

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 November 2020

Public Authority: Maidstone Borough Council
Address: Maidstone House King Street
Maidstone
Kent
ME15 6JQ

Decision (including any steps ordered)

1. The complainant requested from Maidstone Borough Council ("the Council") information relating to the proposed garden community development at Lenham Heath. The Council stated that it did not hold information to some parts of the request. It also refused to disclose information under regulations 12(4)(b) and 12(5)(e) of the EIR to the remaining parts of the request.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold information to some parts of the request, and that it complied with the requirements of regulation 9 (advice and assistance) of the EIR. The Commissioner also decided that the Council has correctly applied regulations 12(4)(b) and 12(5)(e) to the remaining parts of the request. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background to the case

3. The complainant explained to the Commissioner that his request relates to a proposed new Garden Community of 5000 houses at Lenham Heath, and that the Council is the developer for this proposal. He said that although at this stage it is a proposal, the Council have spent money in commissioning a company called Barton Willmore to undertake a feasibility study and plan of the area.
4. The complainant further explained that the Council *"have engaged a number of land owners but have signed them up to a non-disclosure agreement in relation to the potential for them to save their land so that the project can progress."*

Request and response

5. On 7 November 2019 the complainant requested information under the FOIA of the following description:
- 1. "Maidstone Borough Council on 19/9/2019 issued a press release which stated "The Council undertook a borough wide analysis of possible locations for a garden community, considering the various opportunities and constraints of each, to include environmental, landscape, infrastructure, heritage and topography considerations. Based on this analysis, the Council apparently came to the conclusion that Lenham Heath is a preferred option. As a resident of Lenham Heath and wish, together with many other residents, to have access to this detailed analysis, which I assume contains comparative studies of economic, social and environmental sustainability between several candidate locations. I would like to have access to this document and related documents.*
 - 2. In respect of the proposed garden community development at Lenham Heath, under FOIA I would like to see documents that relate to the award of the contract to Barton Wilmore. These I understand are the architects to have worked up the plans in respect of the garden village proposal. As this would have been at expense to the tax payer – I would like to have provision of all documents that relate to the procurement of the that contract'*
 - 3. In respect of the proposed Lenham Heath garden community development and awarding of contract to Barton Wilmore. I would like to have sight of any declared conflict of interest that was declared by any MBC official in respect of the awarding of that contract. In particular any declared previous relationship between Mr William Cornell of MBC and Huw Edwards of Barton Wilmore LTD.*
 - 4. I would like copies of all MBC environmental reports that relate to Lenham Heath and surrounding areas that MBC have on their files. I am aware of the existence of such a report which was issued in 2015 which specifically deals with Lenham Heath and in particular the land to the south of the M20.*

5. *In respect of the proposed garden community site at Lenham Heath. Under FOIA I would like to have copies of all reports, communications and meetings with the appropriate agencies (i.e. Environment Agency) in respect of the water supply and sewage demand for the proposed new site, and or any assumptions MBC are making in respect of water and sewage demand for the area.*
6. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes between MBC and Ashford Borough Council and all associated documentation between MBC and Kent County Council in respect of the proposed development.*
7. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes with Highways England and all other authorities (e.g. The Environment Agency) concerning the proposed new motorway junction on the M20 between the current junction 8 & 9. This will include impact assessments and costs along with all e mails relating to the subject.*
8. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes with the High Speed 1 Railway owners , Network Rail and Department of Transport re the proposed new railway station at Lenham Heath.*
9. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes & subsequent reports issued with Network rail, South eastern Trains, Rail Passenger groups & Department of Transport in relation to how existing railway infrastructure would cope with the proposed new homes as a result of this development.*
10. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes and issues discussed from the meetings held between MBC and the landowners and land owner solicitors and Land Agents.*
11. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes between any property developers involved in this project.*

12. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like copies of all communications, details of meetings and minutes that MBC are in possession of any meeting held, or committee meetings in respect of this proposed development.*
13. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like detailed plans of the proposed development and all documentation that has been produced by Barton Willmore to date or any other company that has been employed by MBC re this proposal to date.*
14. *In respect of the proposed garden village development at Lenham Heath, under FOIA I would like from previous development of the area namely High Speed 1 and the M20 construction details of all previous environmental impact studies and consultation. Additionally in respect of the proposed area details of all known archaeological sites of interest, wildlife considerations and other environmental reports MBC or Kent County Council have."*
6. On 4 December 2019 the Council responded. It confirmed that it does not hold the requested information to some parts of the request, and withheld information to some other parts of the request under section 43(2) (commercial interests) of the FOI and under regulation 12(4)(b) (manifestly unreasonable) of the EIR.
7. On 24 December 2019 the complainant asked the Council for an internal review.
8. On 30 January 2020 the Council provided its internal review response. It maintained its original position but applied regulation 12(5)(e) (commercial confidentiality) of the EIR to some parts of the request. The Council highlighted that section 43(2) was incorrectly applied as this relates to FOI requests and not to EIR requests. With regards to part 7 of the request, the Council stated that information was previously provided within its initial response. With regards to part 8, the Council provided confirmation to this request.

Scope of the case

9. The complainant contacted the Commissioner on 9 February 2020 to complain about the way his request for information had been handled. Specifically, the complainant believes that the Council holds more information than it has disclosed. Also, he disagrees with the Council's refusal to provide information to the remaining parts of his request.
10. The following analysis focuses on whether, on the balance of probabilities, the Council held any information within the scope of some parts of the request. It considers too, whether the Council provided the complainant with adequate advice and assistance under regulation 9 of the EIR. Also whether the Council correctly withheld information under regulations 12(4)(b) and 12(5)(e) of the EIR to the remaining parts of the request.

Reasons for decision

Is the requested information environmental?

11. The Council subsequently dealt with the complainant's request under the provisions of the EIR on the grounds that the requested information satisfies the definition of environmental information provided by Regulation 2 of the EIR.
12. Under Regulation 2(1) of the EIR environmental information is defined as;
13. *"any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment such asland, landscape and natural sites including wetlands...biological diversity...(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"*.
14. The requested information relates to the Council's environmental reports, consultations, policies, plans and activities concerning Lenham Heath and the surrounding areas.

15. The Commissioner is satisfied that all the information is environmental falling within regulations 2(1)(a) and 2(1)(c) as it is on a measure likely to affect the state of the elements of the environment, including land and landscape. Therefore, the Commissioner has concluded that the EIR is the relevant legislation under which to consider the information in this case.
16. Having found that the requested information is environmental, the Commissioner has gone on to examine whether the Council was correct to rely upon the exceptions cited.

Regulation 5(1) / Regulation 12(4)(a) – Information held/not held

17. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
18. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
19. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information was not held, and any other reasons offered by the public authority to explain why the information is not held. She will take into account any reason why it is inherently likely or unlikely that the requested information was not held.
20. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities. This is in line with the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.
21. It is also important to note that the Commissioner's remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Council at the date of the request.

The Council's view

22. In her correspondence to the Council, the Commissioner explained her approach to investigating cases where there was a dispute about the amount of information held by a public authority. She asked the Council to provide detailed representations in support of its position. In line with her standard approach, the Commissioner asked the Council various questions, including questions regarding the searches it undertook to locate the information.
23. The Council confirmed that information regarding minutes between the Council and with certain third parties is not held. This it said, includes third parties such as the Environmental Agency, Network Rail, Property Developers involved in the project.
24. The Council stated:
- *"Register of Interest forms are held by our Legal Services team – we interpreted the request as being senior officials connected to an awarding of the contract. Interest forms are filed according to those who have interests and those who do not, a search was conducted by the legal services team of those forms declaring an interest and no declarations relate to Barton Wilmore.*
 - *Discussions were held with the project lead Director of Regeneration and Place and he confirmed that meetings had not been held with*
 - *Environment Agency and others re water supply and sewage demand*
 - *Network Rail and Department of transport re a new railway station*
 - *Network Rail, Southeastern Trains, Rail passenger groups and Department of Transport*
 - *Property Developers involved in the project".*
25. The Council confirmed that there were no searches undertaken on minutes of meetings as these specific meetings had not taken place.

26. The Council said a search was carried out by the Legal Services team of the declaration of interest forms filled out by all employees. The Council confirmed "*No declarations of conflicts of interest in respect of the awarding of the contract to Barton Willmore.*"
27. The Council stated that the search included information held centrally, and that a member of the Legal Services team checked each form where an interest had been declared, searching for Barton Willmore.
28. The Council said that Register of Interest forms are held electronically, and that minutes could be electronic or hand written. However, the Council confirmed that no such meetings were held.
29. The Council explained that "*Officers are required to complete register of interest forms on starting employment and refresh them every 3 years. It forms part of the Council's Constitution*", and the Council provided the Commissioner with a link to where these forms are held. The Council confirmed that there is not a business purpose for which the requested information should be held. It said, "*minutes of meetings only have a business purpose in formal committee/council meetings which did not form part of the request.*"
30. With regards to any statutory requirements upon the Council to retain the requested information, the Council stated that "*only Council/committee minutes of meetings are statutory.*"

The Commissioner's view

31. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information disclosed, the Council's explanations as to why information was not held and the complainant's concerns.
32. The Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches to locate relevant information within the scope of the request. She notes that relevant officers were consulted and suitable search terms were used. The Commissioner considers that such searches would have located all relevant information.
33. The complainant, in his correspondence to the Commissioner, argued that the proposed development is "*a significant project and as an accountable body it is normal practice for notes to be made.*" Therefore, he disputes the Council's response that information is not held regarding minutes to meetings as no minutes were recorded. The complainant considers internal emails regarding "*Lenham Heath proposed garden community*" should also be disclosed.

34. The complainant argued that the Council must have and would have supplied all environmental reports to Barton Willmore in deciding whether the Lenham Heath area was suitable or not. He said that he does not accept that these reports are not easily to hand and could be supplied.
35. While the Commissioner recognises that the requested information is of interest to the complainant in order to support his wider concerns, there is no evidence to suggest that the specific information he requested was held by the Council.
36. The Commissioner has considered the representations made to her by the Council regarding this complaint. She finds the Council's explanations as to why it did not hold the information to be credible. The Commissioner accepts that the Council did not hold this information at the level requested by the complainant.
37. The Commissioner is satisfied that on the balance of probabilities, the Council did not hold the requested information. The Commissioner considers that the Council complied with the requirements of regulation 5(1) of the EIR and that regulation 12(4)(a) was engaged.

Regulation 12(4)(b) - manifestly unreasonable

38. The Council's position is that the request was manifestly unreasonable due to the time and the effort required to comply with it. The Council considers that to comply with the request would impose a significant and detrimental burden on the Council's resources in terms of officer time and cost.
39. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either as it is considered vexatious, or on the basis of the burden that it would cause to the public authority. In this case the Council is citing Regulation 12(4)(b) due to the burden of the request.
40. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.

41. The FOIA and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing Regulation 12(4)(b) is the time and cost of a request, although they are not a determining factor in assessing whether the 12(4)(b) exception applies.
42. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request must be "manifestly" unreasonable, rather than simply being "unreasonable". The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
43. This was confirmed by the Information Tribunal in the DBERR case¹ where the Tribunal considered the relevance of Regulation 7(1) and commented as follows (paragraph 39):
44. *"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'.*

Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."
45. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:

¹Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

- The proportionality of the burden that compliance would place on the public authority's workload, bearing in mind the size of the public authority and its ability to allocate resources to dealing with an information request.
- The nature of the request and any wider value in the requested information being made publicly available.
- The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
- The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
- The presumption in favour of disclosure under Regulation 12(2).
- The requirement to interpret the exception restrictively.

The complainant's position

46. The complainant believes that the information should be released to understand the rationale for the location of the proposed development being explored further at additional cost. He said "*the spending of tax payers money on a consultancy company and subsequent decisions to progress investigating Lenham Heath as a preferred location (which has now caused upset and misery in our community) must be released...*".
47. The complainant argued that as tax payers money is being used to fund this project, the community has grave concerns that the Council is not being open and transparent. Specifically, the complainant said, that in respect of spending public funds, and in the process of selecting a site, properly recording important meetings, he believes that the Council has not "*put enough distance between themselves and their role as planning authority.*"
48. The complainant said that he does not think "*it is unreasonable or within the time limit to look those reports up and send them out.*" He does not accept that the reports are not easily to hand and could be supplied. He argued "*to not have done the research in the first place would call into question what due diligence has been done before selecting the site, and what Barton Willmore produced for the considerable sum of money they have been paid.*"

The Council's position

49. The Council considered the request manifestly unreasonable on the grounds of costs and diversion of resources. It maintains that it would require a large amount of time and resources to locate, extract and collate every environmental report held that relates to Lenham Heath and the surrounding areas. The Council said that the same is true of locating, extracting and collating all previous environmental impact studies and consultation and details of all known archaeological sites of interest and wildlife considerations. It explained that to provide this information would divert significant time and resources away from the provision of essential services.
50. The Council stated that the Barton Willmore draft report was also withheld under regulation 12(4)(b) as *"the report forms material that was requested in order to inform the process of the incomplete formulation policy. That policy is still being developed."* The Council said that the report in its present form is a draft report that will be published in modified or unmodified form in due course.
51. With regards to the time/cost taken to provide the information falling within the scope of the request, the Council said that its planning development manager had advised that a system search would be based on a geographical area and time period. It explained that the search would not be limited to those records held on the electronic uniform system but would include searching through microfiche and physical paper records. This, the Council considered, would take a very long time on such wide search terms. It said that each single application within the Lenham Parish area that the Council has received, would need to be searched to determine what information it held relating to the request.
52. The Council added, *"Paper copies and microfiche would take longer to search as these would require manual review. Additional areas of research would include searching within spatial planning documents which runs to thousands of pages."* The Council reiterated that a manual search of paper and microfiche records would be necessary due to the wide search parameters. It said that this would be the only way of obtaining any of the requested information which is not held electronically.

The Commissioner's view

53. The Commissioner accepts that the request for information would place a significant burden of the Council in terms of the cost and the disproportionate diversion of resources.
54. The Commissioner's conclusion is that the request was manifestly unreasonable under regulation 12(4)(b) of the EIR. Taking the submissions into account, the Commissioner is satisfied that the exception is engaged.

The public interest test

55. Regulation 12(4)(b) provides a qualified exception, therefore a public authority may only refuse a request that is manifestly unreasonable if the public interest in maintaining that exception outweighs the public interest in disclosure. Regulation 12(2) of the EIR also provides that the public authority must apply an explicit presumption in favour of disclosure. This means that exempt information must still be disclosed unless there is an overriding public interest in maintaining any exceptions applied.
56. The Commissioner will now go on to consider whether the public interest is best served by the Council complying with the complainant's request or whether the public interest lies in maintaining the application of the exception under regulation 12(4)(b) of the EIR.

Public interest arguments in favour of disclosure

57. The complainant argued that the public interest is that "*there is a whole community that is devastated by the proposals.*" He considered that the reports must be available and would have been part of the research conducted by the Council before commissioning Barton Willmore. The complainant further argued that if the Council had not conducted the research, it demonstrates a lack of diligence on their part. He believes that there is significant public interest in disclosing the information, and he referred the Commissioner to a recent meeting with over 300 people that attended to discuss concerns over the proposed development.
58. The Commissioner recognises that the request relates to a matter that is of concern to the complainant, and that it may have a direct impact on the complainant's community. The disclosure of the requested information may therefore allow the complainant to better understand the full reasons and rationale of the Council's decision with regards to Lenham Heath.

59. There is clearly a public interest in the Council's plans for the proposed development. The Commissioner acknowledges an action group² set up to discuss controversial plans for this garden community, and she notes from viewing the local media reports, the public's concerns are about the Council's proposals for 5000 homes on nearby land.
60. The Commissioner will always give weight to factors which favour the disclosure of information which would increase the public's understanding of the actions taken by the Council and of the processes by which it makes its decisions. Such disclosure of information enhances transparency and provides accountability of public authorities.
61. The Commissioner appreciates that greater openness and accountability of public authorities would benefit the public as it would enable greater access to information on topics which affect their lives. It can also have a positive influence on the quality of public debate and enhance accountability in the spending of public money.
62. The Council accepts that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of matters affecting the environment, a free exchange of views, and more effective public participation in decision-making. All of which, may ultimately contribute to a better environment.

Public interest in favour of maintaining the exception

63. The Commissioner's publicised guidance³ on regulation 12(4)(b) states that many of the issues relevant to the public interest test will already have been considered when deciding if this exception is engaged. This is because engaging the exception includes some consideration of the proportionality and value of the request.
64. The Council argued that providing the information requested would divert a huge amount of the Council's time and resources away from providing essential services to the public, "*such as waste and parking services.*"

² <https://receive.news/10/15/2019/save-our-heath-location-opposition-group-meets-to-discuss-concerns-over-proposed-lenham-garden-community/>

³ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

65. The Commissioner recognises the inherent importance of accountability and transparency within public authorities, and the necessity of a public authority in bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
66. The Commissioner appreciates that the information is relevant to the wider public. She notes that the request relates to a matter that is of concern to the complainant, and that it may have a direct impact on the complainant's community. However, the Commissioner regards the volume of work estimated as being required to provide information to the complainant in response to his request is not justified. The volume of information estimated as falling within the scope of the request creates a significant and onerous barrier to providing a full response. Even when balanced against the public interest in knowing the content and context of the information, the Commissioner considers that the public interest weighs in favour of the exemption being maintained.
67. The Commissioner has also taken into account the information already made available by the Council, together with the information which it intends to publish in the future. She considers that this lessens the public interest in requiring the Council to carry out the searches regardless of the burden which this would create.

Balance of the public interest

68. The Commissioner considers that there is valid public interest in favour of disclosure. However, she must also give weight to the effect that this would have on the Council in terms of causing a disproportionate and unjustified level of disruption.
69. The Commissioner has considered both the complainant's and the Council's position regarding this case. She understands the complainant's concern about the proposed development and the impact it may have on the community, also his concern of the spending of tax payers money.
70. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).

71. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – duty to provide advice and assistance

72. Regulation 9 of the EIR states:

"(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

73. When a request is refused because it is burdensome and therefore manifestly unreasonable, the Commissioner considers that the public authority should provide the requestor with advice and assistance so that the request can be refined to bring it within a reasonable cost.
74. The Council confirmed that it could not provide the information requested on the grounds of costs and diversion of resources. However, the Council suggested to the complainant that if he provided a specific timeframe or specific site(s) *"for which you would like to receive environmental reports, environmental impact studies and consultations, archaeological sites of interest and wildlife consideration"*, the Council said that it would then log this as a new EIR request.
75. The Council considered that it had provided advice and assistance to the complainant, and said *"I believe your request in its current form is too wide and is, as stated in the Council's response, manifestly unreasonable. It places an unreasonable burden on the Council's resources. To offer assistance, it may be worth refining your request in order to reduce the amount of time and resources it would take to provide a response."*
76. The Commissioner notes that in the Council's response of 4 December 2019, it advised the complainant that if he refined his request, it would be reviewed as a new request for information. The Council explained to the complainant that it would reduce the amount of time and resources in providing a response, if the request was refined. However, the Council did not receive a refinement or any clarification of the request from the complainant.

77. The Commissioner has concluded in light of the above, that the Council complied with regulation 9(1) of the EIR in its response to the request for information. Therefore, she does not require the Council to take any steps in respect of this matter.

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

78. Regulation 12(5)(e) of the EIR provides that:

“...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;”

79. The Commissioner’s published guidance 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?

80. The information withheld under Regulation 12(5)(e) includes the Barton Willmore report which contains plans, case study reviews, environmental assessments, and all relevant details regarding the proposal for a new Garden Community at Lenham Heath.

81. The information also includes the minutes of a meeting with landowners, a pro forma of the bid to join the Garden Programme, terms and conditions of engagement, and the initial fee proposal letter for planning services.

82. The Commissioner acknowledges that the Council commissioned the report from Barton Willmore in its capacity as a Property Developer, to identify potential future sites for a Garden City.

Is the information commercial or industrial in nature?

83. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about a public authority's revenues or resources will not generally be commercial information, unless the particular income stream comes from a charge for goods or services.
84. The Council stated that the withheld information is commercial in nature as it relates to planning and development. It explained that "*the Council commissioned the report from Barton Wilmore in its capacity as a Property Developer, to identify potential future sites for a Garden City of which Lenham Heath has only one.*"
85. The Commissioner accepts that the information is clearly commercial or industrial in nature as it relates to the proposed planning and development of a garden community of a number of houses.

Is the information subject to confidentiality provided by law?

86. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial, and is not in the public domain. In considering this matter, the Commissioner has focused on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
87. The Council argues that the information is subject to a common law duty of confidence. It states that as it is acting as the property developer, the meetings held with landowners were confidential and commercially sensitive. The Council said disclosure of the minutes of these meetings would jeopardise the Council and the landowners negotiating position. Although the Council did not state a specific contractual obligation of confidentiality, it relies on the information having the required common law quality of confidence, in that it is not trivial and is not in the public domain.

88. The Commissioner notes that the withheld information is the Barton Willmore report, minutes of a meeting between the Council and the landowners, and other information concerning Lenham Heath and the surrounding areas. She accepts that by sharing confidential and sensitive information, the landowners have a legitimate expectation that the Council will owe them a duty of confidence. She also considers that the landowners would not expect their interests in the development to be disclosed into the public domain, but to remain in confidence.
89. The Commissioner is aware that the withheld information is not currently in the public domain, it relates to a proposed development and as such, it is not trivial in nature. She therefore finds that the information satisfies the criteria to be understood as subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

90. The Council considers that disclosure of the information would have bearing on future and current negotiations, and this would prejudice the commercial interests of both the Council and other parties. The Council said that it had considered redactions of the documents, but to redact a report of this nature would render the original document unreadable. It said that the commercially sensitive information contained within the document is considerable and therefore the redaction would not be appropriate.
91. The Council explained that the report forms material that was requested in order to inform the process of the incomplete formulation policy, and that policy is still being developed. It further explained that the report in its present form, is a draft report that will be published in modified or unmodified form in due course.
92. The Council said that it is the task of the Local Planning Authority to analyse the relative benefits of all the proposals, including the Council's own proposal. This will be done, the Council added, *"in part via an externally produce sustainability appraisal, and this work will be in the public domain. Any decisions will be subject to public consultation at the next stage of the Local Plan Review."*
93. Having considered the Council's argument together with the withheld information, the Commissioner is satisfied that a disclosure of the information, at this time, would affect the Council's ongoing negotiations with third parties. This would affect both the Council's and third parties commercial interests in future and current negotiations. Also, it would risk proposals put forward by other land promoters on the same sites.

Would the confidentiality be adversely affected by disclosure?

94. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available and would also harm the legitimate economic interests that have already been identified.
95. The Commissioner 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 the balance of the public interest test regarding the disclosure of the information.

The public interest test

96. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosure

97. The complainant argued that the information – the Barton Willmore report, should be disclosed in order to understand why Lenham Heath was decided as the preferred choice for the development. He also argued that the public should know the reasons why the location is being explored further at additional cost, as it is tax payers money being spent on a consultancy company and subsequent decisions to progress investigating the area as a preferred location.
98. The Council said that it appreciates that there is a public interest in transparency and accountability of public authorities.

Public interest in favour of maintaining the exception

99. The Council argued that the premature release of the information, which may not be representative of the final work to be published, could be misleading and not in the public interest. The Council said that as the information is commercially sensitive, it considers disclosure would have bearing on future and current negotiations. It would also prejudice the commercial interests of both the Council and other parties present. The Council believes that release of the information would adversely affect the commercial confidentiality of the Council.

100. The Council considers the importance of maintaining a strong position during negotiations. Also, for the Council to have the safe space to carry out free and frank discussions and to develop work in private without the fear of outside interference. The Council believes that the premature release of the information which may not be representative of the final work to be published, could be misleading and not in the public interest.

Balance of the public interest

101. The Commissioner acknowledges that there is a public interest in disclosure given that the proposed development involves public expenditure. It also has an impact on the community and the environment.

102. The Commissioner accepts that the proposed development is likely to cost taxpayers a significant amount of money, and there is clearly a strong public interest in the public being aware of the likely costs of taking the development forward, and the options discounted by the Council in reaching its preferred choice.

103. The Commissioner recognises that the proposed development has had a degree of controversy surrounding it, and that conflicting public opinions have been aired. Local media have reported on some of the issues of concern⁴. Disclosure of the information, specifically, the Barton Willmore report, would help the public to clarify the factors which were taken into account by the Council, when deciding on its preferred location.

104. In terms of wider environmental impacts, the Commissioner also recognises that there will be strong public interest on the impact on the local community during construction, flooding issues, and whether it will change local amenities or public spaces.

105. However, the Commissioner must consider the Council's position that disclosing the withheld information will have a prejudicial impact on the development process. The premature release of the information could be misleading to the public as the information may not represent the final work. The Commissioner accepts that the information is commercially sensitive, therefore, disclosure could have an affect on future and current negotiations.

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https://www.downsmail.co.uk/news_sport/News/LENHAM_HEATH_5000_homes_plan_could_cost_me_my_farm_-_landowner/

106. The Commissioner notes from the Council's submissions that information regarding the relative benefits and disadvantages of all the proposals, including the Council's proposal, will be in the public domain, and that *"any decisions will be subject to public consultation at the next stage of the Local Plan Review."* With regards to the Barton Willmore draft report which includes the incomplete formulation policy, the Council stated that this policy is still being developed. However, the Council confirmed that the report will be published in due course.
107. Having considered all of the above points, and despite the weighty public interest arguments in favour of disclosure, the Commissioner's decision is that the public interest rests in maintaining the exception at regulation 12(5)(e). Therefore, as she is satisfied that the exception was correctly applied to the request, the Commissioner does not require the Council to take any steps as a result of this decision.

Right of appeal

108. 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: 0116 249 4253

Email: grc@justice.gov.uk.

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

109. 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.

110. 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

Phillip Angell
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