

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 21 November 2011

**Public Authority:** North Hertfordshire District Council  
**Address:** Gernon Road  
Letchworth Garden City  
Hertfordshire  
SG6 3JF

**Decision (including any steps ordered)**

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1. The complainant requested a copy of a risk register held by North Hertfordshire District Council ("the council") relating to a particular development. The council initially refused to provide the information using an exemption under the Freedom of Information Act 2000 ("the FOIA"). It subsequently sought to rely on exceptions in the Environmental Information Regulations 2004 ("the EIR") relating to internal communications and prejudice to the confidentiality of commercial information.
2. The Commissioner's decision is that the council incorrectly withheld the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose to the complainant a copy of the withheld risk register
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply 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.

**Request and response**

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5. On 4 November 2010, the complainant wrote to the council and requested information in the following terms:

*"Under a Freedom of Information request I would ask you to make public your risk register for the Churchgate redevelopment, showing at least each risk, its priority, its perceived probability of occurrence, mitigation measures proposed and perceived probability of occurrence after mitigation".*

6. The council responded on 23 December 2010. It said an exemption applied under the FOIA which concerns prejudice to the effective conduct of public affairs.
7. The complainant requested an internal review on 5 January 2011.
8. After intervention from the Commissioner, the council completed its internal review on 17 March 2011. It maintained its position that the exemption relating to prejudice to the effective conduct of public affairs was engaged, and it also applied another exemption concerning prejudice to commercial interests. It said that the public interest did not favour disclosure of all of the information, although it was able to disclose some of it to the complainant at this stage.

### **Scope of the case**

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9. 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 council had correctly refused to provide a copy of the risk register.
10. For clarity, following the Commissioner's intervention, the council reconsidered the request under the EIR. It said that it considered that the information should still be withheld using exceptions relating to internal communications and prejudice to the confidentiality of commercial information.
11. Part of the risk register has been disclosed to the complainant. The Commissioner considers that that has resulted in the informal resolution of that particular aspect of the complaint. This notice only concerns the information that the council is seeking to withhold using exceptions under the EIR.
12. For clarity, the Commissioner's investigation must be based on the information that was held at the time of the request. The council explained that the risk register is a fluid document and it had therefore provided a more up to date copy to the Commissioner as well as the version of the register that was held at the time. The Commissioner has only considered the information that was held at the time of the request and he has disregarded the other information provided by the council.

## Reasons for decision

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### Exceptions

#### Regulation 12(4)(e) – Prejudice to internal communications

13. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. For clarity, the council said that it had applied this exception to all of the information in the risk register.
14. The Commissioner has, in his published guidance<sup>1</sup>, established some general principles relating to this exception. Communications within one public authority will constitute internal communications for the purpose of this exception. All central government departments (including executive agencies) are deemed to be one public authority. Communications between a public authority and a third party will not constitute internal communications except in very limited circumstances. The definition of a communication is broad and will encompass any information intended to be communicated to others or to be placed on file where it may be consulted by others.
15. Based on the broad description above of what constitutes a “communication”, the Commissioner is able to accept without any difficulty that the risk register in this case would be a communication. The issue then arises as to whether the risk register should be deemed to be an *internal* communication.
16. By way of background, the council awarded a contract for the redevelopment of Churchgate Shopping Centre and surrounding areas in Hitchin to Simons Developments Limited (“Simons”). The council explained that the Churchgate Project Board is made up of four councillors and professional and experienced officers from the council. The project board is attended by and reported to by internal professional advisors as well as a consultant who is a former Director of Simons. The consultant is contracted by Simons to liaise between Simons and the council to assist the council with the project. The project board contributes to and discusses the risk register for the project, and the register is constantly updated as a result. The council explained that the register is not shared outside of the members of the Churchgate Project Board, save to obtain the essential input required to the risk

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<sup>1</sup> <http://www.ico.gov.uk/foikb/FOIPolicyInformationcaughtbyRegulation124e.htm>

management process from Simons. For these purposes, it is shared with Simons' Project Board and Simons' Project Manager only.

17. The council said that it was of the view that the risk register should be deemed to be an internal communication in the circumstances of this particular case. The council argued that the external parties that the information is shared with (i.e. the consultant, Simons' Project Board and Simons' Project Manager) are in these circumstances acting as "an extension" of the council. The council argued that although they are external parties, they are very much an integral part of the risk management process within the council. The council explained that the register is not shared with any other party whose input is not strictly required and they are subject to a duty of confidence. The council's view was that the steps it took to limit the use of the information are additional support for its position that the information should be deemed to be an internal communication.
18. The council drew comparisons between this case and the case of *Secretary of State for Transport and Information Commissioner EA/2008/0052* ("the Eddington case"). It noted that a key factor in the latter case heard before the Information Tribunal was that an external advisor was invited into the public authority's thinking space or safe space. The council said that it was essential that the third party is involved in this process because Simons are actively involved at a practical level in mitigating some of the risks on the register. It also said that the Eddington case demonstrated that it was possible for information to be an internal communication even where a third party had prepared and contributed to that information.
19. The council also highlighted that it had previously sought to rely on section 36 of the FOIA and that regulation 12(4)(e) is designed to cover similar circumstances. It said that it considered that if it was unable to protect information under the EIR in similar circumstances, this may have implications for the way in which public authorities conduct their business, in particular it may discourage public authorities from seeking expert advice and informed input from third parties.
20. In the Eddington case, a request was made for the first draft of the report prepared by an unpaid, independent expert, Sir Rod Eddington, who had been commissioned by the public authority. In his decision notice, the Commissioner concluded that Sir Rod Eddington was an external independent advisor and that the exception under regulation 12(4)(e) did not therefore apply. More developed evidence was presented to the Information Tribunal, leading it to conclude that in the circumstances of that particular case, the information was an internal communication. It accepted that Sir Rod Eddington was "embedded in the civil service and that is accurate to describe him as the head of a team of civil servants" (paragraph 95) which was described as "an

independently led internal working group rather than that of a wholly external body" (paragraph 86). The tribunal decision notes that it "is common place in modern government for the expertise of the central Civil Service to be supplemented by external advisors working under contract to a department" and "that work carried out under such contract would amount to an internal communication" (paragraph 86).

21. Since the Eddington case, the Commissioner accepts that whether or not a communication should be deemed to be an internal communication will depend on the particular facts and circumstances of the case, although the Commissioner continues to maintain that communications with third parties will only be internal communications in very limited circumstances.
22. The Commissioner recognises that in the present case, there are some comparisons to be drawn with the Eddington case as outlined by the council. However, the Commissioner's view is that the circumstances which led to the Tribunal's findings in the Eddington case were still notably different from the present circumstances. Simons is an external third party, paid contractor. It cannot be described as being "embedded" in the council's internal structure in the same as Sir Rod Eddington, who was an unpaid, independent advisor, who was essentially the head of an internal working group of civil servants. Simons, in this case, is only involved with the council's processes in this scenario by virtue of being paid contractors appointed to carry out a particular redevelopment contract.
23. The Commissioner appreciates that the risk register is part of a cooperative process in this case which involved Simons. However, although he appreciates that a close working relationship existed in this respect, he does not agree with the council's view that it is fair to characterise Simons as being an "extension" of the council. To characterise the relationship with a paid contractor in this way would have the effect, in the Commissioner's view, of broadening the scope of the exception beyond a reasonable construction of the words used in the EIR, that the communication should be "internal". An argument along the lines suggested by the council could be made in relation to a large number of communications involving third parties and the Commissioner does not accept that a communication with a third party can be "internal" except in very limited circumstances.
24. The Commissioner notes that the council has also expressed concern about the possible impact of information which may be covered by section 36 of the FOIA not attracting similar protection under the EIR. While the Commissioner appreciates these policy concerns, the EIR is a different piece of legislation to the FOIA and the exception in question uses different words to the exemption under section 36. The EIR was written to implement a European directive, not to mirror the FOIA. The

legislation is capable of producing different outcomes in relation to the same item of information. The Commissioner reached a conclusion that the exception was not engaged in the circumstances of this case based on his understanding of the application of the particular exception.

25. As the Commissioner was not satisfied that the council had been able to demonstrate that regulation 12(4)(e) was engaged in this case, he did not go on to consider the public interest test associated with this exception.

### **Regulation 12(5)(e)**

26. This exception states 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. For clarity, the council said that it had applied this exception to only some of the risks in the register which it identified to the Commissioner.

27. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that need to be met, namely:

- The information should be commercial or industrial in nature
- The information should be confidential where such confidentiality is provided by law
- The confidentiality should be required to protect a legitimate economic interest
- The confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure

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

28. It is clear that the risk register relates to a commercial project involving redevelopment of a particular area. The Commissioner therefore has no difficulty in accepting that the information is commercial in nature.

### **Is the information confidential where such confidentiality is provided by law?**

29. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
30. The Council presented an argument that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner's approach is

similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:

- Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
  - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
31. The council confirmed that the information is not trivial and is not in the public domain. The Commissioner therefore concluded that the information has the necessary quality of confidence.
  32. The council argued that there was an explicit and an implicit obligation of confidence in this case. The council explained that the Local Government Act 2000 (as amended) provides that all elected members are required to comply with the council's Code of Conduct. This contains an express requirement that a member must not disclose information given in confidence. In addition, all officers of the council are under similar obligations of confidentiality under the council's Code of Conduct. The Project Initiation Document for the project, which was provided to all members of the Project Board, clearly states that all information reported to the Project Board is expected to be dealt with in confidence. This includes the risk register. The confidentiality of the discussions in the Project Board was also reaffirmed verbally at the first meeting of the group. This fact was recorded in the minutes which themselves were marked "confidential". The council also explained that Simon's consultant is contracted to Simons' Project Board and his contract with them states that all information relating to the project is to be treated as confidential. The council stressed the strict limits that had been imposed on the use of the information.
  33. Having considered the above, the Commissioner was satisfied that the information was shared in circumstances importing an obligation of confidence.

**Was the confidentiality required to protect a legitimate economic interest?**

34. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect the legitimate economic interests of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary 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".*

35. The council argued that the confidentiality was designed to protect both its own commercial interests and those of Simons. It acknowledged that to satisfy this part of the test, disclosure of the information would have to adversely affect the commercial interests of the party or parties for whom the confidentiality existed and it argued that the relevant threshold had been met in this case.
36. The Commissioner highlighted that it had been established in the case of *Derry City Council v the Information Commissioner* (EA/2006/0014) that a public authority cannot speculate on behalf of a third party. It must demonstrate that any arguments presented genuinely reflect the concerns of the third party involved. The council said that its arguments had not been speculative as they were based on knowledge it had gained of Simons' concerns from regular discussions as part of the Project Group. One of the issues that had been previously discussed was the possibility of disclosure of the information contained in the risk register. The council also said that it had specifically consulted Simons about the disclosure following the request. By way of evidence, the council provided the Commissioner with a copy of the letter that it had received from Simons in which Simons had confirmed that the council was representing its genuine concerns about the disclosure of the risk register. Based on this, the Commissioner accepted that the arguments put forward by the council represented the concerns of Simons.
37. The council said that if the risk register was made public, it would be misunderstood, misinterpreted or misused by the public which would cause delays and use more resources, which is a particular concern given the current economic climate and the time and expense put into managing a project of this scale. The council placed particular emphasis on the concerns of both parties that the disclosure of the risks would facilitate or encourage campaigners against the project to focus on the particular commercial risk identified and target any weaknesses identified. The council claimed that this would not be possible, or as easy or as likely without the register. It referred to some specific examples of the actions taken by some individuals in an attempt to try to thwart the project.



38. The council explained that because of the possibility of these outcomes following disclosure of the risk register, the council and Simons would be discouraged from placing certain information onto the register and this would affect their ability to fully explore the risks associated with the project. This may also have negative consequences for the project. The council also said that the frustrations and delays that would arise from disclosure of the risk register would have a negative impact on its working relationship with Simons.
39. Additional concerns identified were that the disclosure of certain risks could provide "leverage" against Simons when it conducts commercial activities as part of the project. The council also pointed to concerns about the harmful commercial impact on both parties of disclosing prematurely some details of the options that may be considered if certain issues arose. The council provided limited comments regarding these issues on an annotated version of the risk register.
40. The council also pointed to the wider consequences of disclosing the risk register. It said that the council is likely to offer development opportunities in the future and providing the risk register relating to this project and the agreements reached would impede the council's negotiations on similar issues in the future. This would result in more money being spent on such projects than might otherwise be the case in the future and would therefore be harmful to the council's risk strategy, negotiating stance and publicly funded budget.
41. The Commissioner has already highlighted that the threshold for the engagement of this particular exception is a high one. It is necessary to establish that harm to economic interests would more probably than not result from the disclosure of the information.
42. The Commissioner attached little weight to the concerns raised about the information being misinterpreted or misunderstood. The council did not give any specific examples of ways in which the information may be misinterpreted or misunderstood and the Commissioner was not persuaded that this concern amounted to anything more than a possibility. There is always such a possibility when any information is disclosed by a public authority. The Commissioner considers that public authorities should be able to deal with those sorts of issues by putting the matter into its appropriate context if necessary.
43. The Commissioner considered the concerns raised about those opposed to the project trying to use the information to cause delays or cause other problems. The council was able to provide details that demonstrated that the project had faced some opposition. However, the council only referred to the activities of "certain individuals". The council did not provide evidence to the Commissioner to indicate that there was any wide-scale opposition to the project, however, as there

was clearly some opposition and the council and Simons had raised other concerns about “leverage” and knowledge of its plans being gained through the disclosure of the information, the Commissioner considered how likely it was that the disclosure of the individual risks would more probably than not lead to a consequence that would adversely affect the council’s or Simon’s economic interests. The Commissioner also noted that the risks identified by the council are ongoing concerns. The Commissioner’s comments are necessarily fairly general in nature since he cannot disclose the nature of the specific risk information that is being withheld in this case.

44. The Commissioner carefully considered the risks withheld using the exception under regulation 12(5)(b). The Commissioner was not persuaded that disclosure would have significantly increased the chance of these particular risks occurring as claimed by the council. The Commissioner’s overall impression was that the risks were of such a generic or apparent nature that it is likely that their presence on a risk register would be fairly predictable. Moreover, it was not clear to the Commissioner how many of the risks could be exploited beyond ways that are already likely to be fairly obvious. In some instances it seemed particularly unlikely that the actions of others would impact significantly on the risk identified. Moreover, even if the disclosure of the risk register did encourage attempts to cause some kind of disruption or difficulty, the Commissioner considered that with effective processes in place, the council should be able to deal with any attempts to adversely affect the progress of the project.
45. The Commissioner considered that it was likely in this case that the council had attached too much weight to the “type” of information in question (i.e. a risk register) which had led it to seek to withhold the entire risk register apart from completed risks. Given the above conclusions regarding the nature of the actual withheld information, the Commissioner was not persuaded that disclosure of the risk register would have the harmful effects described on the project, the relationship between Simons and the council or the council and other contractors with whom it may become engaged in the future. On this basis the Commissioner does not consider that the council demonstrated that the disclosure of the information would adversely affect economic interests.
46. In view of the above, the Commissioner considers that regulation 12(5)(e) was not engaged in this case. He has not therefore gone on to consider the application of the public interest test.

## Right of appeal

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47. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Andrew White**  
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**Wycliffe House**  
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**Cheshire**  
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