



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0239**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FER537407

Dated 1<sup>st</sup> September 2014

BETWEEN	Vale of White Horse District Council	Appellant
	And	
	The Information Commissioner	1 <sup>st</sup> Respondent
	And	
	Dr Mary Gill	2 <sup>nd</sup> Respondent
	And	
	Doric Properties	3 <sup>rd</sup> Respondent

Determined at an oral hearing at Fleetbank House On 31<sup>st</sup> March – 1<sup>st</sup> April 2015

Date of Decision 17th June 2015

Date of promulgation 25<sup>th</sup> June 2015

BEFORE

Ms Fiona Henderson (Judge)

Dr Henry Fitzhugh

And

Mr Gareth Jones

**Representation**

Mr Philip Coppell QC : Counsel - for The Appellant and the 3<sup>rd</sup> Respondent

Ms Laura John: Counsel - for 1<sup>st</sup> Respondent

Dr Mary Gill: represented herself

**Subject matter:** EIRs Reg 12(5)(e) and (f) commercial information

**Case Law:**

*Evans A-G [2015] UKSC 21 paras 72-3.*

*Derry City Council v Information Commissioner EA 2006/0014*

*R (on the application of Veolia ES Nottinghamshire Ltd Nottinghamshire County Council (and Ors) [2010] EWCA Civ 1214*

*Office of Communications v Information Commissioner [2010] UKSC 3 and Case C-71/10*

**Decision: The Appeal is allowed in part**

**The Decision Notice is hereby substituted to reflect the reasoning in this decision and to order disclosure within 35 days of the withheld material as specified in paragraphs 45-65 below.**

**REASONS FOR DECISION**

**Introduction**

1. This appeal is against the Information Commissioner's Decision Notice dated 1<sup>st</sup> September 2014 which held that Regulation 12(5)(e) of the EIRs was not engaged and required the public authority to disclose to the complainant specified withheld information.

**Background**

2. The Vale of White Horse District Council (the Council) and Doric Properties Ltd (Doric) entered into a conditional sale agreement relating to 2 adjacent sites at West Way Centre, Botley. In March 2011 site 1 was marketed. The sale of that land was co-ordinated under a marketing co-operation agreement (MCA) between the owners (including the Council). There were 13 bidders from which 6 were shortlisted. Negotiations were initially with Asda/Bride Hall who were the initial preferred bidder. The majority of the figures relating to the earlier Asda/Bride Hall proposal have been disclosed by the Council who argue that they are not commercially sensitive as the site 1 scheme is not being proceeded with and would not form the basis of any subsequent proposal.
3. The Council then approached the second bidder on the shortlist, Doric Properties Ltd (Doric). There had been a public consultation on the development for site 1, and for redevelopment of the Council owned West Way shopping centre in February/March

2012. However, in April 2012 Doric came up with a proposal for a greater development which included site 1 but also site 2 (comprising the existing Council owned West Way shopping centre and adjacent sites not owned by the Council). Doric's proposal was to demolish the West Way shopping Centre and develop the land with a mixture of retail units (including a large food store, new retail units, a new church, community building, space for a library, a cinema and student accommodation, restaurants and parking).

4. In November 2012 the sale of site 1<sup>1</sup> was agreed and in December 2012 the Council signed a Conditional sale agreement with Doric for site 2 (conditional on obtaining planning permission, having a funding partner in place and lettings secured for food store and student accommodation). Mr Tyson (Head of Economy, Leisure and Property Vale District Council) told the Tribunal that the expectation was that the contract would be fulfilled, and although the conditions were challenging they were achievable.
5. The non Council owned elements of the site include a block of age-restricted homes for the elderly and vulnerable, the vicarage of the local church and the 1930s Elms Parade of shops (the oldest building in the area and still in the ownership of the family that built it, which houses local independent businesses). There was considerable concern locally that the development would result in the loss of homes for the vulnerable, local independent businesses would be closed down and private individuals would lose their property because the Council had expressed the view that if Doric were unable to acquire all the land for site 2 they were minded to use their compulsory purchase powers<sup>2</sup>. There was no consultation with the public relating to the development of the entire combined site and no other bidders were sought for the combined site. Mr Tyson's evidence was that the Council did not consult with the public as it was considered as a property matter and not a planning or other public project. Whilst the Council did not go to the market for competing bids, they understood that they were obliged to get best consideration for the site under s123 Local Government Act 1972.
6. In December 2013<sup>3</sup> the Council refused Doric's application for planning permission. We believe that this has been appealed but in the alternative Doric have resubmitted a

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<sup>1</sup> Site 1 would go unconditional in conjunction with site B therefore consideration would not be paid until unconditionality on both deals which is likely to be at least 2-2.5 years from exchange based on their current programme OB2p30

<sup>2</sup> It would be for the Council's cabinet to resolve to make a CPO which would then be submitted to the Secretary of State for Confirmation, those affected by the CPO would be able to make objections and the Secretary of State would take these into account in coming to his decision on whether or not to confirm the CPO following an inquiry (Council website 2.5.14 p54 OB)

<sup>3</sup> After the information request but before the internal review.

modified and smaller development. More recently Mace have become involved as the build partner for the scheme.

### **Information Request**

7. Dr Gill wrote to the Council on 23.10.13 asking for:

*“information on the decision to award a contract to Doric Properties for the development of the West Way Centre, including, but not limited to:*

.....

*6) Minutes of meetings and correspondence on the bid.”*

8. The Council responded on 22<sup>nd</sup> November 2013 supplying some of the information requested but withholding information comprising item 6 under the EIRs (inter alia reg 12(5)(e) commercial confidentiality). The decision was upheld on internal review and Dr Gill complained to the Commissioner. The Commissioner upheld the complaint on the grounds that the exemption was not engaged.

### **The Appeal**

9. The Appellant appealed on 29<sup>th</sup> September 2014 in relation to the withheld material insofar as it related to item 6<sup>4</sup> of the request on the grounds that:

i. The correct regime relating to documents 2-5 was the EIRs.

ii. The information in documents 2-5 is exempt under s41 and s43(2) FOIA or in the alternative under regulations 12(5)(e) and (f) EIRs

iii. Document 6 is exempt under regulations 12(5)(e) and (f) EIRs.

iv. The public interest in disclosing the information is outweighed by the public interest in upholding the exemption.

10. Doric were joined by the Tribunal and supported the Council's case. Dr Gill was joined by the Tribunal and adopted the Commissioner's arguments. She also argued that:

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<sup>4</sup> which comprised documents 2-6 as detailed in paragraph 11 below

- i) Documents containing the Council's information or prepared on their behalf were not commercially sensitive.
- ii) Sensitivity was less over time and in particular after the submission of a planning application.
- iii) The Local Government Transparency code found no evidence that publication of contracts entered into by local authorities prejudiced procurement exercises.

11. Prior to the hearing, substantial disclosure was made in the form of redacted versions of the withheld material (OB2). The Tribunal was provided with a closed bundle comprising some 55 pages consisting of 5 documents (labelled documents 2-6)<sup>5</sup> :

- Document 2: Exempt minutes of a meeting of the Cabinet of the Council.
- Document 3: Council record of decision of cabinet members or key decision officer.<sup>6</sup>
- Document 4: Council record of decision of cabinet members or key decision officer.<sup>7</sup>
- Document 5: Council Cabinet Report (including DTZ report).
- Document 6: Latham High Development Appraisal (based on Doric's figures).

12. The entirety of document 3 (although included in the closed bundle) had in fact already been disclosed in full prior to the hearing. During the hearing further information was disclosed from the remaining 4 redacted documents. The Tribunal has viewed the un-redacted material and heard closed oral evidence and submissions where it was necessary to refer directly to the specific content of the redactions. The Tribunal is satisfied that it is proportionate and in keeping with the overriding objective as set out in rule 2 GRC rules that it should limit its determination to the information which remained withheld at the close of the hearing. The Tribunal has produced an open decision setting out the reasons for its decision, however, it has also produced a closed annex which makes direct reference to the withheld material.

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<sup>5</sup> Document 1 had already been disclosed prior to the hearing and is not therefore the subject of this decision

<sup>6</sup> 3.8.11

<sup>7</sup> 30.4.12

13. The Tribunal gave an oral decision at the hearing relating to the preliminary issue of the Applicable regime, in order to avoid the need for duplication of arguments under both EIR and FOIA. Its reasons are set out below.

### **Scope**

14. Reg 12 (5)(f) was relied upon by the Council at appeal but not before the Commissioner, there is no objection to the late reliance upon this ground.
15. We are satisfied that the relevant date for evaluating the public interest test is from around the time that the primary decision was made Evans A-G [2015] UKSC 21 paras 72-3. Dr Gill asserts that information becomes less sensitive over time in particular once the planning application has been made<sup>8</sup>. We take into consideration in this case that planning was refused and the development was liable to be subject to a further appeal and a modified resubmission. If, after the relevant date the information loses its quality of confidence or the public interest is diminished this is not relevant to the Tribunal's decision. Doric and the Council also rely upon this argument in relation to the inadvertent disclosure of withheld material. A version of the closed material has been disclosed, the redactions are inconsistent and it is apparent from the evidence that on occasion material which is withheld elsewhere is disclosed in parts of the documents. The Tribunal accepts that to disclose the information on the other occasions it appears in the document on the basis that the "cat was let out of the bag" after the relevant date is not in accordance with Evans A-G. However, the Tribunal is entitled to look at the consequences if any, of the disclosure in assessing how sensitive the information is when assessing the public interest.

### **EIRS**

16. It was not in dispute that document 6 fell within regulation 2(1)(e) of the EIRs. The Commissioner maintained that:
- the majority of the information in documents 2, 4 and 5 falls under Regulations 2(1)(c) EIR being either information on the Appellant's decision to sell the land for development, or it is information on the proposed development of land by Doric; the decision and the development both being a measure affecting or likely to affect land.

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<sup>8</sup> In this case the planning refusal was between the original information request and the internal review

- Some of the information in document 5 falls under Regulation 2 (1)(e).

The Appellant initially concluded in its response to Dr Gill that the EIRs applied and maintained this position upon review. However, the Council and Doric now argue that documents 2, 4 and 5 should more properly be considered under FOIA.

17. It was not disputed before us that the decision to sell the land for development or the proposed development was a “measure” or “activity” and that this “affects or is likely to affect the land”. However, the Council/Doric now argue that the withheld information is not information “on” any of the matters listed in Regulation 2(1)(a)-(e). They argued that whilst these documents might “relate to” Environmental information that was not the same as “on”. They argued that “on” should be construed more narrowly than “relates to” (the wording of the predecessor statute<sup>9</sup> and directive) and that the wording change signifies a narrowing of scope.
18. The Tribunal accepts that the regulations should be construed purposively. The Council and Doric argued that the Tribunal should look at the context and nature of the document e.g. document 2 is a Minute of what took place at a cabinet meeting and is not itself a cost benefit analysis. The Tribunal is satisfied that the nature of the document (in the example a Minute) is a method of recording the information and does not characterise the information in the document. Although we were directed to case law, other language versions of the directive and the travaux preparatoires for Directive 2003/4 to assist us to interpret the word “on”, the Tribunal was satisfied that there was no need for this level of analysis, it being an ordinary word. Having had regard to the contents of the withheld information we are satisfied that as a matter of fact the information is on the Appellant’s decision to sell land and Doric’s proposed development of the land; it is the subject matter.
19. The Commissioner’s case in relation to the information in document 5 which is the same as that which appears in document 6, is that it falls within Regulation 2(1)(e) EIRs for the same reasons as document 6. Although the Council and Doric argued that containing figures from a cost benefit analysis did not make the information itself a cost/benefit analysis, on the facts of this case we are satisfied that the withheld information in all the

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<sup>9</sup> Environmental Information Regulations 1992 and Directive 313/90/EEC

documents is economic<sup>10</sup> and provides the basis for making the decision to sell or the case for and against development. We are satisfied that a cost benefit analysis encompasses any evaluation of the economic strengths/weaknesses of a situation and does not need to be headed as such. We are therefore satisfied that all the withheld information (including document 6) also falls within regulation 2(1)(e) EIRs.

### **Exemption**

20. Reg 12 provides that:

*(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—*

...

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

21. It was not disputed that the information which remains withheld is commercial or industrial in nature and that it is covered by confidentiality provided for in law:

- in relation to documents 2-5 Statute<sup>11</sup>
- in relation to document 6 by a contractual confidentiality clause and
- in light of the evidence of Mr Hillcox and Mr Tyson as to the circumstances in which it was provided and received we are also satisfied that it is covered by a duty of confidentiality at common law.

22. The Commissioner invites the Tribunal to determine the question of whether the confidentiality is provided to protect a legitimate economic interest by considering whether disclosure would cause prejudice to Doric, the Council's or another's commercial interests. The Council and Doric argue that the legitimate economic interest is broader in that if financial information is confidential by reason of a legitimate economic interest that is sufficient (without qualifying whether the economic interest

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<sup>10</sup> Apart from the name of an individual which is being withheld on the grounds of data protection of which Dr Gill confirmed she did not seek disclosure and upon which the Tribunal makes no decision.

<sup>11</sup> S110A(4) and paragraph 3 part one Schedule 12a of the Local Government Act 1972



would be damaged by disclosure). In both scenarios the quality of confidence remains at the relevant date and it is not in issue that disclosure pursuant to EIRs would have adversely affected the confidentiality.

23. The Tribunal is satisfied that the confidentiality was provided to protect the legitimate economic interests of the Council and Doric in terms of obtaining the best price for the land, for protecting current and future revenue, to protect development know how, negotiation postures, financial models, working assumptions, anticipated outcomes and the position taken in private negotiations which are of interest to competitors and those with whom contracts are made. None of the information had been disclosed at the relevant date, its confidentiality would therefore be adversely affected by disclosure, therefore we are satisfied that the exemption is engaged. The Tribunal is satisfied that the extent to which disclosure would cause prejudice to the private rights of Doric, the Council or another's commercial interests is material in the balance of the public interest<sup>12</sup>.

**Is reg 12 (5) (f) engaged**

24. Reg 12 (5) (f) applies where disclosure would adversely affect:

*the interests of the person who provided the information where that person—*

*(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*

*(iii) has not consented to its disclosure; ...*

25. It is not disputed that the majority of the information in document 6 and the information in document 5 taken from document 6 was provided by Doric. We are satisfied that reg 12(5)(f)(i-iii) is met as:

- i. Doric was not legally obliged to provide this information as it was provided in the context of a proposed sale/purchase agreement.

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<sup>12</sup> *R (on the application of Veolia ES Nottinghamshire Ltd Nottinghamshire County Council (and Ors) [2010] EWCA Civ 1214*

- ii. We accept Mr Hillcox's evidence that the information was supplied on the understanding that it would remain confidential and they do not consent to its disclosure.
- iii. The Tribunal accepts<sup>13</sup> that disclosure would adversely affect the interests of Doric (who provided the information)

and that this exemption is engaged.

26. The Commissioner argues that the purchase price is not information provided by Doric as it is an agreed price achieved by agreement with the Council (relying upon *Derry City Council v Information Commissioner EA 2006/0014*). The Tribunal is not bound by this case and notes the arguments advanced on behalf of Doric and the Council that *Derry* relates to information "obtained" whereas regulation 12(5)(f)(i) relates to information "provided". The Tribunal does not consider it helpful to analyse any differences between the phrases but relies instead upon the facts of this case; we are satisfied that the prices have been achieved by negotiation between the parties and that to characterise that information as having been provided by Doric ignores the input of the Council and other members of the MCA in reaching that price. Consequently we are not satisfied that reg12(5)(f) applies to the contract price.

27. The Tribunal has considered what weight to give to the confidentiality of the DZT report. This was not raised in the pleadings although it was argued before us at the hearing. Although the DTZ report is marked "private and confidential" we are not satisfied that this is indicative of any commercial sensitivity applicable to DTZ; it is prepared on behalf of the Council (who therefore have a legitimate economic interest in the exclusivity of the work they have paid for) and it contains the Doric figures which have been provided in confidence. There is no evidence before us that satisfies us that there is any confidence on behalf of DTZ attached to the assumptions used by DTZ, the model or that the know-how displayed is unusual or amounts to a trade secret such that either exemption is engaged under reg 12(5) (e) or (f) or that there would be an adverse effect on the interest of DTZ if it were disclosed. From their role analysing Doric's figures on behalf of the Council (rather than providing a competing bid) we are satisfied that the figures and assumptions are likely to be to best industry standards and best practice rather than any unique know-how (as if it were, it would be expected that this would be specified in the analysis). We are therefore also satisfied that the public interests of commercial

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<sup>13</sup> See below

sensitivity to be considered in relation to this document are confined to those of Doric, the MCA, the Council and any parties with whom they have negotiated or undertaken discussions.

### **Public Interest test**

28. The exemptions relied upon are subject to the public interest test as provided for by regulation 12(1)(b) EIRs. The Tribunal considers the general principles and arguments advanced and then applies that to the evidence in relation to each category of withheld information. In assessing where the balance of public interest lies, the Tribunal should aggregate the various interests in favour of withholding the information which apply to the different exemptions relied upon<sup>14</sup>. The public interest considerations on the fact of this case are the same relating to both exemptions relied upon

### **. In favour of Disclosure**

29. The Tribunal applies the presumption in favour of disclosure as set out in reg 12(2) EIRs in assessing the balance of public interest.

30. In addition we have regard to the fact that the Council's decision to sell the combined plot was reached without obtaining competing bids, which we accept limits the public confidence that the Appellant has obtained value for money or the most favourable terms as they are obliged to under s123 Local Government Act 1972. Whilst we accept that this is a significant public interest, we take into consideration that disclosure under the EIR is not the only method of scrutiny. There is significant information already in the public domain through the Council process, knowledge that the Council have sought advice and tested the financial assumptions (and hence the purchase price) through the evaluation by DTZ, the meeting of scrutiny committee in public session and the disclosure of the redacted material in support of their argument that there is sufficient information for the purposes of public scrutiny and transparency.

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<sup>14</sup> *Office of Communications v Information Commissioner [2010] UKSC 3 and Case C-71/10*

31. The Council also points to the fact that the sum of money realised will be in the accounts as will the income figure (but both as total figures). All figures and the contract for sale are subject to review by the Auditor. The Audit Commission Act 1998 gives the Auditor the power to make immediate reports in the public interest<sup>15</sup>. The Auditor is empowered to examine any document which appears to be necessary<sup>16</sup> relating to the audit. Public scrutiny is provided for with provision to inspect reports<sup>17</sup> and attend meetings, object to an item of audit<sup>18</sup>. Although it is argued that this scrutiny would be ex post facto, we take into consideration that on the facts of this case although already signed, the contract is conditional, the Auditor has the power to declare an item of account unlawful<sup>19</sup>, issue an advisory notice<sup>20</sup>, a prohibition order<sup>21</sup> and judicially review a decision<sup>22</sup>.
32. It is argued that the agreement to sell the land gives the appearance of having weighted the planning process. The Public consultation only related to site 1 not site 2. The purpose of the sale was to demolish the shopping centre and regenerate the commercial centre of Botley, but this decision was made without public participation. The Purpose of EIR is to facilitate more effective participation by the public in environmental decision-making (Recital (1) to Directive 2003/4/EC). We accept that agreeing to the sale on the basis of a development proposal upon which there has not been consultation gives the impression of the Council having found favour in the merits of the development without public involvement. Although the original planning proposal was turned down, it is likely that this would be appealed or modified and the Council having a vested interest and appearing to have formed its view without consultation does not give the impression of impartiality or generate public confidence. The Tribunal accepts therefore that this increases the need for transparency and scrutiny of the basis and terms upon which the sale was agreed.
33. We take into consideration the newspaper articles and additional material submitted at the hearing by Dr Gill as evidencing the strong level of public concern relating to the sale and the proposed development and loss of existing services, however, we are satisfied that much of this will be met through the planning process. Whilst Dr Gill argues that the

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<sup>15</sup> S8

<sup>16</sup> S6

<sup>17</sup> S14

<sup>18</sup> S16

<sup>19</sup> S17

<sup>20</sup> s19(A)

<sup>21</sup> S20 & s22)

<sup>22</sup> S24

sale and the planning process are separate and consultation around the planning process is irrelevant to the sale which was agreed without it, we do take into account that one of the conditions of sale is obtaining planning permission. As such the consultation and scrutiny involved in the planning process is capable of preventing or modifying the sale. However, we do acknowledge that resources and time have already been spent pursuing the sale on the basis of Doric's proposed development and that this has been done without consultation.

34. The Council's provisional decision to use CPOs to enable the development to proceed in circumstances where there has not been public consultation upon the scheme and before planning permission has been granted increases the impression that the Council are pursuing their commercial interest above the public interest and necessitates enhanced transparency to restore trust. Knowing that the provisional decision has been made risks putting pressure on the vendors who are not part of the MCA and arguably distorts the level playing field, this is not in the public interest (notwithstanding that the CPO process itself is subject to additional scrutiny and participation by the relevant parties through the involvement of the Secretary of State).

**In favour of Withholding**

35. The Council and Doric argue that disclosure would have a chilling effect on the willingness of developers to contract with the Council in the future and impact the efficacy of those negotiations. Their case is that developers and the planning authorities must be free to exchange information. The local authority is the guardian of the public interest, it owes its constituents a fiduciary duty and needs the maximum information to make an informed decision. The Council is representing the public in the use of land and an open book basis is the best way to achieve this. The parties need to be confident that this process is truly confidential and won't be disclosed to others including competitors in order to engage in this process fully. Mr Hillcox's evidence was that Doric would be reluctant to provide such detailed transparent information if they thought that it would become public and it would incline them to prioritise their commercial efforts in the private sector rather than the public sector.
36. Whilst the Tribunal accepts that the more information the Council has the better positioned it will be to negotiate the best price, and that in the knowledge that the figures are liable to disclosure notwithstanding their commercial sensitivity, the party providing information will think twice about what information it chooses to disclose; the Tribunal is

satisfied that this argument is curtailed by commercial considerations. There is a limited supply of land and most development transactions will have some form of Council involvement. It is a commercial reality that a developer will want to give sufficient information to enable them to secure the deal in what is a competitive market (there was a shortlist of 6 bidders and 13 offers for site 1).

37. The Council argued that disclosure would cause reputational damage. We do not accept this argument since disclosure would not be on the grounds of choice but upon adherence to the EIRs which affect all Councils equally. It is not possible to contract out of the provisions of the EIRs.
38. The Council and Doric argued that disclosure would impact upon their ability to re-negotiate the sale of this land. This could lead to s123 impoverished bargaining position for the Council if their most recent purchase price were known, and Doric believed that should this development be retendered (competitors would have the benefit of the work paid for by Doric for free and would e.g. be able to accept a lower profit percentage as their costs would be lower enabling them to offer a higher price than Doric.
39. The Commissioner argued that the circumstances in which the contract would not be fulfilled were so unlikely that the impact of disclosure would be minimal. Although the evidence from Mr Tyson was that the Council thought that the contract although difficult was achievable and would be fulfilled, the Tribunal has regard to the conditions of the contract which include the grant of planning permission (subject to the planning process) and the achievement of the site as a whole (potentially subject to CPO and review by the Secretary of State). The Tribunal takes into account the refusal of planning permission in December 2013, the requirement to undertake an environmental impact survey and the level of public opposition in concluding that there was a realistic prospect at the relevant date that the conditions of sale would not be met and the contract would have to be renegotiated, in giving weight to this argument.
40. The Council and Doric also argued that disclosure of Doric's figures (in documents 5 and 6) would be used by Doric's competitors both in terms of underbidding in future developments as they would have the blueprint of the way Doric structure a deal, their costs, assumptions and margins.
41. Dr Gill doubted that the information would be used by Competitors in the way envisaged by Doric, she argued that competitors would have their own way of doing things and

would prefer to base their bids upon their own figures. The Tribunal disagrees, we accept Mr Hillcox's evidence that he worked back from the figures that were revealed relating to the earlier Asda/Bride Hall bid. We are also satisfied that as a matter of common sense analysing someone else's approach and comparing it to your own is a useful way to find savings and ways to undercut.

42. The Tribunal accepts also that disclosure of the Council's and Doric's negotiating positions, assumptions, costs and acceptable values will prevent a level playing field in future negotiations with third parties (e.g. rental values, tender of construction costs, or discussions for compensation should the use of CPO powers become relevant) this is against the public interest as it distorts the level playing field. Although the Tribunal has considered Dr Gill's reference to the Local Government Transparency Code 2014<sup>23</sup> which states:

*"The Government has not seen any evidence that publishing details about contracts entered into by local authorities would prejudice procurement exercises or the interests of commercial organisations, or breach commercial confidentiality unless specific confidentiality clauses are included in contracts."*

In finding that this does not impact upon the strength of this argument, the Tribunal notes that this appears to relate to concluded contracts whereas the figures in issue in this case relate to a conditional contract or live negotiations that have yet to happen.

43. Although the Tribunal observes that it is not possible to contract out of the EIRs and reminds itself of the presumption in favour of disclosure, the Tribunal does have regard to private law rights to confidentiality and the protection of commercial interests. Jeopardizing future negotiations with third parties risks that the development proposed for site 2 would be compromised as it may impact upon Doric's ability to meet those conditions. There is a public interest in the development proposed for site 2 not being compromised by one side being forced to disclose the commercial basis for its proposal when its competitors do not have to. We are satisfied that if the development did not go ahead this would impact the other vendors in the MCA.

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<sup>23</sup> p64 OB Although this code post dates the information request the Government's observations contained within it are applicable to the relevant date.

44. The Tribunal accepts that information which reflects confidential negotiations with prospective tenants of the proposed development may cause them to be less willing to proceed if their involvement became public as opponents may try to dissuade them, and that some of the figures reflect confidential negotiations in which the other parties have invested time and money.

### **The Tribunals application of the public interest balance to the categories of information**

#### **Purchase Price<sup>24</sup>**

45. Mr Hillcox's evidence which we accept is that the valuation of the site was linked to the viability of the scheme. His concern relating to the withheld information was that these were pieces of a jigsaw puzzle which were interconnected. His particular concern was the link back to the purchase price. The sensitivity of the site value related to the danger of competitors leveraging Doric's confidential commercial information (giving them opportunity to submit a more attractive competing proposal if the agreement should need to be renegotiated). Although he would not normally expect there to be a problem and Doric had a good relationship with the Council in this case they had now had to do an environmental audit and could have been removed if they did not fulfil it.

46. – We are satisfied that there was a realistic prospect at the relevant date that the conditions of sale would not be met and the contract would have to be renegotiated and that disclosure of the price would disadvantage both Doric and the Council (to whom they owe a fiduciary duty) and the other members of the MCA, We therefore are satisfied that this information should continue to be withheld in light of the other methods of scrutiny available to ensure that the Council have fulfilled their s123 obligations.

#### **Current share value to council,**

47. Mr Tyson's evidence was that if the sale did not go ahead disclosure of the Council's share would distort the level playing field and the Council would not be able to achieve as good value in future. The Asda/Bride Hall figures had been disclosed because they were for a scheme that was not going ahead, this scheme will go ahead or form the basis for any new scheme. If this scheme did not go ahead this information would not be provided to any other bidders.

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<sup>24</sup> This includes the total combined price, the price for each site individually with and without any allowance for vacant possession.



48. Mr Hillcox said that disclosure of the Council's share was harmful because it reflects the overall site price (one could calculate the percentage of the site held by the Council from the land registry and work back to a total figure).
49. The Tribunal accepts this evidence and is satisfied that this information should be withheld for the reasons set out in paragraph 46 above.

#### **Previous estimate of council share**

50. Doric had no particular concern re these figures but Mr Tyson's concern was that although one figure had been disclosed, the other figure would show whether negotiations were likely to be above or below that figure which would point to the Council's current share of the value and distort the Council's negotiating position.
51. The Tribunal is satisfied that this figure should be disclosed. One figure has been disclosed already. This is a historic figure and is only an estimate. It adds to transparency in providing a fuller picture of the likely sums involved and is of little commercial sensitivity.

#### **Vacant possession**

52. Originally a price was agreed with an estimated figure included to achieve vacant possession (this included providing new premises for the library and rebuilding the parish hall), this was removed from any sale price as Doric took responsibility for achieving vacant possession preferring to control this process as it added certainty. Mr Hillcox's evidence was that this is the basis of the actual figure in the budget. Doric thought that by having control they would be able to reduce costs. If the individual occupier tenants on site 1 know the original and actual figures this would undermine the negotiating figure of, for example, the price at which they would be prepared to leave. Although all tenants are in different positions (e.g. how long is left on their lease and the size of the property) if the overall figure is known it undermines the negotiating position.
53. The Tribunal agrees with this analysis and is satisfied that disclosure of the original figure and Doric's revised figure would undermine Doric's negotiating position and that in light of the other methods of scrutiny and transparency available to ensure value for money, this information should be withheld.

### **Profit sharing mechanism**

54. Mr Hillcox stated that it is common practice to have a top up payment dependent upon profit, there would be no surprise or damage to Doric in disclosing the amount in itself but it is filling a gap in the computer programme, showing what they need to do to outbid Doric. Mr Tyson was concerned that disclosure would limit the Council's negotiation position in the event of re-negotiation. We accept this evidence and are satisfied that the percentage of super profit payable and cap should be withheld, the public interest in transparency being met in part by the knowledge that this mechanism is in place and by the other methods of scrutiny available.
55. Doric's profit figure is within the range for industry norms, although there can be significant variation, it would not be a surprise to a competitor. Although disclosure would not be helpful to Doric (it links to the top-up figure and completes more boxes towards helping to work out the purchase price) it was fairly low on the range of concern. The profit on cost to meet the viability conditions (in document 5) was 2/10 in terms of sensitivity. It is an assessment of profitability to make the development viable and not the actual profit expected.
56. We are satisfied that these figures should be disclosed. The actual profit figure is within industry norms and of low sensitivity, it is however important in terms of transparency to the public and their understanding of the likelihood that the terms of the contract represent good value for money. The profit on cost to meet viability is not the actual profit expected and also of low sensitivity, again it is informative in terms of transparency.

### **Doric provision of risk capital**

57. From this Mr Hillcox was concerned that competitors will know how exposed Doric are, how much money they have available, in the context that this was not a fast deal. It was unusual that Doric were not using outside finance at the time (subsequently Mace have come on board). We accept this evidence and are satisfied that this information was sensitive at the relevant date and this outweighs the public interests in transparency and scrutiny.

### **Sentences relating to market demand**

58. Mr Hillcox's evidence was that past experience had been that opponents of the scheme had on occasion approached those talking to the developer to dissuade them from participating, we accept this evidence and give weight to the importance of a level playing field in assessing the public interest we are therefore satisfied that this should be withheld.

#### **Income Protection and Rental void figures**

59. Mr Tyson's evidence was that the income protection scheme figures were sensitive because of difficulties negotiating the rental values of existing and proposed tenants. Disclosure would make it more difficult to achieve the right rental levels. Knowledge of the proposed rental value pot might impact on all the Council's rental values and impact upon the viability of other rental schemes. These were live negotiations. Negotiation of lower rents would impact the Council's revenue stream and was not in the public interest. We are satisfied that this information is sensitive and the primary factor in relation to transparency is the fact of the provision for income protection rather than the amount, disclosure would impact upon future negotiations and it is in the public interest that a level playing field is maintained.

#### **Doc 5 and 6**

60. In relation to Doric's figures Mr Hillcox said that although competitors can find things out in the ordinary course of events (e.g. although there were 10-12 bids, Doric found out who their immediate competitor was on site 1); by a process of maths Doric distilled down the disclosed figures from the earlier arrangement with the council and learnt information from this and discovered that things it thought it "knew" were not in fact the case.

61. The Doric assumptions show how his firm analyses the development based on confidential discussions with the Council, and in his view would be informative to competitors. If a competitor has the price of the site and these figures it is easier to reduce the profit figure on the basis of the work undertaken and the "known knows". A rival could accept a lower profit as they don't have to spend the money Doric has spent because they would have the product of the work Doric had already done.

62. We accept this evidence and that capitalization and yield figures would be relevant to the forward sale of property, rent free periods would impact upon the ability to obtain the best rents. Build costs would be useful to bidders when it went out to tender (although

Mr Hillcox confirmed they were now not intending to go to tender as Mace are involved, but at the time it was a very sensitive figure). Even fee provision makes negotiation difficult with those providing the service. Doric's figures we accept are sensitive and of use to competitors showing their approach both relating to the renegotiation of this contract and future contracts. Figures also impact upon future negotiations e.g. tendering for building costs and rental for student accommodation, for this reason we are satisfied that the public interest is in favour of withholding the information.

63. Mr Hillcox compared the DTZ analysis as "finding their way out of the forest with the string we have laid" – testing the scheme viability with the benefit of the work Doric had done. Although he was less concerned about DTZ assumptions as they were their own figures, some of the DTZ figures were at the extremes and would not be helpful in negotiations with retailers. His prime concern was where their analytical comment pointed to the Doric figure (e.g. higher, lower or the same).
64. Mr Hillcox's evidence was that the DTZ assumptions for student rent, yield and weekly rent based on Doric's figures is very sensitive as the negotiations with a student provider had not yet taken place. Some figures reflect negotiations with prospective tenants – disclosure would breach their confidentiality and undermine the time and money they have invested into the scheme
65. Where the DTZ figures cannot be linked to Doric figures or the site value they should be disclosed as they are assumed figures and not those actually used in the scheme. Although not helpful in negotiations they are DTZ figures and have no more weight than any other professional view. Similarly we are satisfied that the DTZ analysis is an important part of the transparency and scrutiny process. The disclosure of the material in redacted form has gone a long way to meeting the public interest in that the thoroughness of the analysis and the factors taken into consideration can be seen. We are satisfied that unless the analysis points to the Doric figures or site purchase price it should be disclosed.

### **Conclusion**

66. For the reasons set out above we allow the appeal in part. We direct that the Council make disclosure of the withheld material in accordance with paragraphs 45-65 above within 35 days. Our decision is unanimous.

Dated this 17th day of June 2015

Fiona Henderson

Tribunal Judge