



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2010/0153**

**ON APPEAL FROM:**

**The Information Commissioner's**  
**Decision Notice No: FER0256705**  
**Dated: 5 August 2010**

**Appellant:** Chichester District Council

**Respondent:** Information Commissioner

**Additional Party:** Lynne Friel

**Date of oral hearing:** 17 & 18 February 2011

**Before**  
Melanie Carter  
(Judge)

and

Dr Henry Fitzhugh  
Richard Enderby

**Subject:**

EIR regulation 12(4)(e) internal communications  
EIR regulation 12(5)(d) confidentiality  
EIR regulation 12(5)(e) commercial or industrial information

**Cases:**

Coco v AN Clarke Engineers Ltd [1969] RPC 41  
Bath & NE Somerset Council v ICO (EA/2010/0045)

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal decided to uphold the Decision Notice save that a small amount of information should be redacted and withheld. Thus, it ordered that the following Decision Notice be substituted for the original Decision Notice.

**Information Tribunal**

**Appeal Number: EA/2010/00153**

### **SUBSTITUTED DECISION NOTICE**

**Dated 16<sup>th</sup> March 2011**

**Public authority:**

**Chichester District Council**

**Address of Public authority:**

**East Pallant House  
East Pallant  
Chichester  
West Sussex  
PO19 1TY**

**Name of Complainant:**

**Lynne Friel**

### **The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Decision Notice FERO256705 is substituted by the following:

1. other than the information set out in paragraph 2 below, the information contained in Chichester District Council's valuation of the Church Road site, prepared in September 2007, be disclosed;
2. the Council redact (and not disclose) the information at line 27 of the first page and related footnote (see paragraphs 2 & 3 of the Confidential Annex for the exact words to be redacted).

The Council shall within 28 days disclose the information at paragraph 1. The Tribunal recommends that the information at paragraph 2 be disclosed as soon as no longer commercially sensitive.

Dated this 16<sup>th</sup> day of March 2011

Signed:

Melanie Carter

Tribunal Judge

## REASONS FOR DECISION

### **Introduction**

1. This appeal arises from a letter of request from the Additional Party, Ms Lynne Friel under the Environmental Information Regulations 2004 (“EIR”) to the Appellant, Chichester District Council (“the Council”). The letter of request dated 18 May 2009 asked for the following information with regard to a planning application. This related to land associated with Chichester City Football Club and was made by the Council (in the capacity of applicant), to itself (in its capacity as local planning authority). Ms Friel’s request related to estimated costs and revenues arising from the proposed development and, *inter alia*, raised 8 numbered questions. It stated:

*“Would you please direct me to or provide photocopies of documents relating to planning application 08/00554/OUT as set out below.*

*I wish to see the documents that contain Chichester District Council's and/or their agent's calculation of the estimated costs that will be incurred if this planning application is successful. Amongst these estimated costs would be (but not exclusively)*

- 1). Building of new roundabout and other road alterations.*
- 2). Moving the river and culverting it under the new roundabout.*
- 3). Felling the trees on Westhampnett Road and the mitigation measures required by the Environment Agency (including the work on the River Lavant near Waitrose).*
- 4). Providing a new junior pitch as required by the Sports Council.*
- 5). The sum to be given to Chichester City United Football Club for improvements to the Oaklands Park pitch.*
- 6). Mitigation measures that may be required by your own Ecology Officer and Environmental Officer.*

7). *Works to ensure that the contaminated land to the north of the River Lavant do not contaminate either the River Lavant or any other water sources.*

8). *Any other costs that might be incurred as a direct result of this application.*

*It is anticipated that some of these costs will be borne by the purchaser of the land. I wish to know how much this will reduce the amount of money the Council anticipate they will have received from the sale of the Portfield site.*

*I also wish to be directed to (or have photocopies) of those documents which will show me CDC's (or your agents) calculations and conclusions of the sum of money CDC estimate they will receive on the sale of this land for housing, assuming outline planning permission is granted.”*

2. The Council responded stating that it did not hold certain of the information requested and refused disclosure of the remainder relying initially upon section 43 of Freedom of Information Act 2000 (“FOIA”), the qualified exemption for commercially sensitive information. The Council maintained its refusal to disclose on internal review by way of a letter dated 19 June 2009, albeit accepting Ms Friel’s assertion that the EIR applied in relation to all but items 4 & 5 of the letter of request. The Council on internal review changed its position to rely upon regulation 12(5)(e)(commercial confidentiality) of the EIR and maintained its reliance upon section 43 in relation to the two mentioned items of request.
3. Ms Friel complained to the Information Commissioner (“IC”) on 30 June 2009. During his investigation Ms Friel found certain of the information requested in publically available Council minutes. Also during the investigation the IC invited the Council to consider whether it might be said that regulation 12(4)(e) applied. On 5 August 2010 the IC issued a Decision Notice stating, inter alia, that:
  - a) the EIR applied to all of the information sought under the letter of request;
  - b) the Council incorrectly sought to rely upon section 43 of FOIA and on regulations 12(5)(e), regulation 12(4)(d) and (e) of EIR;

c) the information withheld should be disclosed.

4. The Council has appealed the Decision Notice to this Tribunal.

#### The appeal

5. The Council argued in its Notice of Appeal that:

a) the exception at regulation 12(4)(e) EIR (internal communications) is, as the IC found, engaged, but that the IC was wrong to find that the balance of the public interest favoured disclosure; and

b) that the exception at regulation 12(5)(d) EIR (confidential information) is engaged and that the balance of the public interest test favours withholding the disputed information.

6. The Tribunal noted that the Council was not continuing to seek to rely upon regulation 12(4)(d) argued during the investigation. Instead, the Council had raised the exception at regulation 12(5)(d) for the first time in the Notice of Appeal. The Council sought in addition to raise as a new ground of appeal, possible reliance on the exception at regulation 12(5)(e), in the last few days before the hearing (albeit this had been raised before the IC during his investigation and had therefore been analysed in the Decision Notice). The Tribunal considered as a preliminary point whether the Council should be allowed to raise this exception as a new ground of appeal so late in the proceedings. Given that this particular exception had been canvassed before the IC, the Tribunal decided to allow this but to consider the question in relation to costs (see below).

#### Evidence

7. The Tribunal was provided with a copy of the disputed information, not available to Ms Friel, and an open bundle of documents. The Council provided a witness statement from Mr Over, the Director of Employment and Property. In addition, Ms Friel provided a witness statement.

8. The evidence before the Tribunal was as follows:

a) the Council is the owner of the land in question, Portfield Football Ground in Chichester. In 2003 the Council considered the financial viability of the

sale of this land and its development into residential units. It decided that this proposal go ahead in principle. All other activities in relation to this land and the proposed development took place thereafter under officers' delegated authority. The Tribunal was told that this decision in 2003 was the Council authority underpinning all the activities that followed and would follow right up to the point at which the Council would consider accepting or rejecting one of the bids for sale.

- b) during 2003-4 a valuation of the land was made in-house but the plans for the development were delayed.
- c) on 4 September 2007, a Council officer, Mr Over, the Director of Employment and Property prepared a new valuation ("the valuation") of the land including an estimate of the likely costs of certain measures considered necessary if the land were to be developed (including relocation of the football club, alternative open space provision and certain environmental and highway works). This valuation set out the net land value after estimated costs had been deducted and the net usable receipt for the Council once related financial commitments/contributions had been paid for. It is this valuation that is the disputed information for the purposes of this appeal. Confidential Annex at Rider A sets out further details of the contents of the valuation document.
- d) the Tribunal enquired as to whether there were any working papers accompanying the valuation and was told that there were not, the valuation being based on Mr Over's local knowledge and professional expertise. Most of the figures were estimates based on his own knowledge with one item being based on an informal telephone call to a third party contractor who he was satisfied had the relevant expertise. Mr Over put forward the opinion that were the figures in the valuation to be disclosed this would influence potential developers' bids and be likely to have the effect of reducing the range of bids ie: they would cluster around the developers' consequent understanding of the Council's expectations ie the valuation. In this way, Mr Over considered it likely that the Council would lose out on securing any bids substantially higher than the valuation and thereby

the Council and local tax payers would be disadvantaged. He pointed to an annual review of housing prices in the Chichester area (“Chichester Housing Market Update” prepared by the Council’s internal housing department and which drew on external independent sources) to substantiate his view that land/housing prices had remained relatively static such that his valuation would have remained accurate and therefore something upon which developers could reasonably place reliance. Mr Over explained that there could routinely be 6 or 7 developers bidding for the land.

- e) Mr Over did accept and suggest in evidence that there were a significant number of variables which could effect the eventual price offered by developers (e.g.: differing views on the likelihood of full planning permission being granted and with particular conditions; one developer might take the view that 80 houses could be built on the land, whilst another, just 65; equally, one developer who was short of work might be prepared to operate at a much lower profit margin than another).
- f) the valuation in its written form was considered at a Management Team meeting, which was officers only, on 5 September 2007. This was an item for report only and no substantive decisions were taken in relation to the valuation or the proposed development and sale of the land.
- g) an aspect of the valuation figures was mentioned to the Executive Board in closed session on 12 February 2008. At this meeting, it was decided that a contribution would be made to the Portfield Football Club. The Executive enquired orally as to the anticipated net receipt from the sale of the land in order to satisfy itself that the funds for the contribution to the Football Club would eventually be available. This part of the meeting was held in closed session further to a resolution under section 100A of the Local Government 1972.
- h) in and around 2007/late 2008, there was some public consultation over the proposed development, including an exhibition and question and answer session in a local hotel. The consistent line had been that the financial



case for and against the development was not a valid planning consideration and was not therefore canvassed in the public consultation.

- i) Mr Over, having the personal delegated authority to act, decided at the Management Team Meeting on the 5 September 2007, that the outline planning application should go ahead. The application was made on the 7 February 2008 and granted on 8 July 2010 – the valuation was not provided to or reported upon at this meeting.
- j) subsequent to the EIR request being refused, certain of the information contained within the valuation was disclosed. First, by mistake, the contribution to the Portfield Football club, £1m, was disclosed to the public, appearing on a website. Second, the amounts expected of the potential developer/purchaser under a section 106 contribution agreement were made public (approximately £320k).
- k) at the date the request was handled Mr Over was waiting for market conditions to be right before proceeding to sale. Outline planning permission had not in any event yet been granted. It was not until 2011 that Mr Over considered that the market, having picked up, was such that it was the right time to put the land out to sale. He would in due course produce a marketing report which would consider whether it should be sold by way of tender or otherwise. It was explained at the hearing and for the first time, that if the tender method was followed the Council would disclose the information in full to Ms Friel once all the bids had been received and the specific issue set out in the Confidential Annex had been resolved – it being anticipated that this would be before any decision would be taken on the sale. This suggestion was conceived during the hearing in order to offer Ms Friel more involvement in the democratic process in the future, before the development was formally approved. It was anticipated that process would be completed within six months.

#### The questions for the Tribunal

9. It appeared to the Tribunal that the following questions arose:
- a) did the exception at regulation 12(4)(e) apply?

- b) did the exception at regulation 12(5)(d) apply?
- c) did the exception at regulation 12(5)(e) apply?
- d) Insofar as any exception applied, was the balance of public interest in favour of disclosure or maintaining the exception?

### The Law

10. This Tribunal's jurisdiction in relation to appeals is pursuant to section 58 of FOIA. For the purposes of this appeal, the Tribunal must consider whether the Decision Notice was in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. In cases involving the so-called public interest test (see regulation 12(1)(b)), as here, a mixed question of law and fact is involved. If the Tribunal comes to a different conclusion on the public interest test on the same or differently decided facts, that will lead to a finding that the Decision Notice was not in accordance with the law.
11. Subject to a presumption in favour of disclosure (regulation 12(2) EIR), a public authority may refuse to disclose environmental information if an exception under regulation 12(4) or (5) EIR applies and the public interest in maintaining that exception outweighs the public interest in disclosure (regulation 12(1) EIR).
12. Regulation 12 EIR provides, in relevant part:
  - “(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if:*
    - (a) an exception to disclosure applies under paragraphs (4) or (5); and*
    - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
  - (2) A public authority shall apply a presumption in favour of disclosure.*
  - (3)...*
  - (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that:*
    - ...*
    - (e) the request involves the disclosure of internal communications.*

*(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

...

*(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;*

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

13. The Tribunal must in relation to each exception in question consider “*all the circumstances of the case*” and to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure. The Tribunal reminded itself that regulation 12 provides a presumption in favour of disclosure. The burden of proof remains on the public authority to satisfy the Tribunal that the public interest in maintaining the exception outweighs the public interest in favour of disclosure (*DFES v IC EA/2006/10*).
14. In considering the public interest test it was important for the Tribunal to emphasise that it was assessing the public interest at the relevant time, that is for the purposes of this jurisdiction and this case, at the latest by mid- 2009.

## **Consideration**

### Regulation 12(4)(e) (internal communications)

15. The parties all agreed that the exception at regulation 12(4)(e) was engaged. The Tribunal agreed that the valuation had clearly been created for the purposes of use in the Council’s internal communications,
16. The Tribunal considers the application of the public interest at paragraphs 26 to 48 below.

### Regulation 12(5)(d)

17. Regulation 12(5) EIRs provide an exception whereby:

*“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

...

*(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.”*

18. The Council had initially sought to argue that there were relevant proceedings in relation to which the valuation had been provided and that these proceedings were confidential. The confidentiality “provided by law” for these purposes, the Tribunal was told, arose from of the Local Government Act 1972. These provisions allow local authorities, by resolution and in relation to a particular meeting, to resolve that certain information (provided it falls within the definition of “exempt information”) be withheld from the public at that meeting.
19. The Council’s reliance in this regard, it became apparent at the hearing, was in relation to the oral report of the net land value to the Executive Board on 12 February 2008. The Executive Board had taken a resolution to consider the financial support to the Portfield Football Club in closed session. It was in relation to that item on the agenda that the net land value was mentioned. The report of the net land value had been given orally, was not an agenda item in itself and the figure did not appear in any report or minutes (the Council was asked to produce any such document but declined to do so). As neither FOIA or EIR apply to oral information, unrecorded in any form, the submission that regulation 12(5)(d) was engaged, did not begin to hold any weight. The Tribunal noted moreover its doubt that a discretionary power to withhold information for one purpose only, would amount to confidentiality “provided by law” such as to defeat the obligations under the EIR.

Regulation 12(5)(e) (commercial sensitivity)

20. The Council sought at the hearing to return to its reliance upon the exception at regulation 12(5)(e). This provides that:
  - a. All parties accepted that the valuation consisted of commercial information.
  - b. Obligations of confidentiality conventionally arise from statute, contract or equity. The Council, failing in its submissions in relation to regulation 12(5)(d), did not at the hearing, seek to argue that the confidentiality was derived from statute ie: the Local Government Act. Nor was the contract head a possibility this being an internal communication in relation to which none of the information had been provided under contract. Instead, it was argued that this information was confidential further to the courts’ equitable jurisdiction. Most commonly this arises in the context of a relationship between different parties, giving rise to a duty of confidence. Indeed, whilst there had been a number of previous Tribunal cases concerning this exception and

confidentiality further to the equity/common law, this had invariably concerned information that had either derived from or involved the commercial information of third parties (see *South Gloucestershire Council v Information Commissioner* (EA 2009/0032), *Bristol City Council v ICO* EA/2010/0012, *Elmbridge Borough Council v ICO* (EA/2010/0016) and *Bath & NE Somerset Council v ICO* (EA/2010/0045)). What made this appeal distinct was that the information had been created in-house, was not destined to be shared with anyone outside of the Council and except in a very minor and non-material regard, did not contain any information provided by third parties outside of the Council.

21. The Council drew attention to the classic formulation of breaches of confidentiality to be found in the case of *Coco v AN Clarke Engineers Ltd* [1969] RPC 41 and argued that regard need only be had to part of the test there set down. In previous Tribunal cases, it had been generally accepted that in order for information to be subject to confidentiality provided by law, and further to the *Coco* test, the information must (a) have the necessary quality of confidence and (b) be imparted in circumstances importing an obligation of confidence (the third limb of the *Coco* test, that is detriment, not being relevant to this appeal). The Council argued that it need only rely upon the former in order for the exception to apply. Thus, it was argued that to satisfy this part of the test it needed only to satisfy the Tribunal that:
  - a) the information was inaccessible (not in the public domain);
  - b) the information was not trivial in nature;
  - c) that a reasonable person would recognise that the information had the quality of confidence (self-declaration of confidence would not suffice – this was an objective test).
  
22. The IC argued that the two limb test (derived from the case of *Coco*) could not be separated for these purposes and that, whilst the information did have the necessary quality of confidence, it should not for these purposes be looked at in a vacuum. The circumstances surrounding the creation and use of the information had to be considered. It was argued that the essence of equitable confidentiality was the duties owed between individuals or bodies. To accept the Council's submission, the IC said, would be to allow authorities to form a view that its own internal information was confidential in nature, albeit no one was under any actual duty of confidentiality in

relation to that information, and further to it forming that view, and that alone, it would not need to make disclosure under EIR.

23. The Tribunal agreed that this interpretation of the exception would significantly widen its scope. In this regard the Tribunal reminded itself that the exceptions in the EIR, being the implementation of the Environmental Information Directive (2003/4/EC) were to be interpreted purposively. Given the Directive's clear intent and its presumption in favour of disclosure, where in doubt, the exceptions should be interpreted narrowly. It was instructive in this sense, to note that the sister provision under FOIA, section 43, was framed differently – it not being necessary for the information to be subject to any duty of confidentiality. Thus, the exemption under FOIA was arguably broader in scope. This difference was consistent with EIR being the more stringent access regime.
24. Taking a narrow approach to the application of the exception, the Tribunal found that it would not suffice for the information solely to have the quality of confidence. The Tribunal accepted that it did have this quality, in the sense that it was inaccessible to the public, was non-trivial and a reasonable person would consider it was the kind of information which might be viewed as 'confidential'. This however was not sufficient on its own. In the Tribunal's view, more was required, notably, that a duty of confidence should be owed to, or by a third party. The Council could not in some way self-generate the confidentiality. The Tribunal reminded itself that pursuant to the exception in regulation 12(5)(d), the confidentiality had to be "provided by law". For the Council's submission to be accepted, it would be necessary for the Tribunal to find that there was confidentiality "provided by law" despite the fact that no one would be obliged to keep that information confidential and no one could enforce that confidentiality either by way of injunction or declaration. Thus, the confidentiality "provided by law" would be of no effect. In fact, the only effect would be for the information to be rendered confidential by virtue of the EIR themselves, which would of course be entirely circular.
25. There were a range of other exceptions that could apply, if the requisite tests were met and the public interest was against disclosure, such that the Council could not complain that this left a lacuna in the Regulations. The Tribunal was satisfied that the exception in regulation 12(5)(e) was not engaged.

### Public Interest Test

26. The Tribunal's next task was to consider the public interest balancing test in relation to the only exception under consideration, that is, under regulation 12(4)(e), internal communications. First, the Tribunal reminded itself that under the EIR, it was expressly stated that the presumption was in favour disclosure. Thus where the public interest factors for and against disclosure are equally balanced, it was bound to order disclosure.

#### *Public interest factors in favour of disclosure*

27. The general factors which apply in most cases before the Tribunal were present here. Thus, the Tribunal noted the importance of public scrutiny of decisions made by public bodies, transparency, accountability and the facilitation of public engagement in the decision making process.
28. In deciding what weight to give these general factors, the Tribunal paid particular regard to the context in which this appeal arose. In local government, the actions of Councillors and officers are essentially rendered accountable through either public dissemination of information or the ability of ward members to act as the custodians of the public's and in particular their ward members' interests.
29. Whereas, prior to the major changes to local government in 2000, ward members were involved in a variety of decision making Committees, it was commonly the case now, as here in this Council, that almost all decisions are taken by a very small group of Councillors in Cabinet (in this case called the Executive Committee). The ability of Councillors not in Cabinet to scrutinise and thereby render accountable decisions taken which are not in the public domain relies upon either matters going to full Council or the Scrutiny & Overview Committee exercising their 'call in' powers.
30. In this appeal the decision to sell the land for development had gone to Council in 2003. It had not since been before any Council or Committee meeting. Thus, as at mid-2009 when the request was being dealt with, there had been no formal Councillor review or input to this proposal for almost 6 years (in fact the Council was unlikely to

look at this issue again before mid-2011, some 8 years after the original decision). Throughout this entire period, the issues as to sale, nature of development and planning permission had been dealt with at officer level (the Executive Board had considered the contribution to the Football club and in this context been given an update on the anticipated net land value, but the question of the financial viability of the proposed sale had not been before it).

31. Ms Friel and others opposed to the development were consistently and correctly told that the financial viability was not a valid planning consideration and as such, they were told that their concerns in this regard, could not be taken into account. Understandably, since the matter had not been formally put to any Councillors since 2003, this left Ms Friel and others at a loss as to when and how they could access information on this issue and when and how their concerns could be addressed and their views made known. At the hearing the Council offered that Ms Friel could be made aware of the developers' bids received after the tender (that is after they had become binding) and this would leave an opportunity for public engagement and voicing of concerns before any final decision was taken. The Tribunal considered however that by that stage, considerable momentum would have built up behind the proposals (the Council having already made contributions to the Football Club etc – in fact the majority of the anticipated net receipt had already been spent, the Council would have devoted significant officer time on the proposals and related matters).
32. In addition, the Tribunal took into account that, in this appeal, the Council was both the land owner and the planning authority. As was recognised in the Bristol case, this called for a “particular scrupulousness”. Thus, this made it all the more important that the Council acted transparently and commanded the confidence of the public that it was carrying out its functions in the public interest.
33. In these circumstances, the Tribunal considered that the public interest in favour of disclosure, namely in support of accountability and the ability of the public to engage in a meaningful way with decision making, was greatly enhanced.

*Public interest factors against disclosure*



34. Critical to this appeal, was the established approach of the Tribunal, enunciated in the case of *Hogan v ICO (EA/2005/0026 & 30)* at paragraph 59 (a FOIA case but of equivalent import to EIR), such that “*in considering factors that mitigate against disclosure, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue*”.
35. Thus, this appeal being considered under regulation 12(4)(e) only, the relevant public interests were those concerned with the importance of the need for internal communication free from the risk of disclosure. Thus, whilst the risk of commercial prejudice (addressed below) was relevant to the public interest balancing test, it did not hold as much weight as the factors concerned with internal communications.
36. It was argued by the Council, in this regard, that if disclosure was made, the Council would need to change its processes to its detriment. It was said that the Council would need to take decisions without the benefit of a valuation and/or the valuation would need to be in such vague terms as to be essentially worthless. This would inevitably, it was said, mean that the Council’s decisions would be less effective potentially to the financial detriment of local taxpayers.
37. This expected change in practices flowed from the potential negative impact that disclosure might have on the price of the land on sale (which was the second factor against disclosure – commercial prejudice). As set out in Mr Over’s evidence above, it was asserted that developers would take into account their understanding of the Council’s expectations and tailor their bids accordingly, in some cases downwards towards the Council’s own figures.
38. In addition, there was a particular potential adverse interest, the details of which are set out in the Confidential Annex at Rider B.

#### Balance of public interest factors

39. The Tribunal has explained its acceptance that the public interest in favour of disclosure is enhanced in this case by reason of, what might be called a deficit of democratic engagement (see paragraphs 28-31).

40. This had to be set against the possibility that the Council would change its practices as a result of disclosure, thereby impeding internal communications. The Tribunal noted however that there was no evidence, other than Mr Over's opinion, of this, merely speculation and assertion on the part of the Council. That this would follow, ignored the developments in local government since the introduction of FOIA and the EIR. The Tribunal expected authorities to understand by now that disclosure in an individual case was specific to the circumstances of that case. In that sense, disclosure under FOIA and EIR is never routine. In any event, any changes to procedure would still need to provide for elected members being properly informed of relevant matters in the decision making process. The Tribunal questioned whether the Council's reluctance to make disclosure in this case was a product of an old orthodoxy that valuations will never, in any circumstances, be made public.
41. The Tribunal accepted the possibility that disclosure might feasibly have an adverse impact on price. However, it viewed this as a risk and no more. There had been no evidence, other than Mr Over's fears, put before the Tribunal that there *would* be a negative impact or indeed, that this was a likely outcome. The best Mr Over could do was to highlight this as a potential risk.
42. The Tribunal took the view that the impact of disclosure could in fact go either way, it could push the price up or down. The Tribunal considered it likely (drawing on commonsense and common knowledge) that developers would rely heavily on their own professional advisers as to development land prices. They would, moreover, in circumstances where, as anticipated here, there would be a number of developers competing, be obviously anxious to put in bids that outbid their competitors regardless of the Council's expectations.
43. As noted above, there were many variables which may cause a developer to depart from the Council's valuation (eg: number of houses, profit margin etc). In addition, it was important to note that, whilst the valuation was the product of Mr Over's professional judgment and experience (which was not in question), the valuation was based upon rough estimates of costs which had the capacity therefore to change significantly when the final details of the development were decided upon, full planning consent granted, and in particular the section 106 agreement between the Council and the eventual developer owner was agreed.

44. Given the passage of time since the valuation (September 2007), and, as at the date the request was being handled in mid-2009, the actual placing of the land on the market was not planned (permission had not been obtained and the market conditions were not right), there was a good chance that by the date of tender, the valuation would be significantly outdated. The Tribunal was in fact told that the sale is not likely to go through until mid 2011. The passage of time allowed for significant variables to be in play and the sensitivity of the valuation was therefore considerably reduced.
45. The Tribunal did not find persuasive the evidence of the static nature of the housing market (it was based on 2004 figures for the South East and adjusted upwards on a national basis). In particular, it noted that this had not been before Mr Over at the time the request was dealt with and indeed, the responses to Ms Friel at time relied upon the obverse ie: the valuation ought not to be disclosed as given the variables in the market, the figures therein could not safely be relied upon.
46. In all the circumstances, the Tribunal did not find itself able to conclude that the disclosure would be likely (as distinct from possible) to have a negative impact. Given the passage of time since the valuation and the capacity for variable factors to reduce its reliability, the Tribunal had not been satisfied by the Council's argument that there was an appreciable risk to the receipt of best value. In any event, even if there had been some such impact, the Council would not be bound to accept the bids received.
47. Finally, the Tribunal noted that certain of the information contained within the valuation document was already in the public domain (ie: the exact figures for the section 106 agreement, the contribution to the Football club).
48. In all the circumstances, the Tribunal found that, other than in relation to the information discussed in Confidential Annex Rider B, the public interest in maintaining the exception did not outweigh the public interest in disclosure.

## **Costs**

49. An application was made by the IC for certain of his legal costs in relation to a late set of submissions served by the Council on the parties and the Tribunal a few days before the hearing. The IC argued that in the light of the Council's previous conduct of this case, this late submission, after the deadline set in directions, should be seen as unreasonable. Thus, the application was made further to rule 10(1)(b) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009.
50. The Tribunal had indeed been concerned at the way in which the Council had conducted itself. It had sought leave to amend its grounds of appeal, failed to meet the directions deadline on more than one occasion and had had to be chased on numerous occasions.
51. The submissions in question resurrected a legal argument which all had thought left behind at the Decision Notice stage such that it had been necessary for the counsel for the IC to spend some time researching the relevant cases and preparing his response.
52. The Tribunal was of the view that the Council had conducted itself unreasonably in this regard and ordered accordingly that it pay the IC's costs of £243.

## **Conclusion**

53. In light of the reasons set out in this decision, the Tribunal upholds the IC's Decision Notice save in relation to the small amount of information discussed in the Confidential Annex. Thus, the Decision Notice at the beginning of this document should be substituted for the original Decision Notice and the Council should make the relevant disclosure. The Council is encouraged moreover to disclose the remaining redacted information as and when it is no longer commercially sensitive.
54. Our decision is unanimous.

Signed:

Melanie Carter

Tribunal Judge

Date 16<sup>th</sup> March 2011