woking and is now expected to cost in excess of £500 million.
102. The complainant has argued that it is important that the public are able to ascertain whether a '*prudent project*' was presented to Members before they voted on the investment of the scheme and, in addition, whether they were presented with sufficient factual information to make a '*prudent financial decision*'.
103. The complainant has also made comment directly to the council about concerns within the public arena regarding the level of debt to which the council had committed local residents to. He believes that as residents will be ultimately liable for the costs, by way of council tax payments, they are entitled to '*full information*' about the project. The complainant has also argued that, given the time that has passed since the funding

was approved in December 2016 and, as contracts have been exchanged, that much of the information about the project should now be made available to the public.

104. The complainant has also claimed that (at the time of his submissions to the Commissioner) the council's debts were approximately £1.3 billion, making it one of the largest debts of any local authority. He is therefore concerned about the financial commitment that has been given to the Victoria Square redevelopment and what information was known by Members before the finance for the project was approved.

Public interest arguments in favour of maintaining the exception

105. The Commissioner considers that arguments in favour of maintaining the 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 protecting the principle of confidentiality and that of avoiding commercial detriment.

106. The Commissioner has already accepted that the information was shared with the council in circumstances that created an obligation of confidence.

107. The council considers there to be an obvious connection between information that is commercially sensitive and information that is considered confidential. It states that the withheld information is highly sensitive, containing detailed development costs, budget reconciliation and order of costs.

108. It goes on to state that the information requested has been commissioned by VSWL, and not the council, and that the information was provided to the latter in confidence in order for consideration in relation to a loan facility, and was not intended to enter the public domain.

109. The council refers to the fact that it is both the funder of the project and is now a 48% shareholder in VSWL. It regards the redevelopment project to still be in its infancy and, as such, the information is still in use and still commercially sensitive to the parties involved. It adds that the information is not publically accessible by any other means and its release would cause detriment to both VSWL and itself.

110. The council has more recently advised the Commissioner that since the meeting held in December 2016, the budget and costing breakdowns have had to be revised due to a number of major changes; it makes reference to increased fire protection in light of the Grenfell Tower fire and the fact that a major store which formed part of the original development has since gone into administration.

111. It goes on to say that VSWL's negotiating position would be significantly weakened with regards to future negotiations to do with the development and their competitive position in the market place would also be adversely affected.
112. With reference to the specific request for a breakdown of the total acquisition costs, the council has argued that it continues to acquire land in respect of the project and that the release of what specific price it cost to acquire would harm future purchases.
113. The council has also argued that there is already a significant amount of relevant information in the public domain and the disclosure of the information requested would not be of great assistance to the complainant, or the general public, in providing an insight into whether public money has been spent wisely.

The balance of the public interest arguments

114. The Commissioner has considered the arguments put forward both in favour of disclosure and maintaining the exception. She acknowledges the explicit presumption in favour of disclosure under regulation 12(2) of the EIR and the general principles of accountability and transparency of decisions taken involving the expenditure of public money and affecting local residents.
115. In this instance, the Commissioner accepts that a considerable amount of information has been made available to the public with regards to various aspects of the redevelopment plans, overall costings and funding and how the redevelopment will be financed. Various scenarios that might affect the council's lending, such as changes in interest rates on its loans, have also been released, together with how the council would manage its finances in such circumstances.
116. The Commissioner also notes there is some substantive information already in the public domain which refers to the financial risks associated with the redevelopment. The Executive Summary and Agenda dated 24 November 2016 (originally referred to in paragraph 7 of this notice) contains some detailed information relating to this. The council has pointed out that this document also sets out (in paragraph 4.6) a full development cost summary, including the total amount of site acquisition costs. It also includes other financial information relating to the investment.
117. In addition, the Commissioner has identified further documents in the public domain which also include details of the effect of various interest

rate changes to the council's loan³, its liabilities with regards to the PWLB loans⁴ and the potential adverse impact should anything go wrong with the project⁵.

118. The Commissioner also notes that the council has previously informed the complainant that the loans advanced to VSWL would be reported in the Green Book which is published on the council's website⁶. This sets out performance and monitoring information on a monthly basis and includes details of all the loans and payments with the PWLB.
119. The complainant has expressed concerns about the extent of that information provided to Members about the implications of taking out loans with the PWLB in order to finance the Victoria Square project. The Commissioner is mindful that there are separate and more appropriate mechanisms in place, should the complainant wish to raise concerns about the processes which have, or have not, been followed before approving the finds in this instance.
120. The Commissioner would add that she is aware that the council has conducted an investigation into allegations that have been made by a third party about a lack of 'due diligence' by certain senior officers within the council in relation to the funding of the project. The council issued a statement which advised that, in this instance, it viewed it to be in the public interest to disclose the report of the findings of the investigation, which found there to be no wrong doing, in full. ⁷
121. The Commissioner acknowledges that the redevelopment project has generated a lot of public interest, particularly given the level of expenditure which the council was committing itself to. She appreciates that in such circumstances, it would not be unreasonable for the public to expect a greater degree of transparency and openness with regards to the expenditure of public money.

³ https://cl-assets.public-i.tv/woking/document/6a_Victoria_Square_Appendix_1.pdf

⁴ https://cl-assets.public-i.tv/woking/document/7b_Supplementary_Report_Victoria_Square_Appendix_2_Questions_from_Members.pdf

⁵ https://cl-assets.public-i.tv/woking/document/7a_Supplementary_Report_Victoria_Square.pdf

⁶ <https://www.woking.gov.uk/council/pfmi>

⁷ <https://www.woking.gov.uk/contact/media/complaintdecisionnotice>

122. The complainant has also made reference to the potential burden on council tax payers for the debt liability that the council is incurring. The Commissioner is sympathetic to such concerns, however, it is too simplistic to reduce such financial points to a black and white cause and effect. The council's own financial report for 2018/19⁸ shows the total income reported for the year to be £123.4 million, of which council tax comprised £9.2 million. Even if the 'Business Rates collected for government tariff' element is discounted (being cost neutral), the council tax element only accounts for 8.5% of the council's revenue stream.
123. This is not to say that the effect on council tax payers would not be felt in a worst case scenario, as it would be through the wider potential reduction in services as well as possible council tax increases, but that the burden and liability falls far wider than just this area of income.
124. The Commissioner has attached some weight to the argument that the redevelopment is still ongoing and is still subject to change. The council has confirmed that further contracts for works and services will be necessary and that the disclosure of the detailed costings and site acquisition costs would harm the negotiating power of the developer and could result in the negotiation of less favourable terms. This could affect both VSWL as the developer, and the council.
125. In addition, it is the Commissioner's view that, in this instance, the information that had already been released at the time of the complainant's requests did provide the public with some understanding of the redevelopment plans, its costs, how this was to be financed, and the council's involvement, both as the funder, and as a shareholder in VSWL. The council has also continued to provide the public with information about its funding commitments and loan payments to the PWLB.
126. Given the above, the Commissioner has decided that, in this particular case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in maintaining the exception.

Other matters

127. In this instance the Commissioner has felt it necessary to record the difficulty she has experienced obtaining the correct and full disclosure of the withheld information from the council.
128. It has taken several attempts to obtain the information she required from the council and this has led to a significant delay in her making a decision in this instance. In addition, the Commissioner was provided with 'withheld' information that did not fall within the scope of the complainant's requests.
129. The Commissioner also found it to be necessary to issue an Information Notice in order to formalise the need for the council to provide information necessary for the decision.
130. The Commissioner also notes that the council's decision to have a two tier review process created confusion and delays when dealing with the complainant's original requests in this instance. She would therefore recommend that the council carry out a review of the processes it currently has in place to ensure that it deals with any future information requests it receives appropriately and effectively and within relevant timescales.

Right of appeal

131. 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

132. 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.

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

Signed

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