

Environmental Information Regulations 2004

Decision Notice

Date: 12 May 2010

Public Authority: Colchester Borough Council
Address: PO Box 884, Town Hall
Colchester
CO1 1LZ

Summary

The complainant requested project information regarding the firstsite:newsite project in Colchester. The Council provided some information but refused to disclose the remaining information citing section 43(2) of the Act which relates to 'commercial interests'. During the course of the investigation the Commissioner found that the information was environmental information and asked the Council to reconsider the request. The Council maintained that the information is subject to the exceptions in Regulations 12(5)(c),(d) and (e) and 13(1).

The Commissioner found that Regulations 12(5)(c), (d) and (e) are not engaged in relation to any of the withheld information. He also found that Regulation 13(1) is engaged. He requires the Council to now disclose the information incorrectly withheld under Regulations 12(5)(c), (d) and (e). He has also recorded a number of procedural breaches.

The Commissioner's Role

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

2. The firstsite:newsite project is a construction project to build a new community arts facility. The Council appointed Banner Holdings Limited (Banner) as the contractor, Turner & Townsend Project Management Limited (TTPM) as project manager and Arup Project Management Limited (Arup) as Planning Supervisor.

The Request

3. The complainant made the following request for information to Colchester Borough Council (the Council) on 10 March 2008:

"I would like some detailed answers to the following questions in respect of the firstsite:newsite development being carried out by Colchester Borough Council.

A project of this size is doubtless subject to Project Management Regime. Will you please confirm what Project Management methodology is being used. I imagine it may well be PRINCE2.

The reason for my enquiry is that this development is now well behind schedule. The initial project plan was for the handover and opening in 2008. The latest reports in the press are for an opening in late 2008. The initial project time frame is well overdue and I would like to see the details regarding ongoing action. Please appreciate that my understanding of the subject is limited and I am trying to gain information about processes I am not familiar with. As such in addition to the email reply I would be grateful if you would call me by telephone. If only to prevent you wasting your time and me receiving not the information I want.

Can you supply me with the details of the Project Plan which will probably include many of the following:

- The high level plan including the detailed time line
- The key milestones
- A copy of the risk register or risk log, which

- indicate the current status of the project
 - Details of the mitigating action taken or planned in respect of those risks
 - Risk type
 - Risk owner – who it was raised by
 - The dates each risk was identified
 - The date each risk was last updated
 - The risk description
 - The likely cost if the risk materialises
 - Probability (is the risk rated Red, Amber or Green) or use the alternative scoring method.
 - Impact
 - Proximity
 - Possible response actions
 - Chosen action
 - Target date
 - Action owner/ custodian (if differs from risk owner)
 - Closure date
 - Cross references to plans and associated risks with risk status and risk action status”
4. The Council initially responded on 20 March 2008 informing the complainant that it had appointed TTPM as project managers, contract administrators and cost managers. The Council stated that it would not provide the detailed information listed as it considered disclosure could prejudice the interests of third parties as the documents contain sensitive commercial information. The Council did however inform the complainant of the project methodology being used.
 5. The complainant wrote to the Commissioner to complain about the Council’s response on 21 March 2008. There then followed correspondence between the Commissioner and the Council in which the Commissioner asked that the Council issue the complainant with a substantive response to his request.
 6. The Council provided the complainant with a refusal notice on 11 May 2008. It stated that the requested information was a project plan and risk log for the firstsite:newsite development in Colchester. It explained that this information was being withheld under section 43 of the Act.
 7. The complainant requested an internal review of this decision on 13 May 2008.

8. The Council carried out its internal review and communicated the findings to the complainant on 18 June 2008. The internal review found that the information was correctly withheld by virtue of section 43(2) of the Act however it disclosed to the complainant a copy of the project Risk Management Report but redacted it of personal and financial details attached to each risk.

The Investigation

Scope of the case

9. On 12 August 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the public authority had correctly refused to release the information he had requested. The Commissioner has restricted his investigation and decision to the information that remains outstanding.

Chronology

10. The Commissioner began his investigation by writing to the Council on 7 July 2009 requesting a copy of the withheld information and further arguments to support its reliance on section 43(2) of the Act.
11. The Council responded on 19 August 2009 providing the Commissioner with a copy of the withheld information and with further arguments to support its reliance on section 43(2) of the Act.
12. The Commissioner wrote again to the Council on 25 August 2009 querying some of the information provided as the version date of some of the documents was after the date of the request. The Commissioner asked the Council to check if it held the earlier versions of the documents and to supply them to him. This was because the Commissioner must consider the information that was held at the time of the request.
13. The Council responded on 7 September 2009 providing the Commissioner with the versions of the withheld information held at the time of the request. The Council also provided further arguments in relation to the application of section

43(2) and in addition now sought to rely on sections 21, 41 and 40 of the Act.

14. The Commissioner wrote to the Council on 29 September 2009 having reviewed the withheld information in more detail. He informed the Council that he considered the information to be environmental information as defined by the EIR and asked the Council to review the withheld information and provide arguments under the EIR.
15. The Council responded on 12 October 2009 stating that it did not believe that all of the withheld information fell within the definition of environmental information. However, the Council informed the Commissioner that the information was excepted under the EIR by virtue of Regulations 12(5)(c),(d) and (e). In addition some information was also excepted under Regulation 13.
16. The Commissioner wrote again to the Council on 13 January 2010 asking the Council to provide further arguments to support its reliance on Regulations 12(5)(c), (d) and (e). The Council responded on 28 January 2010 providing the further rationale requested by the Commissioner.

Findings of fact

17. The withheld information consists of the following documents:
 - Project Timetables – being withheld under Regulations 12(5)(c), (d) and (e)
 - Health and Safety Plan – being withheld under Regulations 12(5)(c), (d) and (e). Personal data also redacted under Regulation 13.
 - Schedule 3 'defective and/or non compliant works' – being withheld under Regulations 12(5)(c), (d) and (e).
 - Parts of the Risk Management Report – redactions being made under Regulations 12(5)(d) and (e) and 13.

Analysis

Substantive Procedural Matters – Environmental Information

18. The Commissioner notes that the Council initially refused the request for the information because it considered it exempt under section 43 of the Act. However the Commissioner

considered that the information was environmental information and as such it should have been considered under the EIR.

19. The Commissioner's decision is that all of the information relating to the project including, the Health and Safety plan, Risk Management Report, timetables and information regarding the progress of the works, is environmental information falling within Regulation 2(1) of the EIR.
20. Regulation 2(1)(c) provides that –

"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 –

(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'
21. The factors referred to in (a) include –

' 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'
22. The Council has argued that not all of the information is environmental as much of it does not refer to the state of the elements of the environment or factors affecting those elements. The Commissioner interprets the phrase 'information on' broadly when considering Regulation 2(1)(c). In this case all of the information requested by the complainant is about the way in which the development of the new arts centre is being carried out. As mentioned above, this includes the timescales for the development, details from the Risk Management Report associated with it and the Health and Safety plan being used when the work is carried out. He is satisfied that this is all information on the arts centre development which is itself an activity affecting, or likely to affect the elements in Regulation 2(1)(a), namely the land and landscape directly, as well as via the factors list in Regulation 2(1)(b).

23. The Council has not applied any exceptions to parts 3 and 4 and appendices 7 and 8 of the Health and Safety Plan. However, they have not disclosed this information to the complainant as they do not believe this information to be environmental and consider that under the Act the information is exempt under section 21. As outlined above the Commissioner has found that all of the withheld information is environmental information. This decision notice therefore requires the Council to disclose parts 3 and 4 and appendices 7 and 8 of the Health and Safety Plan.

Regulation 5(1) – duty to provide information on request

24. During the course of the Commissioner's investigation it became clear that the redacted Risk Management Report disclosed to the complainant was in fact the wrong version. The version disclosed to the complainant is dated June 2008 however the complainant's request was made on 10 March 2008. The Commissioner has been provided with the version of the Risk Management Report that was held at the time of the request which is dated January 2007.
25. In light of this the Council needs to disclose to the complainant the correct version of the Risk Management Report (January 2007) held at the time of the request including the previously redacted figures which we have concluded below are not excepted.

Exceptions –Regulation 12(5)(e)

26. 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 Project Timetables, the Health and Safety Plan, Schedule 3 and the financial information redacted from the Risk Management Report.
27. When determining if Regulation 12(5)(e) has been appropriately engaged the Commissioner will consider the following questions:
- 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?

28. 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 Commissioner accepts that the information in this case is commercial in nature as it relates to an ongoing project to build a new community arts facility. The information includes agreed actions, timescales and risks associated with the building project and therefore is about the services the Council has purchased from third parties.

Is the information subject to confidentiality provided by law?

29. In relation to the 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.
30. The Council has argued that both a common law duty of confidence and contractual obligations apply to all of the withheld information. The information was created in the context of sensitive commercial negotiations and a contractual relationship. In asserting that there is both a common law duty and a contractual one the Council has sought to protect its own interests as well as those of its third party contractors. These arguments will be considered in more detail later in this notice.
31. The Council explained that all of the documents were prepared and supplied by its private sector suppliers in return for payment, as part of their supply of services to the Council. Banner produced the Health and Safety Plan as parts of its management of health and safety on the construction site. TTPM produced the timetable, schedule of defects and the Risk Management Report as parts of its management oversight of the project. Appendix 10 of the Health and Safety

Plan is a Pre-Construction Health and Safety Plan provided to the Council by Arup.

32. When considering if a common law duty of confidence applies the Commissioner will assess whether the information has the necessary quality of confidence, determining that it is not trivial or in the public domain, and establishing that it was shared in circumstances imparting an obligation of confidence.
33. The Council has stated that Banner, TTPM and Arup needed privileged access to Council information and staff to enable them to create the requested information and that this access was only provided for the purposes of the project – this access was withdrawn when no longer required. Furthermore, the Council has argued that the documents contain, in their structure and methodologies, and the detailed policies in the Health and Safety Plan, know-how that belongs to suppliers and which they only make available to their customers. The Council has also pointed out that the Health and Safety Plan and Risk Management Report contain control lists specifying the small number of individuals who were authorised to access the documents. The schedule of defects and the timetables were prepared for reference between the parties and their officers as part of their management of the project.
34. Although all of the information being withheld under regulation 12(5)(e) was created by the third parties it was nevertheless jointly agreed and created with input from the Council. In view of the restricted access described above the Commissioner is satisfied that there would be an expectation by all parties that information provided to the Council as part of the project would be held under a duty of confidence and that therefore the information was shared in circumstances imparting an obligation of confidence on both parties. In reaching this decision the Commissioner has also noted the clause in the contract between the Council and Banner which grants the Council only a licence to use the documents (including those provided by Arup), and the further clause which reserves the right of ownership of the documents to Banner. In relation to the information created by TTPM the Commissioner notes that the Risk Management Report also contains an express clause which states:

“All rights reserved January 2007. This document is expressly provided to and solely for the use of Colchester Borough Council and must not be quoted from, referred to, used by or distributed to any other

party without the prior consent of Turner & Townsend Cost Management..”

35. The Commissioner is further satisfied that most of the withheld information is neither trivial nor in the public domain and therefore has the necessary quality of confidence. However, the Commissioner does not consider that the information in part 5.7 of the Health and Safety Manual has the necessary quality of confidence because it can be found in the public domain. This information is similar in quality to the information in parts 3 and 4 of the Health and Safety Manual that the Commissioner has referred to above. The Commissioner therefore does not consider that Regulation 12(5)(e) applies to the material in part 5.7 of the Health and Safety Manual.
36. Whilst the Commissioner has referred to the confidentiality clauses when making an assessment about the parties' expectations in relation to the common law duty, he has also considered them because the Council has simultaneously claimed a contractual obligation of confidence. Having viewed the contractual clauses, including the text above, that relate to the withheld information he is further satisfied that a contractual duty of confidence to the relevant third parties also applies in respect of all of the withheld information.
37. Having concluded that both a common law duty of confidence and contractual obligation applies to all of the withheld material the Commissioner has gone on to consider whether the confidentiality is needed to protect economic interests of any of the relevant parties.

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 those to whom the confidentiality is owed. Moreover that confidentiality must be objectively required at the time of the request in order to protect the relevant interests. The Council has argued for reasons outlined below, and detailed in the attached confidential annex, that disclosure of the information would adversely affect its own legitimate economic interests and those of its third parties. The Commissioner has considered the Council's submissions in this regard in relation to all of the material that he has concluded is subject to a duty of

confidence and has the necessary quality of confidence. He has considered each document in turn below.

39. The Commissioner also wishes to clarify that the 'adverse affect' test is a high threshold and places a strong evidential burden on the public authority. Therefore it is not enough that an adverse effect would be likely or might be caused, instead the public authority must demonstrate that the adverse effect is at least more probable than not.
40. One of the Council's arguments was that at the time of the request the project was receiving considerable attention in the local media and one thread of this coverage was calling for the project to be abandoned based on long standing opposition to it. It asserted that any disclosure was likely to generate considerable further enquiries from the public and local media and particularly from established opponents of the Council. Disclosure of the information would have drawn the Council's resources away from dealing with its other business, causing duplication and additional costs because the Council had already appointed a professional project manager. The Commissioner does not consider this argument to be relevant when considering Regulation 12(5)(e) as avoiding the adverse effects mentioned is not inherent in that particular exception. Therefore he has not considered this particular argument any further in relation to any of the material referred to below.

Project Timetables

41. The Council has stated that the confidentiality of this information was objectively required in March 2008 to protect the interests of TTPM in their-know how which is exhibited by the timetables. The Council stated that disclosure would have undermined TTPM's position by making its know-how available to its competitors which would have enabled a competitor to improve its project timetabling capabilities.
42. The Commissioner notes that although the completion date for the project was already in the public domain the project timetables themselves were not. The timetables contain over 200 items showing when each individual item was due to be completed as well as the length of time it would take to complete each item. The timetables also reveal the order of works in that they show the month and week in which each piece of work was to be done.

43. The Commissioner accepts that the project timetables would provide TTPM's competitors with additional information about the approach it has taken to timing of specific tasks in relation to this particular project. Whilst he acknowledges that competitors are likely to be involved in projects of a similar scale, the Commissioner considers it likely that they would have their own well established approach to arranging timetables. Moreover the information in this case is very specific to this particular project which it is recognised is a groundbreaking and relatively unusual development. In view of this the Commissioner is not persuaded that if the timetables were disclosed TTPM's competitors would gain an unfair advantage in relation to future developments. The Council has not supplied any evidence of arguments regarding the similarity of other projects pursued by TTPM or its competitors or the relevance of this information to them.
44. The Council also asserted that due to the strong media interest in the development disclosure would likely have led to TTPM being discredited. The Commissioner is not persuaded by this argument as the fact that the project had fallen behind schedule was in the public domain. Therefore the withheld information being disclosed would not have been the cause of any criticism in this regard.
45. The Council has also provided the Commissioner with submissions in confidence regarding an adverse effect on its own economic interests. The Commissioner accepts that these submissions should remain confidential and therefore he has addressed them in the confidential annex to this decision notice which will only be provided to the Council.
46. In view of the above and the analysis in the confidential annex, the Commissioner has concluded that confidentiality was not provided to protect a legitimate economic interest in relation to the project timetables and therefore the Council incorrectly applied Regulation 12(5)(e) to that information.

Health and Safety Plan

47. The Council argued that this document was produced to achieve compliance with health and safety law applicable to construction sites. It is required to disclose the document to the regulator, the Health and Safety Executive (HSE) on request. Pending any such request the document is relevant primarily to the Council, its contractor and site sub-contractors. The document is largely in a standard form as

compiled by Banner and its structure shows Banner's working practices and procedures and its network of support companies. It represents material investment by Banner of management time and professional consultancy advice. As such it constitutes Banner's valuable know-how and disclosure of this document would have made it to its competitors putting it at a commercial disadvantage. Other construction companies could have used the information to improve their own policies and methodologies to further their competitive edge, effectively at a cost to Banner. Some information within the plan also contains information produced by Arup and contains its valuable know-how including the structure and content of the report. The Council made the same arguments in respect of how Arup would be adversely affected as it made in relation to Banner.

48. The Commissioner accepts that the Health and Safety Plan does represent Banner's know-how and approach to health and safety. The report reveals Banner's approach to the maintenance of the project, its health and safety policies, how responsibilities for different aspects of the site are broken down, the risks it has identified and how it manages and mitigates those risks in relation to health and safety. Appendix 10, which is the Pre-Construction Health and Safety Plan provided by Arup, contains similar information to the main Health and Safety Plan but represents an earlier stage in the project. The Commissioner also accepts that this information represents Arup's know-how in relation to the management of health and safety in development projects.
49. Whilst he accepts that the information represents Banner and Arups' know-how, the Commissioner is not satisfied that the Council has demonstrated that the disclosure of the information within the Health and Safety manual would adversely affect the legitimate economic interests of those parties, particularly bearing in mind the strong evidential burden on the public authority. In the Commissioner's view it is unlikely that the information would provide any potential competitors trying to enter the construction industry with sufficient information to gain an advantage. Furthermore, any existing customers operating in the same market as Banner and Arup would have developed their own policies and procedures regarding health and safety given that they are subject to the same health and safety requirements. Finally, and most significantly, the Commissioner has not been provided with evidence to suggest that the Health and Safety Manual is a significant factor for either company when

competing for contracts. Whilst Health and Safety Manuals may be a routine requirement of any development contract, in the Commissioner's view it is more likely that the companies would compete on the basis of other variables such as price.

50. As mentioned in relation to the project timetables, the Council has provided submissions in confidence regarding an adverse effect on its own economic interests. The Commissioner accepts that these submissions should remain confidential and therefore he has addressed them in the confidential annex to this decision notice. However the Commissioner has concluded that in relation to the Health and Safety Plan, as with the project timetables, confidentiality was not provided to protect a legitimate economic interest and therefore Regulation 12(5)(e) was inappropriately applied by the Council.

Schedule 3 to the Supplemental Agreement (Schedule of Defects)

51. This is a list of defective and non compliant works for the development. The Council argued that if this information were disclosed it would harm its own legitimate economic interests as well as those of the third party contractors. All of the Council's submissions in this regard have been provided in confidence and the Commissioner accepts that they should remain confidential. The Commissioner has considered the withheld information and is not persuaded that confidentiality was provided to protect legitimate economic interests of any of the relevant parties. However he is unable to provide his reasons for reaching this conclusion without revealing the content of the Council's confidential submissions. Therefore he has set out his reasoning for reaching this conclusion in the confidential annex to this notice in order to preserve the Council's right of appeal.

Risk Management Report

52. The Council only withheld the monetary amounts from within the Risk Management Report under Regulation 12(5)(e). It argued that the monetary amounts were commercially sensitive because they reflect the know-how of TTPM. The Council stated that circulation of the document was controlled and monitored and that disclosure would have put TTPM at a commercial disadvantage. The Council also stated that the contingencies give an insight into the Council's financial arrangements for the project and disclosure would have put

the financial management of the project at further risk. The Council also stated that the document was not intended for circulation amongst third party contractors, who could have used such information to exploit the Council's contingencies by seeking to negotiate higher pay under its contract or managing risks using higher tolerances than were appropriate.

53. The Commissioner does not consider that disclosure of the monetary amounts from the Risk Management Report would have the effect described above. Having viewed the monetary amounts withheld the Commissioner considers the breakdown of the amounts to be at a relatively high level and notes that they are specific to this particular development project. Based on this the Commissioner does not consider that the Council has demonstrated why disclosure would have been of detriment to the contractors when tendering for new business or working on other development projects. Furthermore it has not evidenced why it is more probable than not that contractors would seek to use this information to exploit the Council's contingencies if it were disclosed. In view of this the Commissioner has concluded that confidentiality was not provided to protect legitimate economic interests of the contractors or the Council in relation to the financial information within the Risk Management Report and therefore the Council incorrectly applied Regulation 12(5)(e) to that information.
54. The Council suggested that if the withheld information were disclosed it would be at risk of claims for damages for a breach of its common law duty of confidence which would adversely affect its own legitimate economic interests. The Commissioner does not accept that the Council has demonstrated that this is more probable than not, particularly given that he has not accepted that, in relation to any of the withheld information, confidentiality is provided by law to protect a legitimate economic interest of any of the third party contractors.

Regulation 12 (5)(c) – Intellectual Property Rights

55. Regulation 12(5)(c) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property rights. "Intellectual property rights" are rights granted to creators and owners of works that are the result of human intellectual creativity. These works could be in the industrial, scientific,

literary or artistic domain. Intellectual property rights include copyrights, patents, trademarks and protected designs. They may be in the form of, for example, an invention, a manuscript, a suite of software or a business name.

56. The Council has stated that, where the information was supplied by Banner, TTPM or Arup, considerable confidential know-how was involved in the preparation of the documents. The know-how constitutes the parties' intellectual property rights. The Council further stated that disclosure would expose it to claims for damages on the basis that the third parties' intellectual property rights had been adversely affected.
57. The Commissioner does not consider that the Council has provided sufficient evidence to demonstrate that Regulation 12(5)(c) is engaged in this case. It has simply asserted that the know-how within the withheld information constitutes the intellectual property of the third parties. It has not explained which particular intellectual property right it is asserting, nor has it explained or demonstrated how or why disclosure would adversely affect any such rights that exist. In the absence of such evidence the Commissioner has concluded that the Council inappropriately cited Regulation 12(5)(c) as a basis for refusing the requested information.

Regulation 12(5)(d) - proceedings

58. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of proceedings of that or any other public authority where such confidentiality is protected by law.
59. The Commissioner interprets "proceedings" as possessing a certain level of formality (i.e. they are unlikely to encompass every meeting held/procedure carried out by a public authority). They will include (but may not be limited to):
 - legal proceedings;
 - formal meetings at which deliberations take place on matters within the public authority's jurisdiction; and
 - where a public authority exercises its statutory decision making powers.

Public authorities can only refuse to disclose information relating to proceedings where the confidentiality of those

proceedings is provided by law. This includes common law or specific statutory provision. If the confidentiality of the proceedings is not provided by law, Regulation 12(5)(d) will not apply.

60. The Council's submissions regarding its application of Regulation 12(5)(d) have been provided in confidence and again the Commissioner accepts that they should remain confidential. Therefore he has provided further explanation of his decision that the Council has failed to demonstrate that disclosure of the information would adversely affect the confidentiality of proceedings in the attached confidential annex. The Commissioner therefore finds that Regulation 12(5)(d) is not engaged.

Regulation 13

61. Regulation 13 provides an exception for information which is the personal data of any third party and disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 ('the DPA').

In order to rely on the exception provided by Regulation 13, the information being requested must constitute personal data as defined by the DPA. The DPA defines 'personal data' as:

"...data which relate to a living individual who can be identified

- a) from those data, or
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual".

62. The Council has applied Regulation 13 to the names of individuals contained on the second page of the Risk Management Report. The names relate to those individuals involved in the project and are listed against their respective companies/organisations. The companies/organisations have been disclosed and include the Council, the various contractors, University of Essex and the East of England Development Agency. The Commissioner has also found that the Health and Safety Plan should be disclosed. In view of his responsibilities as the regulator of the DPA he has determined

that it is appropriate to proactively consider if the personal data contained within the Health and Safety Plan should be disclosed. In the Health and Safety Plan at the start of the document is a list of names and job titles of those involved in the project at the Council and Banner. The Commissioner accepts that the names of individuals listed in the Risk Management Report and the names and job titles contained within the Health and Safety Plan constitute personal data as defined by the DPA.

63. The Council has argued that the information is excepted from disclosure because to release it would breach the first data protection principle.
64. The first data protection principle has two components:
 1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
65. The Council explained that the personal data contained within the Risk Management Report was not acquired by the Council in the expectation that it would be disclosed so the Council did not give notice to its suppliers leading them to expect disclosure of its staff details. The Council further confirmed that it does not have the consent of the individuals to disclose their information. The Commissioner recognises that the same argument would also apply to the names and job titles contained within the Health and Safety Plan.
66. In considering whether disclosure is fair the Commissioner has considered the consequences of disclosure, the reasonable expectations of the data subjects and has balanced the rights and freedoms of the data subject with the legitimate interests of the public in the information being disclosed.
67. The Council has argued that disclosure of the information would have been likely to result in the individuals being named in the media causing them substantial distress and damaging their reputation and prospects. The Commissioner considers that disclosure of the information could result in the individuals having unwarranted communications from members of the public, particularly those unhappy with the project. However, the names and job titles relate to the main members of the project team and the context in which they are listed relates to the professional lives, therefore any

additional scrutiny or communication which may come about from disclosure of this information may not necessarily be unfair.

68. In assessing the reasonable expectations of those names in the documents consideration is given to two elements, the reasonableness of the expectation and the nature of the expectation. The Commissioner considers that the individuals named in the Risk Management Report and Health and Safety Plan would have had an expectation that their personal details could be disclosed. The Commissioner considers that where the company's client is a public authority the staff members of the company would have a higher expectation that their names may become public. He also considers that, in relation to the Risk Management Report, the other individuals involved in the project would have also have a higher expectation that their names may become public due to the large scale public nature of such a project. The Commissioner also considers that if the requested information relates to the professional life of the data subjects rather than their private life then it is more likely that it will be fair to disclose this type of information.
69. All of the individuals named in the Health and Safety Plan are the main members of the project team, either at the Council or within the private companies. The names in the Risk Management Report are all individuals closely involved in the project either within the Council, the contractors or an external body with an interest in the project. Given the large scale nature of the project in question, the fact that in the case of the company employees they would have understood the work was being undertaken for a public authority, and the fact that the material relates to their professional lives rather than their private lives the Commissioner considers the individuals would have had a reasonable expectation that their names and job titles would be disclosed. The Commissioner recognises that the roles themselves are not necessarily public facing however, he still considers that the individuals would have a reasonable expectation of being named where the client is a public authority.
70. The Commissioner has gone on to balance the rights and freedoms of the data subject against the legitimate public interest in disclosure. The Council recognised, and the Commissioner acknowledges, that there is a legitimate public interest in disclosure of information which would inform the public as to the processes involved in the project and would

clarify which parties were privy to the different information held during different stages of the development. Projects of this scale can generate strong feelings from members of the public and the more information available to the public would enable public debate on an informed basis. There is a legitimate public interest in accountability and transparency. The Commissioner has balanced this against the data subjects rights. In this case he considers that because there is a reasonable expectation on the part of the individuals that the information may be disclosed, the material is of a limited nature and therefore the consequences of release are likely to be minimal and given the state of the project, disclosure would be fair.

71. As the Commissioner has determined that disclosure would be fair he has considered if one of the conditions of Schedule 2 of the DPA is met. The most relevant condition is the sixth condition which establishes a three part test which must be satisfied;
- there must be **legitimate interests** in disclosing the information,
 - the disclosure must be **necessary** for a legitimate interest of the public and,
 - even where the disclosure is necessary it nevertheless must not cause **unwarranted interference** (or prejudice) to the rights, freedoms & legitimate interests of the data subject
72. In determining if disclosure is fair, the Commissioner has already identified that there is a legitimate interest in disclosure of the information. He has therefore gone onto consider if the disclosure is necessary to meet the legitimate interest identified.
73. In this case the Commissioner does not consider that disclosure of the names and job titles of those involved in the project adds significantly to the information which he has already identified for disclosure. The Commissioner has determined that the Health and Safety Plan should be disclosed in full and a redacted version of the Risk Management Report has been disclosed which clearly shows to the public the high level risks identified and actions taken or proposed meeting the legitimate public interest of transparency and accountability. The Commissioner does not consider that in the circumstances of this case, it is necessary to disclose the names of the individuals in the Risk

Management Report or the names and job titles of the individuals in the Health and Safety Plan to meet the legitimate public interests in transparency and accountability in relation to the project.

74. For these reasons the Commissioner accepts that disclosure of the contractors' names and job titles withheld from the Risk Management Report and the Health and Safety Plan would breach the first data protection principle because a Schedule 2 condition is not met. The Council there appropriately applied Regulation 13(1) to the personal data within the Risk Management Report. The personal data in the Health and Safety Plan is also excepted by virtue of Regulation 13(1) for the same reason.

Procedural Requirements

75. Regulation 14 ('Refusal to disclose information') states that if a request for environmental information is refused, this refusal should be made in writing in no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under Regulations 12(4), 12(5) or 13; and where appropriate the matters considered in reaching a decision about the public interest under Regulation 12(1)(b).
76. In failing to deal with the request under the correct legislation and therefore failing to issue a refusal notice which meets the requirements above within twenty working days the Council breached the requirements of Regulations 14(2) and 14(3).
77. In failing to disclose the withheld information that the Commissioner has concluded is not excepted by virtue of Regulations 12(5)(c), (d) or (e) within twenty working days of the request, the Council breached Regulations 5(1) and (2). The Council also breached Regulations 5(1) and (2) in failing to provide parts 3 and 4 and appendices 7 and 8 of the Health and Safety Plan, in respect of which it cited no exception within the EIR, to the complainant within twenty working days.
78. The Council also breached regulation 5(1) for failing to supply the correct version of the Risk Management Report as held at the time of the request.

The Decision

79. The Commissioner's decision is that the public authority appropriately withheld the personal data within the Risk Management Report under Regulation 13(1). The personal data within the Health and Safety Plan is also excepted by virtue of Regulation 13(1).
80. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- (i) The Council incorrectly applied Regulations 12(5)(c), 12(5)(d) and 12(5)(e) to the information withheld from the complainant under those exceptions.
 - (ii) In failing to make the withheld information available to the complainant within twenty working days the Council breached the requirements of Regulations 5(1) and (2). It also breached Regulations 5(1) and (2) in failing to provide the complainant with the information in parts 3 and 4 and appendices 7 and 8 of the Health and Safety Plan, in respect of which it cited no exception.
 - (iii) The Council also breached regulation 5(1) in that the version of the Risk Management Report provided to the complainant was not the version held at the time of the request.
 - (iv) In failing to consider the request under the EIR and issue a refusal notice compliant with its requirements within twenty working days the Council also breached Regulations 14(2) and (3).

Steps Required

81. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR:
- (i) Disclose to the complaint the version of the Risk Management Report dated January 2007 including costs information that was incorrectly withheld on the basis of Regulations 12(5)(d) and (e) but with personal data withheld under Regulation 13(1) redacted.

- (ii) Disclose to the complainant parts 3 and 4 and appendices 7 and 8 of the Health and Safety Plan.
 - (iii) Disclose to the complainant the remainder of the withheld information that was incorrectly withheld on the basis of Regulations 12(5)(c), 12(5)(d) and 12(5)(e), namely:
 - The remainder of the Health and Safety Plan but with personal data withheld under Regulation 13(1) redacted
 - The project timetables
 - Schedule 3 to the Supplemental Agreement (Schedule of Defects)
82. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

83. 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

84. 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.
Website: 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 served.

Dated the 12th day of May 2010

Signed

**Jo Pedder
Group Manager**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

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

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

- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4) of the Act; and

"working day" has the same meaning as in section 10(6) of the Act.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(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.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

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;
- (b) 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;
- (c) intellectual property rights;
- (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;
- (f) 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; or
- (g) the protection of the environment to which the information relates.

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 13 - Personal data

Regulation 13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or

- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.