

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

### **Decision notice**

**Date:** 13 October 2014

**Public Authority:** North West Leicestershire District Council  
**Address:** Councils Offices  
Whitwick Road  
Coalville  
Leicestershire  
LE67 3FJ

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

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1. The complainant has requested a viability appraisal and report for a planning application, or if the council was unable to provide these, the complainant asked for specific financial information to be provided. North West Leicestershire District Council initially refused to provide the information relying on section 43 of the Freedom of Information Act 2000 (FOIA), but amended it's refusal to regulation 12(5)(e) of the EIR after carrying out an internal review.
2. The complainant has asked the Commissioner to determine whether the council is able to withhold the requested information
3. The Commissioner's decision is that the council has correctly relied on regulation 12(5)(e) of the EIR to withhold the information for this request.

#### **Request and response**

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4. On 30 January 2014, the complainant wrote to the council and requested information in the following terms:

*"This application for information concerns representations submitted to North West Leicestershire District Council in support of Planning Application no. 13/00603FULM – Land off Church Lane Ravenstone, LE67 2AE.*

*We understand that a viability appraisal was provided to the Planning Authority by the applicant, Cameron Homes Ltd. Ideally, we should be grateful to receive both a copy of the appraisal and one of the District Valuer's report/ assessment, commissioned by the Authority, in connection with that appraisal.*

*If you are unable to supply copies as requested, please would you advise the following:*

- 1. The amount of money being paid for the composite site by the developer. If this has not yet been determined, please say on what basis it will be calculated.*
- 2. The cost estimate for the conversion of the former Woodstone Primary School building to a dwelling house.*
- 3. The assessed cost of building the 26 new homes proposed for the site including (for the avoidance of doubt) service roads, landscaping, storm and foul water sewers and all other associated infrastructure costs together with any connection charges.*
- 4. The value of all professional fees anticipated with regard to the development of the site, as opposed to any appertaining to the pursuit of a planning consent.*
- 5. The amount of any contingency, allowed in the viability appraisal, for unforeseen items.*
- 6. What proportion of the total value of items 3, 4 and 5 above is attributable to the fact that the site is in a Conservation Area and arises as a consequence of a stated need to:
  - a) use more expensive building materials*
  - b) adopt an especially site sensitive layout*
  - c) construct housing which is sympathetic to the setting and;*
  - d) protect trees that are to be retained both within and on land adjoining the site?**
- 7. Please advise the total anticipated sale proceeds arising on the disposal of the houses. If a breakdown has been provided in the viability appraisal, please say how much money each type of property is expected to sell for.*

8. *What margin of profit has been allowed for the developer in the viability appraisal?*
9. *Please summarise the remarks of the District Valuer in relation to the viability assessment. Please say whether there are any aspects of it with which the District Valuer does not agree."*
5. The council responded on 3 February 2014 and refused to provide the requested information relying on section 43 of the FOIA as it considered the information to be commercially sensitive.
6. The complainant requested an internal review on the 4 February 2014. The council provided its internal review response on the 26 February 2014. It maintained that the information should be withheld, however the council considered that the information fell within the EIR so amended its refusal to withhold the information under regulation 12(5)(e) instead – disclosure would adversely affect or be very likely to prejudice the commercial interests of the council and/ or any third party.
7. The council advised the complainant that if he was not satisfied with the internal review, then he can request a formal appeal for the chief executive to review this decision.
8. The complainant requested this formal appeal on the 26 February 2014.
9. The council responded on the 27 March 2014 and upheld its internal review decision to withhold the information under regulation 12(5)(e) of the EIR.

### **Scope of the case**

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10. The complainant contacted the Commissioner on the 1 May 2014 to complain about the way his request for information had been handled as he did not consider the information should have been refused.
11. During the initial investigations, the Commissioner asked whether there could be a compromise in releasing the information with the financials redacted, however the complainant has pointed out that the reason the request was made, was to be able to view the financial information.
12. The Commissioner considers that the scope of the case is to determine whether the council was correct to withhold the information under regulation 12(5)(e) of the EIR.

## Reasons for decision

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### Regulation 12(5)(e)

13. Regulation 12(5)(e) of the EIR states:

*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-*

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

14. In considering the application of regulation 12(5)(e) the Commissioner's view is that the following four criteria have to be met for the exception to be engaged.

- a) The information has to be commercial or industrial in nature;
- b) The information has to be subject to a duty of confidence provided by law;
- c) The confidentiality has to be required to protect an economic interest; and
- d) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of the information.

15. The Commissioner has considered each of the above points to determine if the withheld information meets these criteria.

*Is the information commercial in nature?*

16. The Commissioner's view is that for information to be commercial or industrial in nature, it needs to relate to a commercial activity being undertaken by the public authority 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.

17. On view of the withheld information, it is in relation to a proposed housing development and the Commissioner is satisfied that it is commercial in nature.

*Is the information subject to a duty of confidence provided by law?*

18. For this point, the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the

information was shared in circumstances creating an obligation of confidence.

19. The Commissioner's view, determining whether the information has the necessary quality of confidence involves confirming whether the information is not trivial and is not in the public domain.
20. The Commissioner considers that the information, relating to the housing development, is not trivial in nature and is satisfied that it is not already in the public domain.
21. The council has also stated that the information was provided by the developer on the basis of it being kept confidential.
22. The Commissioner sees that although there is no absolute test for what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*<sup>1</sup>, it was suggested that the 'reasonable person' test may be a useful one stating:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."*

23. In *Brunswick City Council v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012) the Tribunal accepted evidence that it was 'usual practice' for all documents containing costings to be provided to a planning authority on a confidential basis even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.
24. Applying the 'reasonable person' test the Tribunal stated:

*"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being approved)... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council*

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<sup>1</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

*would have realised that that was what the developer was doing.”<sup>2</sup>*

25. Considering this 'reasonable person' test along with the non trivial nature of the withheld information and its very limited distribution and access, the Commissioner has concluded that the withheld information holds the necessary quality of confidence to satisfy the criteria of this part of the exception.

*Is the confidentiality required to protect an economic interest?*

26. In order for this part of the exception to be satisfied, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
27. The Commissioner's view is that it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by disclosure.
28. The Commissioner, assisted by the Tribunal in determining how "would" needs to be interpreted, accepts that "would" means "more probably than not". In support of this approach, the Commissioner has noted the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. It 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".*

29. The council has argued, in this case, that the disclosure of the information would affect the legitimate interests of the developer.
30. The Commissioner, generally, will not accept speculation from a public authority about the harm caused to a third party's interests unless there is evidence that the arguments genuinely reflect the concerns of the third party involved.

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

31. The council, in its internal review, has stated that it has sought the views of the developer in considering its response to this request. The Commissioner is satisfied that he can accept the submissions of the council which it made in respect of the developer in this case.

*The economic interest of the developer*

32. The council has stated that the developer will have an ongoing economic interest in the disposals of the property at the development and the success of the development as a whole. If information relating to the financial viability assessments is made public, this may detrimentally affect their negotiating position in such disposals and accordingly the viability of the development as a whole.
33. The Commissioner is of the view that the disclosure of this information would provide third parties with knowledge that would not otherwise be available in a competitive market. The information in question is the result of detailed research conducted by the developer. It would give insights to the developers strategies, which would not, otherwise from disclosure under the EIR, be available to its competitors. This would cause a detriment to the commercial interests of the developer.
34. The Commissioner's view is that this type of withheld information falls within the regulation 12(5)(e) and is the type of information that this exception seeks to protect. The Commissioner therefore finds that this, together with the confidential nature of the information, would adversely affect the developers legitimate economic interests and so finds regulation 12(5)(e) is engaged in this case.

**The public interest test**

35. Even though it has been found that regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest test.

36. Regulations 12(1) and 12(2) of the EIR states:

*"(1)... 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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

*(2) A public authority shall apply a presumption in favour of disclosure."*



37. The Commissioner has considered the submissions made by both the council and the complainant in this case.

*Public interest in disclosure*

38. The Commissioner is of the opinion that some weight must be given to the general principle of accountability and transparency by disclosure of information through the EIR as it would assist in the public's understanding of how public authorities make their decisions. This would help to increase trust in public authorities and may allow greater public participation in the decision making process.
39. The council recognises that the development is a significant scheme within a village setting and has prompted considerable interest and comment with the potential to prompt further interest and comment from the residents during the ongoing planning process.
40. The council sees that disclosure of the information may promote the transparency and accountability of the council in that it will promote a greater public awareness and understanding of the environmental matters. Also it will promote a free exchange of views and a more effective public participation in environmental decision making.
41. The complainant explained to the Commissioner that a council case officer had stated that the developer could not meet social infrastructure needs associated with its development if the scheme was to be viable. The officer stated that the developer's viability appraisal had been independently assessed by the District Valuer. The District Valuer found that a reduced level of developer contributions would be acceptable in this instance.
42. However, planning permission was refused by the planning committee in January 2014 on sustainability grounds and instead of appealing the decision, the developer applied for planning permission, three weeks later, to develop the exact same scheme with enhanced developer contributions. The amount offered by way of Section 106 payments (of the Town and Country Planning Act 1990) had increased from £55,000 to £202,365.18, almost 370%.
43. The complainant is of the opinion that if the developer can resubmit with a higher offer of section 106 payments, then what confidence can the public have if such statements are made by council officers that developers cannot afford to pay education, healthcare, affordable housing costs and then the District Valuer's assessment allows the development. This at a time when local authority demands for contributions are routinely being referred to District Valuer Services for review.



44. The complainant also states that following the approval of the second application for planning permission in April 2014, members of the planning committee evidently determined that the enhanced offer by the developer was sufficient to address concerns over sustainability and that development would make a useful contribution towards the shortfall of housing in the district. The complainant points out that, 3 months following the approval, the developers application is still marked as 'Decision Pending' on the council's website leaving the public to speculate that the developer is challenging the Section 106 payments. According to the council's website, the developer has deposited nothing further with the council since the end of January, questioning what is holding things up?
45. The council responded to the Commissioner on this stating that it is incorrect to say that the developer has negated on its Section 106 obligations.
46. The council explained the planning application, although approved, is still pending the legal sign off of the contract agreeing to the S106 payments. That is why it is still showing as 'Decision Pending' on the website.
47. The complainant has also referred to the Tribunals decision in Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association which is referred to in the Commissioner's guidance on regulation 12(5)(e)<sup>3</sup> paragraphs 65-67. He considers this case has direct parallels with the Tribunal's considerations. The complainant states that the developers asserted that substantial demolition and conservation of a protected (albeit non designated) building on the application site has contributed towards the costs of this site.
48. The council in response to this has stated to the Commissioner that it accepts that the costs of demolishing and/ or converting a protected building are likely to be higher than the costs of a new build due to the requirements being placed on the developer to undertake conversions/ demolitions which are sympathetic to both the building and conservation area.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Practical\\_application/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/eir_confidentiality_of_commercial_or_industrial_information.ashx)

49. The council has explained the fact that the building is a 'building of interest' in a conservation area was carefully considered by the conservation officer and so members of the Planning Committee were provided with a detailed and comprehensive report on which to base their decision.
50. The council also has stated that the committee report <sup>4</sup>(pages 163 -199) dealt thoroughly with the appropriate considerations required under the National Planning Framework relevant to the site. Also the minutes<sup>5</sup> can be reviewed (pages 234-235).
51. The complainant also considers the outlay costs have been increased because the site is owned by different parties, Those being:
- i. Leicestershire County Council (LCC)
  - ii. A member of the council's Planning Committee
52. The complainant considers that as LCC is a statutory consultee, it has a conflict of interest in securing funding for its public duties through developer contributions, whilst demonstrating that it is securing the best price for the land it is selling. Also the part of the land owned by the member of the planning committee cannot be accessed from the public highway except via publically owned land.
53. The council has responded to the Commissioner on this stating it is unable to comment on costs arising from multiple ownership. It is a matter for LCC to satisfy itself and its external auditors as to any actual or perceived conflict of interests between its various roles as land owner and statutory consultee.

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4 <http://minutes-1.nwleics.gov.uk/documents/g172/Public%20reports%20pack%2008th-Apr-2014%2016.30%20Planning%20Committee.pdf?T=10>

5 <http://minutes-1.nwleics.gov.uk/documents/g172/Printed%20minutes%2008th-Apr-2014%2016.30%20Planning%20Committee.pdf?T=1>

54. The council state that any existence of a conflict of interest whether actual or perceived is not a material planning consideration taken into account when determining to grant or refuse a planning application.
55. With regards to the member of the planning committee, the council state that it is assiduous in ensuring that any planning application involving an elected member is dealt with in an open and transparent manner in that members are required to comply with the council's adopted Code of Conduct and Planning Code of Conduct. The council has advised the Commissioner this member did not sit on the committee for this application and again notes that the planning committee actually refused the original application after recommendation it should be approved.

*The public interest in maintaining the exception*

56. The council has stated that the Planning Policy Guidance encourages a collaborative approach involving the local planning authority, business community, landowners and other interested parties. But this must be balanced with the fact that developers should be able to conduct negotiations with the council without fear of suffering commercially by market sensitive information, or potentially useful information being released giving competitors a competitive advantage.
57. The council consider that releasing this information could undermine its relationship with developers if commercially sensitive information was regularly released into the wider public and may affect the ongoing ability for the parties to enter into constructive dialogue concerning future development.
58. The council consider that with the above in mind, the planning application process goes some way to satisfy the public interest.
59. The Commissioner has considered the arguments for and against the release of the information. He considers that the council and developer must have been aware that this type of development would attract public interest.
60. The Commissioner sees that concern around the developers S106 contributions would increase public scrutiny.
61. The Commissioner recognises that the disclosure of the information requested would promote openness and transparency to help inform the public debate on this project. At the same time, the Commissioner is aware that the development is subject to the planning process, and this process would go some way to meet the public interest.

62. The Commissioner also notes the complainant's concerns about the increased offer of S106 contributions which turned the decision from refusal of the development to accepting it as well as his concern that the developer may not be meeting these contributions.
63. However, the council has explained that even though the planning application has been agreed, it is still pending until the legal contracts have been signed agreeing to the S106 contributions.
64. The Commissioner also notes that the planning committee declined the initial application until acceptable S106 contributions were made. This in the Commissioner's view adds weight in the public interest that the planning committee is considering the application and not just accepting the District Valuer's view to accept the initial application.
65. The council's view is that the Planning committee is best placed to consider the public interest in approving or refusing an application having the benefit of being fully informed.
66. The planning process provides mechanisms for engagement and scrutiny and, whilst knowing how a developer supports and progresses its business model might be of interest to the public it has to be considered against the wider public interest, which includes the public interest in allowing commercial endeavours to proceed on a level playing field.
67. With regards to the Tribunal's decision in the Bristol case, paragraph 23 does state that:

*"We emphasise that that decision arises from the circumstances of this particular case as is not designed to set a precedent... Our decision certainly does not mean that every piece of commercially sensitive information which is provided in confidence by a developer to a local planning authority in the course of a planning application must be disclosed to the public on request."*
68. The Commissioner notes that in the above mentioned Tribunal case, the Tribunal considered there was less weight to withholding that particular viability report because it was related to a hypothetical scheme and was not provided as part of a negotiation of a S106 agreement.
69. Having considered all of the above, the Commissioner, in reaching his decision, is mindful of the general presumption in favour of disclosure. In this case, given that the nature and content of the withheld information, which is intended to assist a private developer in delivering a commercial housing scheme, and weighing that with the arguments for disclosure, he considers that the public interest in maintaining the exception outweighs the public interest in disclosure.

70. Therefore the Commissioner finds that the council was correct to withhold the information in this case.

## Right of appeal

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71. 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: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.
73. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**