

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 22 November 2010**

**Public Authority:** Gwynedd County Council  
**Address:** Council Offices  
Shirehall Street  
Caernarfon  
LL55 1SH

### **Summary**

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The complainant requested information in respect of the development of Victoria Dock, Caernarfon. The Council originally refused the request on the basis of section 43 of the Act. During the course of the Commissioner's investigation the Council reconsidered the request under the provisions of the EIR and refused to disclose the requested information, citing regulations 12(5)(e) and 12(5)(f). The Commissioner finds that neither exception is engaged and requires the Council to disclose the withheld information. He also found a number of procedural breaches of the EIR.

### **The Commissioner's Role**

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1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

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2. The Commissioner notes that at the time of the complainant's request (8 January 2009) both the sale and the development of Victoria Dock was complete.
3. During the course of his investigation the Council informed the Commissioner that the Victoria Dock area of Caernarfon was a derelict site for many years. The Council and the then Welsh Development Agency formed a joint board with the aim of finding a suitable developer for the site. The site was extensively advertised in the press and a development brief was sent to 30 development companies. Expressions of interest were received from three developers and Watkin Jones were chosen as the preferred developer being granted an exclusivity agreement in 1999.
4. An exclusivity agreement (also known as a lock-out agreement) is a contract between two or more entities to deal only with each other regarding a specific area of business. In the case of the sale and purchase of land, the land owner agrees not to negotiate with another prospective buyer for period of time.
5. The detailed offer for the site was received in 2004 at which time the Council commissioned a company of surveyors to conduct an independent appraisal of the offer and proposals. It is this report and its appendix which forms a significant part of the disputed information.

## The Request

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6. On 16 December 2008, the complainant asked to view the following information in respect of Victoria Dock, Caernarfon:  
  
*"...all documents relating to the sale of the above at your premises."*
7. On 7 January 2009, the Council informed the complainant that most documents would be available for him to view apart from information deemed commercially sensitive, for example:  
  
*".... calculations of site and development value provided by applicants and professional advisors."*
8. The complainant refined his request on 8 January 2009 to:

*"...the calculations of site and development value provided by applicants and professional advisors for Victoria Dock which you describe in ...your email."*

9. On 21 January 2009, the Council provided a redacted copy of the Independent Valuation Report that contained the requested information but refused the following information, citing section 43 of the Freedom of Information Act ('the Act'):
  - Paragraphs 4.1 to 4.12 inclusive of the report.
  - The Appendix to the above report.
  - A letter from the developer to the Council dated 28 July 2004.
10. The complainant requested an internal review of this decision on 30 January 2009 and the Council informed the complainant on 21 July 2009 that its review had upheld the original refusal to disclose the information referred to in paragraph 9 above.

## **The Investigation**

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### **Scope of the case**

11. On 22 July 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled.

### **Chronology**

12. On 10 August 2009, the Commissioner informed the Council that he had received a complaint regarding its handling of the above request for information and requested a copy of the disputed information.
13. On 19 August 2009, the Council forwarded a copy of the withheld information to the Commissioner. It also confirmed that it was relying on section 43(2) of the Act.
14. The Commissioner wrote to the Council on 27 October 2009 asking it to consider this request under the EIR and for further information in respect of this complaint.
15. On 23 November 2009, the Council confirmed that it had considered this request under the EIR and that it had concluded that the information should not be disclosed. The Council cited regulations 12(5)(e) and 12(5)(f) of the EIR.

16. Between 27 January 2010 and 9 April 2010, there was various correspondence between the Commissioner and the Council including letters from the developers objecting to disclosure of the withheld information.
17. On 21 September 2010, the Commissioner informed the Council that he was not persuaded by the arguments of either the Council or the developer and asked it to consider disclosing the information to the complainant voluntarily. The Commissioner asked for a decision from the Council by 5 October 2010.
18. The Council confirmed to the Commissioner on 13 October 2010 that it was not prepared to provide the information on a voluntary basis.

## **Analysis**

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### **Substantive Procedural Matters**

19. Full details of the relevant legislation applicable to this case are reproduced in the attached legal annex.
20. The Commissioner notes that the Council initially refused the request for information because it considered it exempt under section 43(2) of the Act. However the Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
21. The Commissioner considers that the information requested falls within regulation 2(1)(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."
22. The disputed information relates to the tender for the development of land the effect of which would have significant repercussions on both the land and the landscape of Victoria Dock.
23. Accordingly, the Commissioner considers that the information requested constitutes environmental information and the request should have been dealt with under the EIR rather than the Act.

## Exceptions

### Regulation 12(5)(e)

24. Regulation 12(5)(e) 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. The Council has applied Regulation 12(5)(e) to the whole of the disputed information, previously referred to in paragraph 9, above.
25. When determining if Regulation 12(5)(e) has been appropriately engaged the Commissioner will consider the following tests, all of which need to be met in order for the exception to be engaged:
  - 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?

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

26. For information to be commercial or industrial in nature it will need to relate to a commercial activity, either of the Council or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The withheld information in this case contains details of the calculation for a tender figure and a detailed financial appraisal based on information provided by the developer. As it relates to the tender for the development of an area of land for commercial gain, the Commissioner accepts that the information in this case is commercial in nature.

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

27. In relation to this second question the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. There is no need for the information to have been obtained from another party as is the case with section 41 of the Act.
28. The Council has provided the Commissioner with evidence that a confidentiality clause was included with the Development Agreement signed between the Council and the developers in 2006. However, this

document was signed after the disputed information was created and falls outside of the scope of this request. The Commissioner notes that there is no such confidentiality clause attached to the withheld information itself.

29. Additionally, the Commissioner does not accept that all information is held in confidence because the parties decide together that that will be the case. Accepting this could potentially allow parties to contract their way out of their obligations under the EIR. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.
30. For the duty of confidence to apply, the Council must be able to demonstrate that the information:
  - a. was imparted in circumstances creating an obligation of confidence, and
  - b. has the necessary quality of confidence

*The obligation of confidence*

31. The Commissioner notes that the information was provided as part of a tendering process. The Commissioner is satisfied that the information provided as part of a tender should be considered to be held in confidence by the parties, at least until such time as the tender is concluded. After that point, the parties would understand that some details of the successful tender are likely to be disclosed, particularly in the case of public authorities with a duty to be accountable to the public for their actions and to act transparently.
32. The Commissioner is also satisfied that there was an ongoing expectation that financial details relating to the costs and pricing of the developer would be considered to be held in confidence, at least until the development of the dock was completed and occupied.
33. The Commissioner is mindful that at the time of the request, (January 2009), the tender was concluded and the development of Victoria Dock completed. However, the Council has argued that even as late as 2010, 25 per cent of the units remained unoccupied. This, it believes impacts on the developer's ability to obtain the desired rents for the units.
34. The Commissioner is therefore satisfied that the withheld information was imparted in circumstances creating an obligation of confidence.

*The necessary quality of confidence*

35. Information will be considered to have the necessary quality of confidence if it is not trivial and its detail is not generally in the public domain.
36. The Commissioner is satisfied that information relating to the costs and pricing mechanisms of the developer is not trivial and that it is not generally in the public domain and therefore has the necessary quality of confidence.
37. Since the information has both the necessary obligation of confidence and the necessary quality of confidence, the Commissioner is therefore satisfied that the information is subject to a duty of confidence provided by law.

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

38. To satisfy this element, disclosure would have to adversely affect the legitimate economic interests of the party that the confidentiality is designed to protect. Moreover, that confidentiality must be objectively required at the time of the request in order to protect the relevant interests.
39. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

40. The Council has argued that disclosure of the information would adversely affect its own legitimate economic interests and those of the developer. The Commissioner has therefore considered the submissions made by the Council and the developer in relation to the

sensitivity of the information and the nature of any harm which would be caused by disclosure.

41. In its original refusal of the request the Council argued that it needs to conduct negotiations with developers in an atmosphere that allows it to gain an understanding of their proposals. This necessitates the scrutiny of developers proposals by exchanging sensitive information in a confidential manner. Developers therefore need to have confidence that the Council will deal with commercially sensitive information in an appropriate manner to enable full and frank discussions.
42. The Council has argued that disclosure of this information will erode this confidence thereby prejudicing its ability to choose the most cost effective tender for future developments.
43. The Commissioner is not persuaded by this argument as he does not accept that disclosure of this information would prevent developers from tendering for a project or that it would lead to less detailed tender bids being submitted in the future. In the Commissioner's opinion potential tenderers clearly have an inherent interest in being frank and open and submitting full and detailed tender bids in order that they are in the best position to be awarded the tender contract. If a company does not provide sufficiently detailed proposals during a tender exercise they risk not being awarded the contract by undermining the strength of their tender proposal. Further, the Council has not provided any evidence to demonstrate exactly how receipt of less detailed tender proposals would affect its ability to procure goods and services efficiently. The Commissioner is not therefore satisfied that the confidence is required to protect a legitimate economic interest of the Council.
44. The Commissioner has therefore gone on to consider the arguments in support of the legitimate economic interest of the developer. The Commissioner notes that the Council contacted the developers at the time of the request for its views regarding disclosure. On 10 June 2009 the developers formally objected to disclosure stating:  
  
*"The release of this information to third parties could have a damaging effect on our business."*
45. The Commissioner notes that the argument that disclosure 'could' have a damaging effect does not meet the threshold set out in paragraph 39 above and that the developer has not identified the nature of the 'damaging effect'.



46. During the course of the Commissioner's investigation, the Council therefore contacted the developer to seek further submissions in support of the legitimate economic interest. In a letter to the Council dated 25 February 2010 the developers argued that maintaining the confidentiality protected its business from its competitors having access to its pricing procedures and rates. It also stated that if this information was to be made public, its competitors 'could' use it to predict estimated costs on future projects placing it a disadvantage in future tender opportunities.
47. The Commissioner is mindful of the fact that at the time of the request, not only had the agreement between the developer and the Council been completed but the development itself had been constructed. Not persuaded by the arguments thus far provided by the developer the Commissioner asked the Council to clarify why the developer considered that the disclosure of information dating back to 2004 relating to prices and costings could still be used to predict estimated costs and questioned the relevance of 2004 prices to those of 2009.
48. The developers have argued that the documents reveal its pricing mechanisms and schedule of rates and that it would be relatively easy for a competitor to predict what those rates would be today. It maintains that due to the economic downturn its current pricing values are essentially the same or similar to those of 2004. It has further maintained that it is continually tendering and considering tendering for similar work to that carried out at Victoria Dock.
49. In his consideration of the developer's arguments, the Commissioner has considered the information itself which consists of Paragraphs 4.1 to 4.12 inclusive of the Independent Valuation Report, the Appendix to the above report and a letter from the developer dated 28 July 2004.

*Withheld information*

50. The Independent Valuation Report was produced for the Council by an independent company of surveyors. It includes detailed information provided by the developers and paragraphs 4.1 to 4.12 provide the surveyors comments regarding the developer's financial appraisal of its costs and pricing mechanisms. The appendix to this report contains the developer's detailed financial appraisal for the project itself and the letter from the developer contains a formal offer for the site with a high level breakdown of land values and unique costs associated with the development.
51. The Commissioner therefore accepts that at the time of an on-going tender there was a legitimate economic interest in maintaining the

confidentiality of this information, even in view of the exclusivity agreement signed between the developer and the Council. However, at the time of the request, the agreement had been signed and the development constructed.

52. However, whilst the Commissioner accepts that there has been a downward pressure on prices in recent years, he does not accept the view that the pricing mechanisms and costings for a development based on figures for 2004 would be similar to any future development in 2009 even in view of the economic recession. Each development is unique in terms of land values, costings and pricing mechanisms and since the agreement had been concluded and the development constructed the Commissioner is not persuaded that the legitimate economic, interest inherent whilst negotiations were ongoing, remains valid on completion.
53. In the absence of any further evidence from the Council to support its position on this point, the Commissioner is unable to conclude that the exception at regulation 12(5)(e) is engaged. Because the Commissioner considers that the exception is not engaged he is not required to consider the public interest test in relation to disclosure.

### **Regulation 12(5)(f)**

54. The Council has also relied on the exception at regulation 12(5)(f) in order to withhold the information referred to in paragraph 9 above.
55. Regulation 12(5)(f) applies to information where disclosure would have an adverse effect upon:
- (a) the interests of the person who voluntarily provided the information to the public authority,
  - (b) where the authority is not entitled to disclose the information apart from under the regulations,
  - (c) where the provider has not consented to the authority disclosing it.
56. The purpose of the exception at 12(5)(f) is to protect the voluntary supply to public authorities of information that might not otherwise be made available. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the provider. It is clear from the wording of the exception that the public authority's interests are excluded from consideration.
57. In this particular case, there is no evidence that the developers were legally required to provide the information. The Commissioner also accepts that the information was not supplied in circumstances that

would entitle the Council to disclose it, apart from under the Act or the EIR. The Commissioner also notes that the provider has explicitly refused consent to the disclosure of the information.

58. However, as with the exception at regulation 12(5)(e) the threshold for disclosure is a high one. The Commissioner also notes that although the Developers have not provided specific details of the adverse effect, the Council has argued that releasing the developers pricing mechanisms to competitors would put the developers at a disadvantage in future tendering exercises. However, the Commissioner notes that the Council offered no further specific arguments in support of this.
59. The Commissioner has already considered in his assessment of the Council's application of regulation 12(5)(e) whether disclosure of the requested information would cause a commercial detriment and he has decided that it would not. The Council's argument under regulation 12(5)(f) in relation to the adverse affect of disclosure is identical to its argument presented under regulation 12(5)(e) and, consequently, the Commissioner's conclusion is the same. The Commissioner has therefore determined that the exception at regulation 12(5)(f) is not engaged. He has not gone on to consider the public interest test in respect of this exception.

### **Procedural Requirements**

60. As the Commissioner has found that the exceptions claimed were not engaged based on the arguments presented to him, he considers that the Council breached regulation 5(1) and 5(2) because it failed to provide information to the complainant.
61. Unlike the Act, the EIR contains a specific requirement for the public authority to conduct an internal review. Regulation 11(4) of the EIR states:

*"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."*

62. The Commissioner notes that the complainant requested an internal review of the Council's original decision on 30 January 2009. However, the Council did not communicate the outcome of its review until 21 July 2009. The Council's failure to communicate the outcome of its internal review within the specified timescale therefore represents a breach of regulation 11(4) of the EIR.

63. The Council should have handled the request under the terms of the EIR rather than the FOIA. As it only sought to rely on exceptions during the course of the Commissioner's investigation, the Commissioner considers that the Council breached regulation 14(2) and 14(3)(a) of the EIR.

## **The Decision**

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64. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR.
- As discussed in paragraph 60, it breached regulation 5(1) and 5(2) for failing to provide the information requested.
  - The Council breached regulation 11(4) for failing to communicate the outcome of its internal review within the specified timescale.
  - As discussed in paragraph 63, the Council breached regulation 14(2) and 14(3)(a) for failing to cite exceptions under the EIR until after the Commissioner's investigation had commenced.

## **Steps required**

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65. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
- Disclose a copy of the withheld information referred to in paragraph 9 of this Notice to the complainant.
66. The public authority must take the steps required in this notice within 35 calendar days of the date of the notice.

## **Failure to comply**

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67. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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68. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 22<sup>nd</sup> day of November 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Freedom of Information Act 2000

#### Commercial interests.

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

**Section 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”

### Environmental Information Regulations 2004

#### Regulation 2 - Interpretation

**Regulation 2(1)** In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

### **Regulation 5 - Duty to make available environmental information on request**

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 5(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

### **Regulation 11 - Representation and reconsideration**

**Regulation 11(1)** Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

**Regulation 11(2)** Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

**Regulation 11(3)** The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

**Regulation 11(4)** A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

## **Regulation 12 - Exceptions to the duty to disclose environmental information**

### **Regulation 12(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 –

- (a) international relations, defence, national security or public safety;
- (a) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (b) intellectual property rights;
- (c) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (d) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (e) 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
  - (i) has not consented to its disclosure; or
- (f) the protection of the environment to which the information relates.

## **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.



**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;  
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).