

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 25 September 2013

**Public Authority:** Oldham Borough Council  
**Address:** Civic Centre  
West Street  
Oldham  
OL1 1UT

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information relating to a proposed development at Foxdenton. Oldham Borough Council refused the request citing the EIR exceptions for personal data, material in the course of completion, adverse effect to the confidentiality of commercial information and adverse effect to the course of justice. During the course of the Commissioner's investigation the complainant confirmed that they did not want to be provided with personal data falling within the scope of the request.
2. The Commissioner's decision is that Oldham Borough Council has:
  - correctly applied the exception for adverse effect to the confidentiality of commercial information to some of the requested information;
  - in relation to some of the withheld information, failed to demonstrate that the exception for adverse effect to the confidentiality of commercial information is engaged;
  - failed to demonstrate that the exception for material in the course of completion is engaged;
  - has correctly applied the exception for adverse effect to the course of justice.

The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

Disclose the following information to the complainant:

- H: Guest Garsden Heads of Terms
  - I: How Planning EIA Scoping Note
  - J: Mouchel technical note and appendices
  - K: Curtins transport assessments
  - L: Bundle of email correspondence withheld under the exception for adverse effect to the confidentiality of commercial information.
3. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Request and response**

---

4. On 12 February 2013, the complainant wrote to Oldham Borough Council (the "council") and requested information in the following terms:
- "...full disclosure of correspondence and emails relating to the 110 acre of farms and attendant grazing lands. This is to include HOW Planning Company, the 3 farm owners, ALDI Supermarket Company, and any other developers."*
5. The council responded on 11 March 2013. It stated that it was refusing to provide the information, citing the exemption for prejudice to commercial interests (section 43 of the Freedom of Information Act 2000 (FOIA)).
6. Following an internal review the council wrote to the complainant on 29 April 2013. It stated that it had reconsidered the request and had concluded that some of the information fell within the scope of the EIR. It confirmed that the information was being withheld under the exceptions for internal communications and adverse effect to the confidentiality of commercial information.

### **Scope of the case**

---

7. On 2 May 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

8. The Commissioner initially confirmed with the complainant that his investigation would consider whether the council was entitled to rely on exceptions to refuse the request.
9. During the course of the Commissioner's investigation the council disclosed some previously withheld information to the complainant. The complainant confirmed that he wished the Commissioner to investigate whether the council had correctly applied exemptions to the remaining withheld information.
10. The complainant also confirmed that they wanted the withheld information identified by the council as "G: List of potential housing developers" and any personal data as defined by the Data Protection Act 1998 (DPA) to be excluded from their request and the scope of the investigation.

## **Reasons for decision**

---

### **Regulation 12(5)(e) – commercial confidentiality**

11. The council has withheld the following documents under this exception (includes reference letters designated by the council):
  - F: Soil Analysis Reports Collated by PSL
  - H: Guest Garden Heads of Terms
  - I: How planning note from Planning Application
  - L: Bundle of email correspondence.
12. Regulation 12(5)(e) of the EIR 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".
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
  - 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?

14. The Commissioner has considered each of these factors as they relate to each element of the withheld information.

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

15. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned 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 for profit. The Commissioner considers that "industrial" information could include information about methods of manufacture, raw ingredients or precise recipes or formulae used for making a product.

*F: Soil Analysis Reports Collated by PSL*

16. The withheld information constitutes a report commissioned on behalf of Foxdenton LLP (the "developer") to test the suitability of the land for the proposed development. The council explained that the results of the test will determine whether any remedial work will be needed prior to the development going ahead. The council confirmed that purchase of the land is contingent upon the planning application being accepted and the exercise of the options agreement with the landowners for the developer to buy the land. Disclosure of the information would have a direct impact on the value of the land and would potentially undermine the developer's negotiating position.
17. Having considered the council's submissions and the withheld information the Commissioner is satisfied that the information relates to a commercial activity, namely the purchase of land. He has gone on to consider whether the information is subject to confidentiality provided by law.

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

18. In relation to this element of the exception, the Commissioner has considered whether 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.
19. In determining whether the withheld information is subject to confidentiality provided by law the Commissioner has also considered whether the information was shared in circumstances creating an obligation of confidence. The Commissioner considers that the obligation of confidence can be explicit or implicit and may depend on the nature of the information itself, the relationship between the parties and any previous or standard practice regarding the status of information. A useful test is to consider whether any reasonable person

in the place of the recipient would have considered that the information had been provided to them in confidence.

20. The Commissioner notes that the withheld information relates to ongoing discussions between the council and the developer. It consists of a detailed analysis of the soils of the land which would comprise the proposed development. The information has a direct bearing on the value of the land in question and, hence, on the developer's ability to negotiate a commercially competitive purchase price. This in turn has an impact on the broader scheme and the ability of the council to secure a successful partnership with the developer.
21. The Commissioner has seen no evidence to suggest that the disputed information is already in the public domain. In view of these circumstances, the Commissioner accepts that there is an implied obligation of confidence on the public authority not to disclose the report given the likely effect it would have on the negotiations as well as on the commercial interests of the developer and the landowners.

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

22. To satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of the developer and/or the landowners.
23. The council has confirmed that the progress of the development is subject to a number of undecided contingencies. The land purchase required for the development to progress is dependent upon the planning application being accepted and the exercise of the options agreement with the land owners for the developer to buy the land. At the time of the request a planning application had not even been submitted<sup>1</sup>.
24. The council has argued that negotiations as to the value of the land are a legitimate economic interest of both the landowner and the developer as both will be seeking best value in terms of cost. The council

---

<sup>1</sup> An outline planning application was submitted on 31 July 2013:  
<http://planningpa.oldham.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal= OLDHA DCAPR 49167>

maintains that, should the information be disclosed it would undermine the negotiating position of both parties.

25. The Commissioner accepts that disclosing the information would have an impact on negotiations between the developer and landowner and would have an adverse effect on the developer's ability to secure best value in purchasing the land.
26. In view of the above, the Commissioner accepts that the confidentiality attached to the withheld information is protecting the legitimate economic interests of the developer.

**Would the confidentiality be adversely affected by disclosure?**

27. The Commissioner considers it is inevitable that this element will be satisfied once the first three elements of the exception are satisfied. Disclosure of confidential information would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests identified above. He has gone on to consider the public interest arguments.

*Public interest in disclosing the information*

28. The council has acknowledged that there is a general public interest in transparency and has confirmed that it has considered the presumption in favour of disclosure provided by regulation 12(2) in reaching a decision as to where the balance lies.
29. The Commissioner considers that authorities should expect that large scale developments involving the use of public authority land will attract a significant degree of public scrutiny. The Commissioner notes that, in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010)*, the Tribunal considered that the fact that the council itself owned the site to be developed "*gave rise to a need for 'particular scrupulousness' on the part of the Council*" and added substantial weight in favour of disclosure.<sup>2</sup>
30. Following the Tribunal decision in *EA/2010/0012*, the Commissioner's guidance sets out that he considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. In particular, the Commissioner notes that the Tribunal gave weight to the Directive

---

2

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol\\_CC\\_v\\_IC\\_&\\_PBSA\\_\(0012\)\\_Decision\\_24-05-2010\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

(2003/4/EC) which gave rise to the EIR, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

*"Increased public access to environmental Information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*<sup>3</sup>

31. Following the Tribunal decision in EA/2010/0012, the Commissioner's guidance sets out that he considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. In particular, the Commissioner notes that the Tribunal gave weight to the Directive (2003/4/EC) which gave rise to the EIR, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

*"Increased public access to environmental Information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*<sup>4</sup>

32. The Commissioner considers that, in general, disclosure of information relating to proposed developments would enable the community affected by the development to understand and participate in the council's decision making and would assist the council in meeting one of the goals of the NPPF.

#### *Public interest in maintaining the exception*

33. The council has argued that the economic interests of both the developer and landowners would be compromised by the disclosure of the information.
34. The Commissioner notes that, at the time of the request, the relevant planning application had not been submitted and negotiations between

---

3

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol\\_CC\\_v\\_IC\\_&\\_PBSA\\_\(00\\_12\)\\_Decision\\_24-05-2010\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(00_12)_Decision_24-05-2010_(w).pdf)

<sup>4</sup> Paragraph 69, published

here: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6077/211650.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/211650.pdf)

the developer and landowners were still live or pending. He notes that the purpose of the exception is to protect legitimate economic interests from harm and, having had regard for the nature of the information and the timing of the request, he has given these factors proportionate weighting.

*Balance of the public interest*

35. In determining the balance of the public interest, the Commissioner has considered the general public interest in transparency, the specific public interest in community engagement with the planning process and the public interest in understanding how authorities go about utilising public land in developments such as these. He has weighed these factors against the public interest in protecting legitimate economic interests from harm.
36. Whilst the Commissioner has given the public interest in transparency due weighting, having considered the nature of the withheld information, which constitutes technical analysis, he does not consider that there is any specific public interest in this being disclosed. It is not apparent that making this information available would assist the public in understanding the broader development and planning process or enable it to engage with the process in a meaningful way.
37. The Commissioner notes the role the information would play in informing negotiations between the developer and landowners and the harm which disclosure would cause to these negotiations. In view of the timing of the request and the impact that disclosure would cause to negotiations the Commissioner has concluded that, in this instance, the public interest favours maintaining the exception. He, therefore, finds that the council has correctly applied the exception to the withheld information.

38. *H: Guest Garsden Heads of Terms*

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

39. The council has explained that this document sets out the proposed grounds for its partnership with the developer should the planning application be consented to and the subsequent land purchases take place.
40. Having viewed the withheld information the Commissioner notes that it consists of draft directions as to how the partnership will manage development costs, sales of assets and profits. He is, therefore, satisfied that the information is commercial in nature.



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

41. The Commissioner has considered whether 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. He has also considered whether the information was shared in circumstances creating an obligation of confidence.
42. The council has not provided the Commissioner with any arguments in support of its contention that the information is subject to confidentiality provided by law.
43. However, having considered the specific content of the withheld information and the broader context, the Commissioner accepts that it forms part of a body of information which might inform decision-making regarding the proposed development. In view of these factors, the Commissioner has concluded that any reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence and accepts that there is an implied obligation of confidence on the public authority not to disclose.

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

44. The council has argued that the withheld information is a draft and incomplete piece of work that, if disclosed, could prejudice the commercial interests of the council. The council has explained that this scenario would present itself should the development not go ahead with the current developer and another developer become involved.
45. The council has further argued that, in the event of any other large scale development in the future it would provide an advantage to others to gain an insight into the rationale of the council as a part whilst being the planning authority at the same time.
46. Having considered the council's arguments and had regard for the withheld information, the Commissioner considers that it is unclear precisely what specific harm disclosure would cause to the council's legitimate economic interests. The Commissioner notes that the arguments provided by the council are vague and highly speculative and do not explain what specific prejudice disclosure would cause to the council's commercial interests. Clearly, disclosure of the information would provide parties with an insight into the council's practices in facilitating such developments, however, it has not been explained how this knowledge would impact on the council's commercial interests.
47. The Commissioner further considers that, both implicitly via the level of detail (or lack of detail) provided about the alleged effects of disclosure and explicitly, in stating that disclosure "could" prejudice its commercial

interests, the council has not demonstrated that the likelihood of harm being caused is more likely than not.

48. In light of the above the Commissioner has concluded that the confidentiality in this case is not provided to protect a legitimate economic interest.

**Would the confidentiality be adversely affected by disclosure?**

49. In order for this exception to be engaged, it has to be shown that disclosure of the confidential information would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner has concluded that the council has not demonstrated that disclosure would harm its own or the developer's economic interests and he has, therefore, decided that the exception is not engaged. He has not gone on to consider the public interest arguments

*I: How Planning EIA Scoping Note*

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

50. The council has explained that this document constitutes a letter/not from How planning which responds to comments posed by a council officer. It was created in support of a forthcoming, published environmental impact scoping report. The document addresses a variety of issues such as topography, residential and environmental aspects of the development. The council has stated that the information does not replicate the information contained within the published report and has drawn the Commissioner's attention to the heading of the document which states that it is "Strictly Private and Confidential".
51. Having viewed the withheld information the Commissioner is satisfied that it relates to a commercial endeavour, namely the proposed development of the Foxdenton site. He has found that the information, therefore, engages this element of the exception.

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

52. Having considered the nature of the withheld information, which relates to a large scale commercial development, the Commissioner is satisfied that the information is not trivial. He notes that, as stated by the council, the information is not duplicated in the publically available environmental impact scoping report and he has no evidence that the information has been otherwise made available.
53. In view of these factors and, given that the information was shared with an explicit understanding that it remain confidential, the Commissioner has concluded that the information is subject to confidentiality provided

by law. He has gone on to consider whether the confidentiality is provided to protect a legitimate economic interest.

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

54. To satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of the developer or the council.
55. In this instance the council has argued that disclosure would harm the legitimate economic interests of the developer. It has stated that the information could impact on the value of the land should the planning application go ahead and the land options exercised. The council considers that the potential employment and housing opportunities of the site and its capacity to generate these are directly linked to its value for development. Disclosure of the information could undermine the negotiations between the developer and land owners and lead to not realising best values and benefits for the public.
56. As previously stated, the Commissioner considers that, in order for the exception to be engaged, it has to be shown that disclosure of the confidential information *would* adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
57. In this instance the council has argued that disclosure *could* have an impact on elements of the development, for example, land values. Firstly, the Commissioner considers that this level of likelihood of harm does not meet the threshold for engaging the exception. Secondly, he considers that the alleged effects of disclosure are quite separate to any direct effects which could result from the disclosure of the specific information. Having viewed the withheld information it is not apparent to the Commissioner that its disclosure would produce the direct effects ascribed by the council.
58. In view of the speculative and general nature of the council's arguments, its failure to identify the specific harm which disclosure would cause and failure to demonstrate that the likelihood of the harm occurring is more probable than not, the Commissioner has concluded that it has not shown that this element of the exception is engaged.

**Would the confidentiality be adversely affected by disclosure?**

59. The Commissioner has concluded that the council has not demonstrated that disclosure would harm its own or the developer's economic interests and he has, therefore, decided that the exception is not engaged. He has not gone on to consider the public interest arguments.

*L: Bundle of email correspondence*

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

60. The withheld information consists of correspondence between the council and third parties which relates to the proposed development. As the Commissioner has already found that this matter constitutes a commercial endeavour, he has concluded that this correspondence, which relates to this issue, similarly engages this element of the exception.

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

61. Having considered the nature of the withheld information, which relates to a large scale commercial development, the Commissioner is satisfied that the information is not trivial. He notes that, as stated by the council, the information is not duplicated in the publically available environmental impact scoping report and he has no evidence that the information has been otherwise made available.

62. In view of these factors and, given that the information was shared with an explicit understanding that it remain confidential, the Commissioner has concluded that the information is subject to confidentiality provided by law. He has gone on to consider whether the confidentiality is provided to protect a legitimate economic interest.

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

63. To satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of the developer or the council.

64. The council has argued that the information in question relates to strategy and negotiations in relation to the proposed development and the development is at a critical stage. The council has explained that the planning application has only recently been submitted, the matter is locally contentious and there are many interdependencies going forward. The council identified the following interdependencies which are still yet to be finalised: planning permission, sale of land and the formation of a possible joint venture company.

65. The Commissioner understands the general principle that, where negotiations regarding a proposed commercial venture are ongoing, disclosure of information relating to this could have an impact on this process. However, in order for the exception to be engaged the onus is on public authorities to demonstrate that some specific harm to a party or parties' legitimate interests will ensue and to link this harm to the disclosure of specific information.

66. In this instance the Commissioner clearly set out the factors which the council would need to consider and the arguments and evidence required in order to engage the exception. The council was provided with ample opportunities to provide submissions in this regard, however, the Commissioner considers that the council has failed to explain what specific harm to either the council's legitimate economic interests or to those of a third party would result from the disclosure of the withheld information. He has, therefore, concluded that confidentiality in relation to the withheld information was not provided in order to protect a legitimate economic interest.

**Would the confidentiality be adversely affected by disclosure?**

67. The Commissioner has concluded that the council has not demonstrated that disclosure would harm its own or the developer's economic interests and he has, therefore, decided that the exception is not engaged. He has not gone on to consider the public interest arguments.

**Regulation 12(4)(d) – material in the course of completion**

68. The council has withheld the following information under this exception:

J: Mouchel technical note and appendices

K: Curtins transport assessments

69. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

*J: Mouchel technical note and appendices*

70. The council has argued that the information was formulated by Mouchel which had been tasked by the council to undertake a preliminary traffic study in relation to the Foxdenton development area. The council stated that it was produced in around Autumn 2012 and its nature is not part of regular routine monitoring but constitutes intelligence gathering regarding the proposed Foxdenton development.

*K: Curtins transport assessments*

71. The council explained that the two withheld letters were generated by Curtins Consulting who were appointed by the developer to advise on transport and highway issues in relation to the Foxdenton development. Again, the council has argued that the information was not part of a routine monitoring process and represent initial intelligence gathering about the specifics of the Foxdenton development.

### *Analysis*

72. The council considers that both J and K contain indications that the contained findings were very much preliminary and initial and depended on further analysis.
73. The council has stated that, in spite of being completed documents, the information contained within is "unfinished" and "incomplete" and preliminary in nature.
74. The Commissioner understands from the council's submissions that it considers the information to be "unfinished documents" and "incomplete data". In reaching a decision as to the application of the exception the Commissioner has referred to his own guidance.

### *Unfinished Documents*

75. The Commissioner's guidance states that a document may be unfinished because an authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it. Furthermore, draft documents will engage the exception because a draft of a document is by its nature an unfinished form of that document<sup>5</sup>.

### *Incomplete Data*

76. The Commissioner's guidance clarifies that data that is incomplete because a public authority is still collecting it will be covered by this, but where an authority is using or relying on data at the time of the request, then it cannot be considered incomplete simply on the basis that it may be modified or amended in the future.

### *Conclusions*

77. The council has argued that the information constitutes preliminary assessments; however, it has not argued that it is a draft report and it has acknowledged that the relevant documents are "complete". Having viewed the withheld information the Commissioner notes that this

---

<sup>5</sup> The Commissioner's guidance is published here:  
[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_material\\_in\\_the\\_course\\_of\\_completion.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx)

acknowledges that more detailed assessments could be produced should further data become available.

78. It is the Commissioner's view that the relevant consideration here is the information contained within each document itself and the purpose for which it was created not the overall project or development proposal to which it relates.
79. Having viewed the withheld information and considered the council's arguments the Commissioner is of the view that it does not constitute unfinished documents or incomplete data. It is apparent that both J and K were intended to be preliminary assessments based upon data available at the time and with a focus and scope which was defined by the party which commissioned them.
80. The Commissioner considers that, whilst further, more detailed assessments might follow, both J and K constitute finished pieces of work which would have informed the decision-making process regarding the development. The Commissioner has, therefore, concluded that, in relation to the information contained within J and K, the exception is not engaged.

### **Regulation 12(5)(b) – adverse effect to the course of justice**

*(L) – some emails contained within the bundle of correspondence*

81. Regulation 12(5)(b) provides that the disclosure of information can be refused if its disclosure would adversely affect, "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."

*Is the exception engaged?*

82. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

*"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".*

83. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:



*"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".*

84. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, "a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."<sup>6</sup>
85. There are two types of privilege – legal advice privilege and litigation privilege. In this case the council has stated that the withheld information constitutes advice/discussions between the council's lawyer, the developer's lawyer and the council as client. The Commissioner understands that the purpose of these exchanges was to explore the legal dimensions of the strategy and approach regarding the development. The council has argued that the information constitutes legal advice and that it is subject to LPP.
86. The Commissioner considers that regulation 12(5)(b) is not limited to excepting only information that is subject to LPP. The wording of the exception has a broad remit encompassing any adverse effect on the course of justice generally; this allows for documents that are not subject to LPP to still be covered by the exception, as long as disclosure would adversely effect on 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. The Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO* (EA/2010/0034) when they acknowledged that the regulation covered more than just LPP.

---

<sup>6</sup> EA/2005/0023, para 9.



87. The council has argued that the withheld information consists of advice and discussions between the council lawyer and developer's lawyer and between the council's lawyer and the council as a client.
88. It has argued that the purpose of the emails was to exchange frank information and advice with a view to consideration of strategy and approach in relation to the development and falls under the scope of LPP as defined under common law.
89. Having viewed the withheld information the Commissioner is satisfied that it either constitutes a communication between a lawyer and a client, in this case, the council and that this advice has not lost the quality of confidentiality, or that it more generally can be said to fall within the category of the 'course of justice'. He has gone on to consider whether disclosure would result in adverse effect to the course of justice.

### **Adverse effect**

90. The council has argued that disclosure of the information would damage its ability to seek and receive free and frank legal advice and would limit its ability to reach decisions which take account of all available options. The council has argued that disclosure would provide those opposed to the scheme with insights into its legal position, something which would not be reciprocated and which would assist parties with an interest in challenging the scheme, to the council's detriment.
91. The Commissioner is of the view that disclosure of information which is subject to LPP and information which assists in the course of legal determinations will have an adverse effect on the course of justice. This is because the principle of LPP, including would be weakened if information subject to privilege were to be disclosed under the EIR. He considers the likelihood of this happening to be more probable than not.
92. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
24. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

### *Public interest in disclosure*

93. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and

enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.

94. The complainant has submitted that the large scale of the development and the impact on local residents are strong, specific reasons for accountability and transparency.

*Public interest arguments in favour of maintaining the exception*

95. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the weighting of such arguments, as they have been submitted to him by the council.
96. The council has also argued that disclosure would be unfair since parties seeking to challenge its legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position.
97. The Commissioner notes that the withheld information relates to matters which are still undecided and that the legal advice is, therefore, still effectively "live".

*Balance of the public interest*

98. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
99. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
100. The Commissioner notes that the legal advice is still current. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's

strategy and this could result in adverse effect to the course of justice via revealing the Council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. . In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.

101. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
102. The Commissioner acknowledges that the complainant has a personal interest in accessing the information and that there is some local opposition to the proposed development. However, he considers that the planning appeal process provides mechanisms for such issues to be addressed.
103. The public interest in the context of the EIR refers to the broader public good. In this instance, the Commissioner has not been presented with any evidence that or arguments which show that the council has misled the public or otherwise been guilty of maladministration. ,
104. In weighing the public interest against those of the council and its ability to undertake planning and development matters on behalf of the wider public, the Commissioner does not consider that the public interest in disclosure tips the balance in this case.
105. The Commissioner has determined that, in the circumstances of this particular case, the public interest arguments in favour of disclosing the information are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
106. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

## Right of appeal

---

107. 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,  
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)

108. 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.

109. 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**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**