

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 24 October 2019

**Public Authority:** City of York Council  
**Address:** West Offices  
Station Rise  
York  
YO1 6GA

#### **Decision (including any steps ordered)**

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1. The complainant has requested information held by City of York Council (the council) about York City Football Club and its contribution to the funding of a new community stadium.
2. The council provided the complainant with some information in response to his request. During the course of the Commissioner's investigation the council then confirmed that a small amount of additional information could also be released. However, the council maintained that it was correct to have withheld the remainder of the information relevant to the request under regulation 12(5)(e) of the EIR-confidentiality of commercial or industrial information.
3. The Commissioner's decision is that the council was correct to have considered parts 1, 2, 3, 4, 5 and 7 of the request under the EIR. However, it should have considered part 6 of the request under the Freedom of Information Act 2000 (FOIA).
4. The Commissioner is satisfied that, with the exception of some information requested at part 2 of the request, the council is entitled to rely on regulation 12(5)(e) of the EIR, and section 43(2) of the FOIA, when withholding that information identified as being relevant to the request.

5. The Commissioner requires the council to take the following steps to ensure compliance with the EIR.
  - In response to part 2 of the request, disclose the information contained within the Loan Agreement, with the exception of the interest rate charge figures and the last page of the document, which constitutes third party personal data.
  - Release the relevant extract from the Deed of Priorities, if it has not already done so.
6. The council 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

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7. In 2002, the York City Supporters' Society Limited (the Trust) was set up with the aim of trying to secure the future of York City football club, which had gone into administration. It went on to form a new company, York City Football Club Ltd (York City).
8. York City subsequently negotiated a low interest loan of £2m from the Football Stadium Improvement Fund (FSIF), which it used to acquire a majority shareholding in Bootham Crescent Holdings, a company which owned York City's home ground of Bootham Crescent. The FSIF loan is to be converted into a grant payment upon York City meeting a condition to move to a new stadium.
9. In 2006 a transfer of shares was agreed and a company owned and operated by the club Director, who was investing further money into the club, became the majority shareholder of York City.
10. In 2009 a business case for a community stadium (the stadium) in York was formally submitted to the council's executive committee. The facilities included plans for the stadium, a number of different leisure and athletic facilities for community use, a cinema, retail units etc. The Commissioner understands that whilst the construction of the stadium has been subject to some delay, it is now close to completion.
11. The current plan is that York City, who has made a commitment to pay up to £2m towards the financing of the new stadium, will move there upon its completion sometime in the current football season.

## Request and response

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12. On 27 December 2018 the complainant wrote to the council to request information relating to York City's contribution to the development of the new community stadium. The council provided its response on 18 January 2019.
13. The complainant's request was set out in six separate parts and has been edited below for the purposes of this decision notice to include the council's response to each part:

### Complainant

*Please provide me with a copy of the following items:*

1. *Evidence showing that city of York council have a secured fixed legal charge over Bootham crescent for £2m and that the £2m will be received in full on the same of Bootham crescent.*

### Council response

*Please note that the charging structure for the land is publicly available from the Land Registry for title NYK239566 showing the legal charge dated 19 December 2014. Enclosed is the registration of Charge document, again publicly available this [sic] from Companies House. The Council Executive report of March 2016 confirms this is the case. This is publicly available from:*

<https://democracy.york.gov.uk/ieListDocuments.aspx?CIId=733&MIId=8847&Ver=4>

### Complainant

2. *Evidence showing that city of York council will loan York city football club c£350,000.*

### Council response

*Can [the complainant] please confirm what he is referring to here and in which document this comes from?*

### Complainant

3. *Evidence showing that the council have secured a fixed legal charge over Bootham Crescent for c£350,000 or any other evidence showing the security.*

Council response

*Please note the charging structure for the land is publicly available from the Land Registry for title NYK239566 showing the legal charge dated 19 December 2014. Enclosed is the registration of Charge document, again publicly available this [sic] from Companies House.*

Complainant

- 4. Evidence showing city of York have carried out a duty of care exercise to ensure that they [sic] will be sufficient equity on the sale of Bootham Crescent to enable the council to receive the full £2m grant contribution towards the cost of the new stadium project and also cover the £350k loan ie sufficient to pay the council £2.35m plus interest.*

Council response

*This amount is incorrect. The total contribution as noted in several public executive reports is £2m. City of York Council has carried out a number of valuations of the Bootham Crescent site. I can confirm that we do hold the information. However, it is exempt under section 43 of the FOI Act as we are satisfied that to release this information would prejudice our commercial interests, and also we are satisfied that the public interest in withholding this information, outweighs the public interest in disclosing it. Enclosed is the registration of Charge document, again publicly available this [sic] from Companies House.*

Complainant

- 5. Evidence showing the valuation of Bootham Crescent shows that it adequately covers the debts, so that city of York council will receive the full £2m on the sale of Bootham Crescent or before demolition commences.*

Council response

*I can confirm that we do hold this information. However it is exempt under section 43 of the FOI Act as we are satisfied that to release this information would prejudice our commercial interests, and also we are satisfied that the public interest in withholding this information, outweighs the public interest in disclosing it.*

Complainant

- 6. Evidence showing that York City Football club will pay commercial rent at the new stadium, I am aware of a figure of £100k per annum has been in the public domain and also in various council business*

*case reports etc. Please provide up to date evidence showing how much rent York city football club pay per annum.*

Council response

*I can confirm that we do hold the information. However, it is exempt under section 43 of the FOI Act as we are satisfied that to release this information would prejudice our commercial interests, and also we are satisfied that the public interest in withholding this information, outweighs the public interest in disclosing it.*

Complainant

7. *The council's own business case shows a £2m payment coming in to the stadium budget from York city fc towards the project costs, it's clear that the council are cash flowing the payment out of there [sic] own resources and would like evidence showing that interest will [sic] added until the council receive the payment in full, once Bootham Crescent is sold.*

Council response

*The agreement for charge agreed with Bootham Crescent Holdings, the Football Stadia Improvement Fund, CYC and JM Packaging is confidential. I can confirm that interest is payable on these amounts in line with the agreed terms of the agreement and chargeable to the sale of Bootham Crescent. Enclosed is the registration of Charge document, again publicly available this from Companies House.*

14. On 19 January 2019 the complainant requested an internal review. He complained that the council's response to parts 1, 2 and 7 did not include the charging structure ("Deed of Priorities") and that he required 'a copy as requested'. With regard to part 2, he advised that the information he was referring to was as follows:

*A) Third party legal agreement 19 March 2014.....York city fc (borrower) and city of York council....(lender).*

*B) ....Executive report March 2016 item 116 which I assumed the council was lending YCFC £350k to pay the up front payment into the project prior to construction commencement. Please provided [sic] Deed of priorities or other evidence ie any loan agreements as evidence as requested.*

15. With regards to item 4, 5 and 6, the complainant asked that the council provide evidence as previously requested, stating that, at the very least, it should be supplied to him in a redacted format.

16. On 11 March 2019 the council provided its internal review response. It advised that it should have considered the request under the EIR, rather than FOIA.
17. The council went on to say that it understood the complainant was requesting further consideration only of parts 1, 2, 4, 5, 6 and 7 of his request. It confirmed that it held the information requested but regarded it to be exempt from disclosure under regulation 12(5)(e) of the EIR.
18. The council also provided the complainant with some further explanation as to why it believed that the release of the information requested would be detrimental and adversely affect its economic interests.
19. The council went on to confirm that it was intending to publish some of the information that had been withheld, once certain financial transactions had been finalised.

## **Scope of the case**

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20. The complainant contacted the Commissioner on 8 March 2019 to complain about the way his request for information had been handled.
21. During the course of the Commissioner's investigation, the council confirmed that a small amount of additional information could now be released, but maintained its decision to withhold the remaining information relevant to the request under regulation 12(5)(e).
22. The Commissioner has firstly considered whether the information held relevant to each part of the complainant's request falls under the scope of the EIR, or the FOIA.
23. She has then gone on to determine whether the council was entitled to withhold information in response to the complainant's request.

## **Reasons for decision**

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### **Part 1 of the request**

24. The Commissioner regards considers there to be two elements to part 1 of the request. The first element is *'evidence showing that the city of York council have secured fixed legal charge over Bootham Crescent for £2m....'* The second element is evidence *'that the £2m will be received in full on the sale of Bootham Crescent.'*

*Is the information environmental?*

25. The definition of environmental information is set out at regulation 2(1) of the EIR as follows:

*"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:*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a):*
- (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:*
- (d) reports on the implementation of environmental legislation:*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).*

26. With regard to part 1 of the request, the council has argued that the legal charge fundamentally relates to the reasons that it is place, the provisions it covers and how the charge has been calculated. It goes on to say that the *'material consideration relating to how the charge is calculated relates to the value of the land.'* It states that it considers that the value of the land includes the state of the water, soil, land, landscape and structures within the site and how this will impact on current and potential for future use.



27. The council also states that it believes that the placing of the charge is a measure likely to affect the elements of the environment as it places limitations on how the site can be used during the term of the charge and how it can be disposed of. It goes on to say that it believes this to be a cost benefit analysis relating to securing the state of elements within the site to maintain the sites value and the council's interest in it.
28. The Commissioner notes that the Aarhus Convention Implementation Guide<sup>1</sup> provides for a broad approach to be taken when considering what is environmental information stating that:

*the clear intention of the drafters, however, was to craft a definition that would be as broad as possible, a fact that should be taken into account in its interpretation.*
29. The Commissioner also notes the comments made by the council that, by considering the request to fall in its entirety under the EIR, information was more likely to be released than if the request had been considered under the FOIA.
30. Part 1 (in part) of the request relates to a charge that has been placed by the council on Bootham Crescent. It is the Commissioner's view that a charge is not, in itself, necessarily environmental information. The terms of the legal charge, whilst being a charge on a particular piece of land, solely relate to a financial agreement and is a method by which an entity can protect a financial interest. As far as the Commissioner understands, this gives the council an interest over the club's assets, that being its football ground; it does not confer any ownership rights.
31. However, the Commissioner has to consider the specific circumstances of the case as this can affect whether information is environmental for the purposes of the EIR. In this case the charge has been registered as a result of the club's commitment to pay a contribution towards the construction of a new stadium and it provides the council with some assurance that it will receive payment upon the sale of Bootham Crescent.

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[https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)



32. The Commissioner is satisfied that information relating to the financing of the development and construction of the new stadium is sufficiently connected to a measure (the development and construction of the stadium) to be an integral part of the development. The council has registered a charge on Bootham Crescent to ensure that the financial commitment made by York City to contribute to the development is met. Whilst appreciating that this may be taking a very broad approach to the definition of environmental information, the Commissioner accepts it is appropriate to do so in this instance.
33. With regard to the second element of part 1 of the request, the information requested relates to the contribution made by York City to the construction costs of the new stadium following the sale of the ground at Bootham Crescent for re-development. The sale price, and York City's contribution to the new stadium will be dependant, at least in part, on the redevelopment value of the land at Bootham Crescent. Having taken the same approach to that set out in paragraph 32 of this decision notice, the Commissioner is satisfied that the second element of part 1 of the request can also be considered to fall under the scope of the EIR.
34. She has therefore gone on to consider whether the council has dealt with all of part 1 of the request in accordance with its obligations under the EIR.

#### Regulation 5(1) of the EIR

35. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request, if it not excepted from its duty to do so.
36. The council states that it has provided all the information held relevant to part 1 of the request. In its response to the complainant it advised that this information was held in the '*Third Party Legal Charge over Bootham Crescent Football Ground*' (Legal Charge) document, which is available on the Land Registry website. The council also advised that further details were available within a cabinet report dated 17 March 2016<sup>2</sup>, published on its website.

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<sup>2</sup> <https://democracy.york.gov.uk/ieListDocuments.aspx?CIId=733&MIId=8847&Ver=4>

37. The Commissioner is satisfied that the Legal Charge document provides a full response to the first element of part 1 of the request. However, it makes no reference to York City's commitment to pay up to £2m following the sale of Bootham Crescent. Whilst the reports published at various meetings held by the council, including the report of 17 March 2016, confirm that a charge exists, and also cite the maximum £2m contribution to be made by York City on the sale of Bootham Crescent, the Commissioner does not accept that this is the 'evidence' that has been requested, i.e. it is not proof by way of a formal agreement that York City will pay up to £2m on the sale of the ground.
38. Therefore, the Commissioner is of the view that the information originally provided to the complainant by the council did not fully answer the second element of part 1 of the request.
39. However, the council has now confirmed that some additional information can be provided to the complainant. This information, extracted from a 'Deed of Priorities' document held by the council, does, in the Commissioner's view, constitute evidence of the formal agreement made between parties of York City's contribution of £2 million.
40. As a result, the Commissioner does not require the council to take any further action in respect of item 1 of the request.

## **Part 2 of the request**

### *Is the information environmental?*

41. Part 2 of the request relates to a loan agreement between York City and the council for £350,000. The council has explained that this loan is a method of formalising York City's agreement to make a financial contribution to the development and construction of the new stadium. The Commissioner is satisfied that this is therefore integral to a measure that affects the environment, that being the development and construction of a new stadium, and that it is environmental information for the purpose of this request.
42. Before going on to consider the information that is held relevant to part 2 of the request, the Commissioner believes it to be of some relevance to provide some further detail about York City's financial contribution to the new stadium. This is because the complainant has made reference to an agreement for York City to pay £2 million, plus an additional £350k, plus interest to the council, suggesting that there may be some confusion about the terms of the current agreement.
43. The council has provided detailed explanations, both publically, and in its responses to the complainant and the Commissioner, as to why

there are the two figures cited (£350k and £2m) in relation to York City's financial contribution to the stadium.

44. The cabinet report of 17 March 2016 (and other reports published on the council's website) confirm that York City's agreed contribution of £2m is not due until the sale of Bootham Crescent (and that this is unlikely to occur until after the construction of the new stadium is complete). The report also states that the '*risk of not receiving the contribution is mitigated through the Council legal charge on Bootham Crescent upon its sale and through securing £0.35m from YCFC from the outset of the NSLC [new stadium] contribution.*'
45. The council's internal review response to the complainant advised that:  
  
*The amount subject to charge is in total £2m plus interest which will be paid in full on the sale of Bootham Crescent. The loan of £350k is in effect a deferred payment. There is no money being physically loaned to YCFC [York City], it is described as a loan as it will not be paid at the time due. It is accepted that this money due on completion of the new stadium, and which is part of the £2m subject to charge, will be paid on the sale of Bootham Crescent. This money is therefore subject to an interest charge, also charged to Bootham Crescent. The total is £2m plus any interest due, payable on the same of Bootham Crescent'.*
46. The council has further clarified this point in its representations to the Commissioner. It states that the original business case only required a commitment to pay a minimum of £350,000 to get the project approved from York City, and therefore it was agreed to do this by way of a loan agreement. The council has confirmed that it never gave York City £350,000 and that it was, historically, a way of legally capturing the fact that York City owed money dating back to the original approvals. The council has therefore clarified that the charge is up to £2 million in total, including the £350,000, plus interest.

#### Regulation 12(5)(e)-commercial interests

47. The council has advised that it has applied regulation 12(5)(e) to all the information that it has withheld that is relevant to the complainant's request. This includes information that the Commissioner regards to be relevant to part 2 of the request.
48. Regulation 12(5)(e) states:  
  
*For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-*

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.*

48. The Commissioner's published guidance<sup>3</sup> on this exception explains that, in order for this exception to be applicable, there are a number of conditions that need to be met. These are:

- 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?

49. Whilst the Commissioner understands that the loan of £350,000 was a '*paper exercise*' with no money physically changing hands between York City and the council, she is satisfied that the council does hold some information relevant to part 2 of the complainant's request. This is contained within the Deed of Priorities and a Loan Agreement.

50. With regard to the Deed of Priorities, the council has confirmed that an extract from this can now be released. The Commissioner is satisfied that this information is all the '*evidence*' contained within that document that is relevant to part 2 of the request.

51. The council has also confirmed that an extract from the Loan Agreement can now be released in order to satisfy part 2 of the complainant's request. However, the Commissioner regards the entire Loan Agreement to fall within the scope of part 2 of his request. This is because the complainant has asked for evidence that the council will loan York City £350,000 and, in the Commissioner's view, the Loan Agreement in its entirety constitutes such evidence. She has therefore considered whether regulation 12(5)(e), as cited by the council, is applicable to the withheld information contained within the Loan Agreement.

52. The Commissioner will firstly consider whether the four conditions required for the exception at regulation 12(5)(e) to be engaged (as set

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<sup>3</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)

out in paragraph 48 of this decision notice) have been met in relation to the information contained within the Loan Agreement.

*Is the information commercial or industrial?*

53. Whilst the council has not made direct reference to the Loan Agreement in its representations to the Commissioner, it has provided arguments as to why interest rates that relate to the financial arrangements agreed between the council and York City should not be released. The Commissioner has therefore taken such arguments into account when considering the withheld information contained within the Loan Agreement.
54. The Commissioner accepts that the Loan Agreement sets out the terms of a financial arrangement where interest is to be charged at the time that the loan takes effect. She is satisfied that the loan relates to a commercial activity, that being a financial arrangement between the parties that relates to the development of a new stadium, and it is therefore commercial in nature.

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

55. The Commissioner considers this to include to confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
56. The Commissioner accepts that whilst the loan amount agreed is in the public domain, the interest rate charged is not. She also accepts that this particular information is not trivial in nature and that it has the necessary quality of confidence.
57. However, the Commissioner is not persuaded that the remaining part of the Loan Agreement attracts the same quality of confidence as the interest rate charged.
58. The terms of the loan, other than that which directly relates to the interest charges that would need to be met, do not appear to be unique or in any way extraordinary. The agreement appears to be very similar in format to other standard loan agreements and the Commissioner has therefore found some difficulty determining, based on the arguments presented by the council, what detriment would be caused to any party, should this information be released.
59. As a result, aside from the interest rate charge figures, the Commissioner is not persuaded that the second condition required for the exception to be engaged has been met in relation to the rest of the information contained within the Loan Agreement, and this should therefore be disclosed to the complainant.

60. Given the decision set out above, the Commissioner has gone on to consider only the interest rate figures set out in the Loan Agreement when deciding whether the remaining conditions have been met for the exception to be engaged.

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

61. The Commissioner considers that, in order for the third condition of the exception to be satisfied, disclosure of the interest rate charge would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
62. The Commissioner is satisfied that the disclosure of the interest rate set by the council for the loan could undermine its position when arranging further loans with third parties. This is because it could affect its ability to negotiate such loans, and this could have a detrimental effect on its financial position, and the public purse.
63. The Commissioner is therefore satisfied that this condition of the exception has been met in relation to the interest charge figures contained within the Loan Agreement.

*Would confidentiality be affected by disclosure?*

64. As the first three conditions of the test have been established, the Commissioner is satisfied that disclosure of the interest rate charge into the public domain would adversely affect the confidential nature of the information by making it publicly available and would consequently harm the legitimate economic interests of the council.
65. The Commissioner therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the interest charge rate contained within the Loan Agreement. 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.
66. When carrying out the public interest test the Commissioner has taken into account the presumption towards disclosure required by regulation 12(2). The test is whether the public interest in the exception being maintained is outweighed by that in the information being disclosed.

*The public interest in the information being disclosed.*

67. The council advised that it considered the main public interest arguments in favour of disclosure to be transparency and accountability. It states that it accepts that it is in the public interest

to show best value for the public purse, and that arrangements are being made fairly and competitively without preference for individuals.

*The public interest in maintaining the exception*

68. Whilst the council has provided the Commissioner with a number of public interest arguments in support of maintaining the exception, some of these are not relevant to the information that has been withheld within the Loan Agreement. However, the council does state that the release of certain financial transactions would result in loss of credibility in negotiating financial deals and be detrimental to the public purse, stating other organisations may '*want to drive down costs*'. The Commissioner does view these particular arguments to be relevant to her consideration of the public interest when making her decision in respect of part 2 of the request.
69. The Commissioner has also taken into account the information about the loan that is already in the public domain; this provides the public with some understanding of how much the loan is, why it exists as a '*paper exercise*', and how it relates to York City's agreed financial contribution to the stadium of up to £2m.
70. The Commissioner accepts that the disclosure of the interest rate charge will provide further transparency in the process followed by the council. However, she does agree with the council that the disclosure of the interest rate charge will indicate the level of financial risk taken by the council, and its disclosure may undermine its ability to agree competitive loans with other third parties in the future.
71. The Commissioner therefore considers that, with regard to the information contained within the Loan Agreement which directly reveals the interest rate charge, the public interest in withholding that information outweighs that in the information being disclosed.
72. The Commissioner's decision therefore is that the council should now disclose the information contained within the Loan Agreement, other than the figures that directly show the interest rate charged, and also the last page of the Agreement which contains third party personal data that the Commissioner is satisfied is exempt from disclosure.

**Part 3 of the request.**

73. It was not clear from the complainant's representations whether he wanted the Commissioner to consider further the council's handling of part 3 of his request. For the sake of completeness the Commissioner has considered it appropriate to do so and has decided that the information that the council has provided in response to point 1 and 2 of the request, also satisfies part 3 of the request.



74. Therefore, the Commissioner does not require the council to take any further action in response to part 3 of the request.

### **Parts 4 and 5 of the request**

#### *Is the information environmental?*

75. The value, and sale, of the Bootham Crescent site is the primary focus of the term of both part 4 and part 5 of the request.
76. The Commissioner understands that the site is to be sold for redevelopment and that there are already some proposed plans in place. She accepts that these factors are likely to affect the value of the site, and its sale.
77. As a result, the Commissioner considers that the withheld information relevant to part 4 and part 5 of the request relates to information held that is connected to the redevelopment of land and property and is environmental under regulation 2(c) of the EIR. It should therefore be considered under this access regime.

#### Regulation 12(5)(e)

78. The council, when providing the withheld information for the Commissioner's consideration, provided a valuation that was dated 2016. However, the correspondence which the council sent with the withheld information refers to a valuation in 2019 (which, if correct, would have fallen outside the scope of the request).
79. In any event, the Commissioner regards the copy of the valuation that has been provided by the council to be sufficient when considering whether the council was correct to withhold any information held relating to the valuation of the site under regulation 12(5)(e) of the EIR.
80. The Commissioner has firstly considered whether the four criteria required for regulation 12(5)(e) to be engaged (as set out in paragraph 48 of this decision notice) have been met.

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

81. The council has stated that the information is a commercial valuation of a piece of land (Bootham Crescent) that is intended to be sold for the best price possible. The Commissioner is satisfied that this is sufficient for her to accept that the information is commercial in nature.

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

82. The council has advised that information relating to the valuation of land is confidential. It states that it is aware that there is some information about what the land in question may be potentially worth in the public domain. However, this does not match the information it holds and therefore the council states that it is satisfied that the information requested is not already in the public domain.
83. The Commissioner notes that the withheld information relating to the valuation consists of detailed professional advice provided by a third party company. She accepts that this information is not otherwise in the public domain, and that it is not trivial in nature. The valuation has been obtained by the council in order to assess the likelihood of receiving York City's £2m contribution towards the development and construction of a new stadium, following the sale of the Bootham Crescent site. The Commissioner understands from the information provided by the council that, at the time of the request, the sale of site was not complete and was still subject to negotiation.
84. Given the above, the Commissioner is satisfied that those parties involved in the sale of the site would not have expected the council to disclose the valuation and advice received whilst negotiations were ongoing. She therefore accepts that the relevant information has the necessary obligation and quality of confidence and that the second condition of the exception is met.

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

85. The council has advised that the disclosure of the valuation would affect its own legitimate economic interests because it may jeopardise a substantial sum of money paid to the public purse due from the sale of the site. It states that to release a valuation, which was paid for in confidence, would help any buyer to potentially negotiate a lower sale price. The council states that the sum it had agreed with York City upon the sale of the site cannot be put to such risk.
86. The Commissioner is satisfied that a disclosure of the information relating to the valuations held by the council could affect the sale of the land and its value and this, in turn, could affect the monies received by the council following the sale of the site. She therefore accepts the council's argument that the confidentiality is in place to protect its economic interests.

Would confidentiality be adversely affected by disclosure?

87. As the first three conditions of the test have been established, the Commissioner accepts that disclosure into the public domain would adversely affect the confidential nature of the information by making it publicly available. This would consequently harm the legitimate economic interests of the council.
88. The Commissioner is satisfied that the exception at regulation 12(5)(e) is engaged in respect of that information held relating to the valuation of the site. She has therefore gone on to consider the public interest test.

The public interest in the information being disclosed

89. The Commissioner has again considered the arguments presented by the council that it would provide for transparency and accountability.

The public interest in the exception being maintained

90. The council has argued that to release the valuation it has obtained for the site could affect negotiations that other third parties currently have in relation to the value and sale of the site. The Commissioner is mindful that this, in turn, may affect the revenue that York City, and therefore the council, receive following the sale. This could also then have an impact on the development of the stadium and also the costs to the public purse.
91. The Commissioner has had some difficulty establishing the benefit to be gained from disclosing details of the advice received by the council in relation to the valuation of the site prior to its sale. However, she regards the detriment that could be caused as a consequence of its release at the time that the request was made to be real and significant.
92. As a result, the Commissioner is satisfied that the public interest weighs in favour of maintaining the exception in respect of the information held relevant to parts 4 and 5 of the request.

**Part 7 of the request**

93. When responding to part 7 of the request, the council advised the complainant that the agreement for charges between various parties is confidential, but did confirm that interest is payable in line with the agreed terms. It refers to the publicly available registration of charge document as being relevant to the request.

94. The Commissioner, having considered the terms of part 7 of the request, is of the view that her consideration of parts 1 to 4 of the request already takes into account the information held that is relevant to part 7 of the request. Therefore, any information that the complainant is entitled to receive to answer this part of his request has already been addressed and requires no further consideration within this decision notice.

### **Part 6 of the request**

#### *Is the information environmental?*

95. Part 6 of the request relates to the rent to be charged to the football club at the new stadium. The information identified by the council as being most pertinent to this part of the request is contained within the '*Lease and Match Day Agreement*' (lease agreement).
96. The council has argued that the amount of rent which is calculated is based on the facilities and services provided in the lease agreement. It states that this lease agreement covers the use of a laundry, kitchens and parking facilities and rights to light and air. It also sets out responsibilities including those for utilities, electricity, gas, water and sewerage, the ability to attach scaffolding, signs, placards, boards and posters to the structures and the right to attach a structure, fixture or fitting to the boundary of the property.
97. In addition, the council has argued that the lease agreement covers environmental issues in the detail of responsibility for clearing snow, maintenance of the pitch and restrictions on how often the pitch can be used and for what purpose. The council states that the payment, or non-payment, of the rent would have a significant impact on the rental agreement, the use of the stadium and the responsibility for environmental factors. It goes on to say that evidence of the payment of costs is therefore also considered to fall under the provisions of the EIR.
98. The Commissioner does not agree with the council that the information relevant to this part of the request can be viewed to fall under the scope of EIR. This information primarily concerns the lease agreement between the football club and the council at the new stadium. The Commissioner understands that the lease itself does not require any specific changes to the footprint of the building, or the surrounding area, and its terms do not require any further planning consents. On this basis, whilst accepting that a broad approach can be taken when considering whether information is environmental, she does not agree that the definition can be extended to such an extent to include the rental/lease agreement itself. The Commissioner is therefore satisfied

that the information held relevant to part 6 of the request falls under the scope of the FOIA.

99. In saying the above, in this particular instance, the difference of opinion between the Commissioner and the council about the correct information access regime has less relevance as a consequence of the council applying regulation 12(5)(e) to all the information that it has withheld in response to the complainant's request. This is because the Commissioner regards the council's arguments to be relevant, and transferable, to section 43(2) of the FOIA.

#### Section 43(2) of the FOIA-commercial interests

100. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

101. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual, or of substance, and;
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

102. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant party, the Commissioner

expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

103. In this instance, the council has provided no evidence of any communication with any third parties about the potential disclosure of the lease agreement in response to the complainant's request. Given this, the Commissioner only intends to consider the arguments put forward as they relate directly to the council.

104. The Commissioner will firstly consider whether the three criteria required for the exemption to be engaged, as set out in paragraph 101 of this decision notice, have been met.

#### Applicable interests

105. When identifying applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.

106. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance<sup>4</sup> on the application of section 43 provides the following description:

*A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.*

107. The Commissioner considers that details of how a business (the council) will deliver a service (as set out in the lease agreement) relates to a 'person's ability to participate in a commercial activity.' Given this, in the context of this case, the Commissioner is satisfied that the information contained within the lease agreement relates to a commercial interest.

#### Nature and likelihood of prejudice

108. A public authority must be able to point to prejudice which is real, actual or of substance. The disclosure of information must have some effect on the applicable interest, and this effect must be detrimental or damaging in some way.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

109. It is therefore not sufficient 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'.
110. The council has advised that, at the time of the request (and it would appear that it is still the case) the lease agreement had not been finalised and won't be until it has been executed. It argues that the information should be withheld to protect its own commercial interests. It goes on to say that to release the rental figure in advance of signing the document may affect the values achieved and, or, provide confusion in a final figure being released which differs from the figure at this point.
111. The council also states that other prospective tenants or partners may be put off by discussions held in public which would affect the revenue and business model for the site, and this would be significantly detrimental to the public purse. The council goes on to say that this would be particularly the case if the release of the figures impacted on its ability to negotiate with other prospective partners who may want to drive down costs based on agreements with others, meaning negotiations are not on a level playing field for the public purse. The council also argues that this would directly affect the public funding it has to support the site.
112. The Commissioner regards it to be pertinent that the lease agreement is still not complete and is therefore potentially subject to change. Given that a final agreement has not been made on the terms of the lease between the council and York City, the Commissioner accepts that premature disclosure of the lease agreement at this time could have a bearing on both this, and possibly other negotiations and transactions which the council is involved in. Whilst appreciating that York City are the only large football club who are due to use the stadium, other sporting clubs may be interested in using the stadium. It is noted that it has already been confirmed that the new stadium will also be the home ground of a local rugby league club, York City Knights, whom, it is assumed, will also be agreeing terms of use with the council by way of a lease agreement.
113. Given the circumstances, the Commissioner is of the view that the disclosure of the information, which would be to the world at large, could provide third parties with critical commercial information which may weaken the council's negotiating position. This would be likely to have a negative impact on the council's ability to obtain value for



money, achieve the best commercial position and maximise the potential return on public investment.

114. Having considered the council's arguments, the Commissioner accepts that the disclosure of the lease agreement, at this stage, could prejudice the council's ability to obtain best value for money, particularly when negotiating lease terms with other third parties.

115. She is therefore satisfied that a disclosure of the information would be likely to prejudice the council's commercial interests and the exemption in section 43(2) is engaged in relation to the withheld information relevant to part 6 of the request.

116. She has therefore gone on to consider the public interest test required by section 2 of the FOIA.

*Public interest arguments in favour of disclosure*

117. The complainant, in his request for an internal review of the council's decision, set out a number of reasons why he believed the public interest weighed in favour of the disclosure of the information:

- *The desirability of furthering the understanding of participation in public debate on the topics.*
- *Facilitating accountability and transparency of the council for their decisions.*
- *Allowing individuals to understand the decisions made by the council affecting their lives.*
- *Facilitating accountability and transparency in spending of public money.*
- *Various confusing public statements [sic] have been made public and by providing the information requested would help clear up any further confusion and controversy over this matter and ensure the public is well informed.*

*Public interest arguments in favour of maintaining the exemption*

118. The council has put forward a number of factors which it believes to weigh in favour of withholding the information relevant to the request. Those which the Commissioner considered to be relevant to part 6 of the request are:

- *The information is commercially sensitive and subject to confidential negotiation*

- *There could be a loss of revenue if advertising partners are put off by public review of private financial transactions and this could be detrimental to the public purse*
- *The information contained within the Rental Agreement is misleading as figures potentially may change before signature*
- *There may be a loss of credibility in negotiating financial deals in public.*
- *Other prospective tenants and, or, partners could be put off if discussions are held in public and this would impact in the revenue and business model for the site. It would be significantly detrimental to the public purse.*

#### The Commissioner's view

119. The Commissioner accepts that there is a significant public interest in the disclosure of information about the council's finance and how it collects funds. This promotes transparency and openness by informing the public about how the council manages the public purse.
120. The disclosure of the rents which are charged by the council would give details of negotiations that have been undertaken and the terms agreed. This, in turn, evidences the efforts, and the concessions, that have been made and supports the argument for transparency.
121. The complainant has argued that the stadium project is due for completion in the very near future and the various agreements relevant to his request have already been confirmed to be '*in place*'. In addition, the complainant states that the contracts are with York City, who has a 99 year lease, and it is not a competitive tender as they are the only football club using the stadium.
122. Whilst appreciating the points made by the complainant, the Commissioner regards it to be important to note that, at the time of the complainant's request, the terms of the lease were yet to be finalised (the council has also confirmed that this still remains the case). There was, therefore, still the potential for terms of the lease, and the charges, to be changed.
123. The Commissioner is also mindful that, at the time of the request, it is likely that the council was arranging the terms of a number of other leases for the use of the stadium. The disclosure of the terms of the proposed lease with York City may have affected its ability to negotiate competitive rates with other parties and could have put the council at a disadvantage, which would not be in the public interest. It could also

have led to some confusion, should the terms of the lease have then been revised after the disclosure.

124. The Commissioner notes that the council has confirmed that, once all processes have been complete, it intends to release the lease agreement with York City into the public domain.

125. The Commissioner considers there to already be some substantive information in the public domain about the agreements between York City and the council. She is also satisfied that the information already in the public domain goes some way in providing details and clarification of York City's financial commitment to the new stadium.

126. After careful consideration, the Commissioner is satisfied that the public interest favours maintaining the section 43(2) exemption in this instance.

### **Information falling outside the scope of the request**

127. The Commissioner notes that in the internal review response, the complainant advised the council of the following:

*For the avoidance of any doubt the evidence required is the suite of documents (approx 6/7 legal contracts I believe, maybe more) between the council, York City FC, FSIF, JMP and Bootham Crescent Holdings Ltd, and any side letters between the parties that amends or affect the contract.*

128. The complainant, in correspondence that he sent to the Commissioner, also advised that should the council provide copies of the legal contracts signed around 19 December 2014 as referred to in the legal charge document, then this would resolve the matter in terms of his request.

129. The council, when responding to the Commissioner's enquiries, provided copies of a number of documents for her consideration which, it is assumed, it regarded to be relevant to the complainant's original request. These are as follows:

- Third party advice on the valuation of the Bootham Crescent site.
- Lease and Match Day Agreement
- Loan Agreement
- Deed of Priorities

130. The Commissioner is not satisfied that the terms of the complainant's original request captures all the information that he has set out as missing in his internal review request. Given this, it is her view that it may have been appropriate for the council to have advised the

complainant that his representations contained within his internal review request were considered, at least in part, to be a new request for information.

131. However, given that the council has already confirmed that it regards regulation 12(5)(e) to apply to all the withheld information contained within these documents, it would seem to be a fruitless and burdensome exercise to ask that the council now issue the complainant with a separate response to his 'new' request.
132. Given this, the Commissioner has decided to take the unusual step of considering any information contained within the documents referred to by the complainant which she regards to fall outside the scope of his original request (thus indeed constituting a new request), and deciding if the council is entitled to apply the exception at regulation 12(5)(e) to such information.
133. The Commissioner has already given full consideration to the information that has been withheld relating to the valuation advice, the Loan Agreement and the lease agreement. Her decision remains unaffected by the terms and circumstances of the new request and therefore she is satisfied that these documents do not require any further consideration.
134. With regard to the Deed of Priorities, the council had agreed to provide an extract from this document in response to the complainant's original request. The Commissioner was satisfied that this was all the information held within the document that was relevant to that request. She will now consider whether any of the remaining information contained within this document is disclosable.

### **Deed of Priorities.**

#### *Is the information environmental?*

135. The Commissioner views all the information contained within the Deed of Priorities to be environmental for the purposes of the EIR. The reasons for this are already set out in paragraphs 25 to 33 of this decision notice.

#### Regulation 12(5)(e)-commercial interests

136. The Commissioner is satisfied that the four conditions required for the exception at regulation 12(5)(e) to be engaged have been met in relation to the information contained within the Deed of Priorities.

*Is the information commercial or industrial?*

137. The details contained within the Deed of Priorities relate to charges on the Bootham Crescent site. The Commissioner is satisfied that these charges relate to a number of commercial activities, including the revenue allocated following the sale of the site for redevelopment, financial agreements made by York City, and the funding and construction of the new stadium. The Commissioner accepts that this information is commercial in nature and that the first condition is met.

*Is the information subject to confidentiality by law?*

138. The Commissioner is aware that some of the information contained within the Deed of Priorities is already in the public domain. This includes confirmation that the council has registered a charge on the Bootham Crescent site, that it is ranked second in the Deed of Priorities, that other parties have also registered a charge on the site, that the council entered into an agreement to loan York City £350,000, and that York City has committed to a contribution of up to £2m to the construction new stadium.

139. However, the Commissioner notes that the council has advised that the Deed of Priorities is not complete or signed by the relevant parties. Given this, the Commissioner assumes that it could potentially be subject to change and that whilst this remains the case, there is an expectation between all relevant parties that the terms set out therein will remain confidential.

140. The Commissioner accepts that the relevant information contained within the Deed of Priorities has the necessary obligation and quality of confidence and that the second condition of the exception is met.

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

141. The Deed of Priorities sets out details of the charges registered to the Bootham Crescent site and the terms associated with this. These charges have been registered to protect the financial liabilities that have been incurred by York City, whether it be from loans to finance the club, or its commitment to make a financial contribution to the new stadium. The Commissioner accepts that the release of this information, at a stage where the document and its terms are not formally complete, could result in detriment to York City, or the council, or any other third parties who have an interest in the Bootham Crescent site.

142. The Commissioner therefore accepts that the confidentiality is in place to protect a legitimate economic interest.

*Would confidentiality be adversely affected by disclosure?*

143. The Commissioner is satisfied that, as the first three conditions of the test have been met, disclosure of the relevant information into the public domain would adversely affect the confidential nature of the information. This would consequently harm the legitimate economic interests of the council and potentially other third parties who also have an interest in the Deed of Priorities.
144. The Commissioner is therefore satisfied that the council was correct to have applied regulation 12(5)(e) to the information contained within the Deed of Priorities (with the exception of the extract which it has now agreed can be released). As a result, she has gone on to consider the public interest test.

*The public interest test*

145. The Commissioner notes that the complainant has argued that statute requires the information contained within the Deed of Priorities to be made publicly available. The council has advised the Commissioner that it is not aware of such a requirement. As far as the Commissioner is aware, whilst the registration of the charge itself is published by the Land Registry, there is no requirement to extend such publication to other related documents, such as the Deed of Priorities.
146. The public interest arguments already presented in this decision notice in relation to that information that was withheld relevant to the original request have some relevance to the Commissioner's consideration of the information contained within the Deed of Priorities.
147. As well as the presumption in favour of disclosure and the general public interest in transparency and accountability, there is always a public interest in knowing whether the council is following proper processes, attaining value for money, and taking appropriate steps to protect the public purse.
148. However, in this instance the Commissioner regards it to be pertinent to take account of the information relating to the funding of the stadium that is already in the public domain. In her view, this information provides the public with a good understanding of the agreements between York City and the council, and the funding arrangements between the two parties. It also confirms the risks that the council considers to be associated to this funding arrangement and the contingency plans that are in place, should the sale of the Bootham Crescent site fail to provide York City with sufficient funds to pay the agreed £2m contribution towards the development of the stadium.

149. The Commissioner also acknowledges that the information requested is contained within a document that is, according to the council, still incomplete. In addition, the terms that are relevant may be affected by the actual sale price of Bootham Crescent. The Commissioner accepts that a degree of confidentiality is necessary to protect the interests of the council and York City and that to release the Deed of Priorities, at least at this stage of the process, could have a detrimental effect on the council, and the public purse, and this would not be in the public interest.
150. The Commissioner is satisfied that some considerable weight can be attached to the confidentiality afforded to the relevant information at this stage of the process. In addition, she has taken into account the information that is already in the public domain which she views to provide the public with a good understanding of the details of the funding and liabilities of York City and the council.
151. The Commissioner considers that there is a weighty public interest in ensuring that the council is able to engage in commercial activities without its commercial interests being harmed.
152. Having considered all relevant factors, the Commissioner is satisfied that, with regard to the information contained within the Deed of Priorities, the public interest in maintaining the exception outweighs the public interest in disclosure.
153. It is therefore the Commissioner's decision that, aside from that extract of information that the council has already agreed to release, the information contained within the Deed of Priorities is exempt from disclosure under the exception at regulation 12(5)(e) of the EIR.



## Right of appeal

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154. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

155. 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.

156. 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**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**