

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

**Date:** 8 March 2018

**Public Authority:** Worcester City Council  
**Address:** The Guildhall  
High Street  
Worcester  
WR1 2EY

**Decision (including any steps ordered)**

---

1. The complainant requested information from Worcester City Council ("the council") relating to its attempts to seek a site for Worcester City Football Club to build a stadium in 2016. The council said that all of the information was exempt under section 41 of the Freedom of Information Act 2000 ("the FOIA"). This exemption relates to information provided in confidence. The Commissioner asked the council to reconsider the request under the terms of the Environmental Information Regulations 2004 ("the EIR"). The council relied on the exception under regulation 12(5)(e). This exception relates to commercial confidentiality. It said that the public interest favoured maintaining the exception. The Commissioner's decision is that insufficient evidence was presented to support the use of the exception. The council also identified that some information was not held. The Commissioner has found breaches of regulations 5(1), 5(2), 14(3)(a) and 14(2) of the EIR.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - The council should provide a notice to the complainant specifying the information that was not held and relying on regulation 12(4)(a) of the EIR.
  - The council should disclose the information that was held to the complainant.

3. 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

---

4. On 22 March 2017, the complainant requested information from the council in the following terms:

*"During the period 21/1/16 to 31/10/16 I believe the council attempted to find a suitable site for Worcester City Football Club to build a stadium, other than Perdiswell Park.*

*During that time (21/1/16 – 31/10/16), could you tell me:*

- i) how many potential sites in total, other than Perdiswell Park, were suggested to Worcester City Football Club and WCFC Supporters Trust?*
- ii) how many of these potential sites were owned by Worcester City Council*
- iii) how many of these potential sites were owned by Worcestershire County Council?*
- iv) how many of these potential sites were privately owned (ie: by a company, organisation or person other than the authorities specified above)?*
- v) how many of these potential sites were brownfield land?*
- vi) how many of these potential sites were visited by representatives of Worcester City Football Club and/or WCFC Supporters Trust (that you are aware of)?*
- vii) how many of these potential sites were refused by both Worcester City Football Club and WCFC Supporters Trust?*
- viii) how many of these sites were refused by WCFC Supporters Trust but considered potentially acceptable by Worcester City Football Club?*
- ix) what reasons were given for the various sites not being suitable (eg: location, requirement to buy, cost of renting/leasing, lack of transport infrastructure)?*

5. The council replied on 24 March 2017. It said that the information it held was exempt under section 41 of the FOIA.
6. The complainant requested an internal review on the same day.
7. The council completed an internal review on 21 April 2017. It said that it wished to maintain its position.

## Scope of the case

---

8. The complainant contacted the Commissioner on 20 July 2017 to complain about the way his request for information had been handled. She asked the Commissioner to consider whether the council had correctly withheld the information.

## Reasons for decision

---

### Background

9. Worcester City Football Club ("WCFC") and Worcester City Football Club Supporters' Trust ("Supporters' Trust") submitted a joint planning application for a new football stadium at Perdiswell. Details of this application are available via the following link:

<http://planning.worcester.gov.uk/OcellaWeb/planningDetails?reference=P14M0176&from=planningSearch>

This request relates to alternative sites considered to Perdiswell. The planning application at Perdiswell was, at the time of the information request, yet to be determined. This application is currently the subject of an appeal to the Planning Inspectorate and the council continues to work with WCFC to explore the possibility of bringing forward another site for a community football facility.

10. The council explained that a working party was set up to discuss the suitability of land for a new stadium for WCFC comprising of representatives of WCFC, the Supporters' Trust, political leaders and the council. The working party met on various dates from 2016 to 2017. At the first meeting, all attendees were required to sign a confidentiality agreement relating to the proceedings.

### Environmental information

11. The council originally dealt with this request under the EIR however it accepted the Commissioner's view that the request should have been considered under the EIR. Under regulation 2(1)(c), environmental information is any information on plans affecting or likely to affect the elements and factors of the environment. It is clear that a plan for a new stadium would affect the land.

### Regulation 12(5)(e)

12. This exception concerns the confidentiality of commercial or industrial

information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality required to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

**Is the information commercial or industrial in nature?**

13. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
14. The council said that the information discussed in the meetings of the working party related to the suitability of land for a new stadium for WCFC. It said that the location and constraints of particular sites is on any ordinary analysis commercial information. The Commissioner agrees that the process of seeking a new site for the football club was a commercial activity.

**Is the information subject to confidentiality provided by law?**

15. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
16. The council said that the proceedings of the working party were subject to a confidentiality agreement. It considered that this represented a contractual obligation of confidence. The council provided a copy of this agreement to the Commissioner. Having inspected this agreement, the Commissioner accepts that there was a relevant contractual agreement in place that imposed a duty of confidence.

**Is the confidentiality required to protect a legitimate economic interest?**

17. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner

interprets “would” to mean “more probable than not”. In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) 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”.*

18. The Commissioner will not accept speculation about prejudice to the interests of third parties. She expects public authorities to provide evidence that the arguments being presented genuinely reflect the concerns of the relevant third parties. This is in line with the decision of the Information Tribunal in the case of Derry City Council v the Information Commissioner (EA/2006/0014). In the latter case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air but as the arguments expressed only represented the council’s own thoughts on the matter, the tribunal rejected the arguments.
19. The council explained that it wished to rely on the arguments it had presented in its internal review on 21 April 2017. It said that individuals and organisations would be discouraged from confiding in the council if they did not have a degree of certainty that this trust will be respected. It added that disclosure of the information would undermine the relationship of the council with key stakeholders and impact on the members of the working party having future discussions with the council. The council provided a supporting statement from a representative of the working party who agreed with the position that disclosure would erode the degree of trust and confidence in the process, when the issue remains ‘live’. A brief comment was made that there would be commercial prejudice.
20. Following the Commissioner’s guidance, the council consulted the members of the working party. It provided copies of the responses received. WCFC objected to the disclosure. It provided the following comments:

*“I can confirm that as a Club we would not be happy to release information in the public domain concerning our joint working party in connection with the Clubs search for a new site back to Worcester. There was much rancour at that time on the issues of confidentiality and as you know we diligently kept to this and would not be very disappointed if that commercial discipline were to now have proved to have been to no avail”.*

21. A consultant for the Supporters' Trust reached a different view and commented that there was no issue with the release of the information provided that the council was happy for the information to be available to the requester.

22. A further view from a political leader that was part of the working group was as follows:

*"1) My gut feeling is...we should be as transparent as possible – ie a presumption to publish if all parties to the confidentiality agreement agree.*

*2) There are no matters contained in the meeting minutes or agendas that I would regard as creating a difficulty in publishing.*

*However I can not speak for the other parties involving in making the confidentiality agreement".*

23. As stated above, there is a high threshold of evidence required to support the use of this exception. A public authority must be able to demonstrate that disclosure would "more probably than not" cause commercial harm. Where the argument is being made on behalf of a third party, the Commissioner would expect to see a thorough case made by the third party that refers to the specific withheld information in question. The Commissioner did not consider that the council or the third parties had provided appropriate evidence to support the decision to withhold the information from the requester.

24. The council largely relied on the limited arguments it had made in support of the use of the exemption under section 41 of the FOIA. None of these arguments are relevant to the question of whether disclosure would cause commercial prejudice. Moreover, there was no attempt to link the actual information requested with prejudice or to describe the precise nature of the commercial prejudice that was envisaged. The Commissioner is not able to accept 'generic' arguments that the information would erode trust and confidence, hamper future discussions or discourage organisations from confiding in the council in the absence of specific argument. It is worth bearing in mind the well-trodden principle in this context that public authorities are not able to 'contract out' of their obligations under the FOIA through confidentiality agreements or other means. A genuinely persuasive argument must be presented in support of any given exception and that was not the case here.

25. The third party evidence was also limited and unconvincing. Again, there was no attempt to deal with the specific information that had been requested and no argument was made to suggest that there would be commercial prejudice.

26. The Commissioner has also had regard to the revealing comments by other members of the working party, who generally seem untroubled by the information and the idea of transparency in relation to this request. The only concern seems to be that there would ideally be a consensus about disclosure.
27. For the reasons above, the Commissioner was not able to accept the use of the exception under regulation 12(5)(e). In view of this, it is not necessary to consider the associated public interest test. As the exception was not engaged, the Commissioner has found that the council breached its obligation to provide environmental information upon request in accordance with regulations 5(1) and 5(2) of the EIR.

**Regulation 12(4)(a) – Information not held**

28. This exception should be relied upon when requested information was not held. During the Commissioner's investigation, the council prepared a response to the request and in doing so, identified that some of the information was not held. It should have provided a refusal notice to the complainant relying on regulation 12(4)(a). This was a breach of regulation 14(3)(a) and 14(2) of the EIR.

## Right of appeal

---

29. 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)

30. 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.
31. 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 .....**

**Elizabeth Archer**  
**Senior Policy Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**