

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

**Decision notice**

**Date:** 2 November 2015

**Public Authority:** Salford City Council  
**Address:** Salford Civic Centre  
Chorley Road  
Swinton  
Salford  
M27 5AW

**Decision (including any steps ordered)**

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1. The complainant requested information about the sale of public open space land and the proposed refurbishment and extension to Walkden Cricket Club. Salford City Council (the 'Council') failed to provide a response to either request until six months after receipt. Having initially decided to withhold all the information in scope of the request, the Council then revised its position and made a number of disclosures, with some of the information redacted under regulations 12(4)(e), internal communications, 12(5)(b), course of justice, 12(5)(e), commercial confidentiality, 12(5)(f), adverse effect on the person who provided the information, and 13(2), personal data. During the investigation, the Council discovered additional information in scope of the request which it subsequently disclosed to the complainant, with redactions, as set out in paragraphs 19 and 20 of this notice. It also withheld some information in its entirety relying on the above exceptions.
2. The Commissioner's decision is that the exceptions in regulations 12(4)(e), 12(5)(b) and 13(2) are only engaged in relation to some of the withheld information. He also finds that regulations 12(5)(e) and 12(5)(f) are not engaged in relation to any of the withheld information.
3. The Council breached regulation 5(2) of the EIR by failing to provide the requested information within 20 working days, and regulation 14(2) by failing to issue a refusal notice within 20

working days. It also breached regulation 11 by failing to carry out an internal review until requested to do so by the Commissioner.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Comply with the order to issue a fresh response/disclose the information in relation to the documents in Batches 1, 2, 3 and 4 listed in Annex A of this notice.
5. The Council 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.

## **Background**

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6. The two requests in this case centre around a proposed development in Salford by Redwaters (the developer), which wants to build 60 houses on Hill Top Moss and have promised to refurbish the existing Walkden Cricket Club if a deal is eventually struck.
7. The Council has been negotiating with Redwaters for more than two years, but the plan only emerged in a public notice published in June 2014. Last year the Council's deputy mayor, David Lancaster, agreed to dispose of Hill Top Moss subject to consultation. Despite the land not yet being sold off, plans have emerged for the cricket club.
8. The multi-use training complex would include a county-standard cricket pitch, an all-weather pitch and a pavilion. The new club will be known as Walkden Cricket and Sports Academy and may be used by Lancashire's first team. Football clubs and other sports teams will be able to make use of the facilities.
9. Residents say the open space is an urban oasis, brimming with wildlife, and argue it is considered part of neighbouring Blackleach Country Park; many signed a petition against the proposals. It has been said on behalf of residents that they are not opposed to plans to transform the cricket club, but are against plans to build homes on adjoining Hill Top Moss. Redwaters insist that proposals for the cricket club and new homes 'come as one'.
10. The Commissioner understands that plans for the cricket club have been disclosed, but not for the proposed housing development. The

Commissioner can find no evidence to demonstrate that a planning application has been tabled.

## Request and response

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11. On 20 August 2014 the complainant wrote to the Council and made two requests for information via the *WhatDoTheyKnow.com* website as follows<sup>1</sup>:

### Request 1

*"Please could you supply Hill Top Residents Group with copies of all correspondence that Salford Council (or Urban Vision on their behalf) have exchanged between their officers or elected members and Redwater Developments Ltd and Redwater Homes Ltd, or their representatives, from the date the Council were first approached by either of these 2 companies, or their representatives, in relation to the sale of public open space land off Hill Top Road, Walkden, that is part of Blackleach Country Park scheme. This would have been approximately 2011.*

*This is to include any internal correspondence between them all such as emails, memo's,[sic] etc., between all mentioned above and also any reports written by officers specifically to advise any of the elected members regarding the proposal to sell of the public open space land mentioned above."*

### Request 2

*"Please could you provide Hill Top Residents Group with the following information regarding the proposed refurbishment and extension to Walkden Cricket Club (part of the pay off for being allowed to buy and build houses on the much used, much valued by the entire community and a vital part of the wildlife corridor according to Council's own documents) longstanding public open*

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<sup>1</sup>

[https://www.whatdotheyknow.com/request/proposal\\_to\\_sell\\_public\\_open\\_sp\\_a#incoming-564852](https://www.whatdotheyknow.com/request/proposal_to_sell_public_open_sp_a#incoming-564852) and

<https://www.whatdotheyknow.com/request/2..>

*space land, part of the Blackleach Country Park scheme, which is the land off Hill Top Road, Walkden:*

*1/ Copies of all correspondence between these parties stated between officers and elected members of Salford Council, Urban Vision who are acting on their behalf on this matter, Redwater Developments Ltd, Walkden Cricket Club and Lancashire County Cricket Club or any of their representatives, in relation to the subsequent development/refurbishment of the under used old Walkden Cricket Club. This is to include, reports, emails, memo's,[sic] etc."*

12. Despite several follow-up contacts from the complainant, and an internal review request on 24 September 2014, no response to either request was provided by the Council.

### **Scope of the case**

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13. The complainant initially contacted the Commissioner on 15 December 2014 to complain about the way her request for information had been handled and specifically that she had not had a response to either request.
14. On 17 December 2014 the Commissioner queried the non-responses with the Council, who subsequently confirmed it was drafting them. However, the Council repeatedly asked for extensions as it advised that it had received a response from the developer and was now seeking internal advice. In the absence of any substantive response from the Council, the Commissioner recommenced an investigation of the complaint in mid-February 2015.
15. The response was finally provided on 27 February 2015, six months after receiving the requests. A number of EIR exceptions were applied to parts of the information provided and the Council also withheld documents in their entirety. It cited regulation 12(5)(b), where disclosure would adversely affect the course of justice; regulation 12(5)(e), where disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest; regulation 12(5)(f), where disclosure would adversely affect the interests of the person who provided the information; and regulation 13(2), where disclosure would breach the data protection principles.

16. The Council incurred further delay in responding to the Commissioner and in providing its internal review; the review response was due by 31 March 2015 but was not provided until 20 May 2015.
17. Following the Commissioner's instruction to carry out an internal review and in response to his investigation, the Council subsequently disclosed some information to the complainant, redacted in parts, on 20 May 2015. It said that while it had intended to rely upon regulation 12(4)(e), internal communications, for some of the information, it had not cited this in its initial response due to an oversight. It continued to rely on regulations 12(5)(b), 12(5)(e), 12(5)(f) and 13(2).
18. The Commissioner then contacted the complainant to seek her views following the internal review outcome and disclosures. Once received, and as the complainant had asked a number of questions about the disclosed information, the Commissioner contacted the Council again for its comments.
19. At this stage the Council located two additional documents in scope of the requests, which it subsequently disclosed to the complainant, with minor redactions for personal data in accordance with regulation 13(2) of the EIR. These are PDFs 24 and 25 in Batch 1 described in paragraph 26 of this notice.
20. The Council then located two further documents which fell in scope of the requests, namely minutes of a meeting attended by the Deputy Mayor and councillors in April 2012, and a report. It apologised that these had not been placed on the "primary file" and so had been missed from the initial disclosure. These documents were provided to the complainant on 13 July 2015 with redactions made under regulations 12(5)(e) and (f) and 12(5)(b) and are part of Batch 4.
21. Having received the Council's response, the Commissioner has considered whether it has properly applied the following exceptions to some of the information falling in scope of the request:
  - Regulation 12(4)(e), internal communications,
  - Regulation 12(5)(b), course of justice,
  - Regulation 12(5)(e), commercial confidentiality,
  - Regulation 12(5)(f), adverse effect on the person who provided the information and
  - Regulation 13(2) personal data.

## Reasons for decision

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22. The Commissioner has first considered whether the requested information constitutes environmental information.

### Regulation 2 - Is any of the information environmental?

23. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

*"measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in [2(1)](a) and (b) as well as measures or activities designed to protect those elements."*

24. In both the Commissioner's and the Council's view, the information requested by the complainant constitutes environmental information under regulation 2(1)(c) as it concerns a plan to alter the use of land and to alter an existing structure, and is likely to affect several of the elements of the environment referred to in 2(1)(a).
25. The Commissioner has concluded that the requested information is environmental and that the Council properly handled the request under the EIR.

### Disclosed and withheld information

26. The information already disclosed in response to this request can be viewed on the *WhatDoTheyKnow.com* website<sup>2</sup> by scrolling down to

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<https://www.whatdotheyknow.com/request/proposal-to-sell-public-open-space-incoming-564852> and [Link to this](#)

the end of the screen. The information, which is redacted in parts, consists of correspondence (emails and letters), reports, plans and specifications relating to the proposed development to create five acres of housing land, together with an improvement and enlargement of Walkden Cricket Ground. This information constitutes 'Batch 1' and 'Batch 4', although the Commissioner cannot find copies of redacted PDFs 24 and 25 on this site, which are the items referred to in paragraph 19 above.

27. Additionally, the Council has forwarded all the information it holds in scope of the requests to the Commissioner as follows.

- 'Batch 1' contains 12 PDFs with both redacted and unredacted versions of the information which the Council has disclosed to the complainant. In addition, it contains PDFs 24 and 25 which the Council discovered at a later date. Redactions have been made under regulations 12(5)(e), 12(5)(f) and 13(2).
- 'Batch 2' consists of 23 PDFs. PDFs 1 to 10 and 12 to 23 have been withheld in their entirety, whilst PDF 11 has been disclosed. The exceptions relied on here by the Council are regulations 12(5)(b), 12(5)(e) and 12(5)(f).
- 'Batch 3' consists of seven PDFs, all of which have been withheld in their entirety. These documents consist of email exchanges, a memo and a 'Record of Decision'. Those that the Council considers constitute internal communications between its employees have been withheld under regulation 12(4)(e). The remainder consist of communications between Council employees and Redwaters' representatives and have been withheld under regulations 12(5)(e) and 12(5)(f).
- 'Batch 4' consists of another set of documents which has been disclosed to the complainant with redactions made under regulations 12(5)(b), 12(5)(e), 12(5)(f) and 13(2). This information consists of letters, reports, emails, a briefing note to the Deputy City Mayor and a Property Lead Member Briefing.

28. The Commissioner has found that a document in Batch 2, namely PDF 11, which has been marked as being withheld by the Council, was disclosed to the complainant as part of Batch 1. He has highlighted other instances of duplication in Annex A.

### **Regulation 12(4)(e) – internal communications**

29. This has been cited only in relation to some items in Batch 3.

30. Regulation 12(4)(e) of the EIR states:

*"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...*

*(e) the request involves the disclosure of internal communications."*

31. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest for its engagement.
32. On 20 May 2015, the Council told the Commissioner that: *"A limited amount of information is exempt from release under Regulation 12(4)(e) - internal communications. This exception was considered initially and it was intended it would be applied to some information. However, due to an oversight this exception was not referenced in the Council's initial response."*
33. The Council has argued that in this case, the information consists of an early exchange of views and opinions in relation to preliminary enquiries raised by the developers about possible development opportunities. Additionally the Council confirmed that no decision has yet been made about the possible disposal of the land.
34. The Council acknowledged the significant public interest in the proposals but argued that to disclose initial thinking and views on a scheme prior to, and outside of, formal decision making processes could be both detrimental to the overall process and damaging to the developer, whose interests rest on the final decision itself. As a result the Council determined that the public interest falls in favour of withholding the information.
35. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others.
36. Any documents attached to a communication are also considered to have been communicated to others. Attachments will therefore constitute communications. However, a public authority should consider each attachment separately when deciding whether or not it is an 'internal' communication.
37. From the information before him, the Commissioner notes that the Council initially relied on regulation 12(4)(e) to withhold seven documents in Batch 3 in their entirety. However, the Commissioner



noted that not all the email exchanges appeared to be between Council employees, and therefore asked the Council to review its position with reference to his guidance<sup>3</sup>.

38. The guidance sets out that communications sent to a third party, or sent both internally and externally, do not constitute internal communications. The unique feature of an internal communication is that it is **only** circulated internally. If it is also sent outside the public authority, it is not purely internal and will not be covered.
39. The Council revisited its position and, on 18 September 2015, told the Commissioner that it wished to continue to reply on regulation 12(4)(e) in respect of those documents in Batch 3 which were sent internally only, which it considered to be PDFs 2 to 7. For PDF 1, the Council said that it instead wished to rely on regulations 12(5)(e) and (f) so this item will be considered later in this notice.
40. Having viewed the information, the Commissioner finds that some of the emails considered to be 'internal communications' by the Council do not engage the exception 12(4)(e) because they have been sent from an officer in his capacity at Urban Vision Partnership Limited. Urban Vision is a joint venture partnership between Salford City Council, Capita and Galliford Try and is not therefore an 'internal' body. The Commissioner therefore requires the Council to disclose the documents set out in Annex A under Batch 3.
41. In respect of the remaining information, having considered the Council's revised position and having examined that information, the Commissioner is satisfied that where cited the withheld information in Batch 3 constitutes internal communications and that the exception at regulation 12(4)(e) is, therefore, properly engaged.
42. The Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:

*"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public*

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

*authorities will be entitled to refuse access if the request concerns [...] internal communications<sup>4</sup>."*

43. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commissioner proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes.
44. The Commissioner considers that these factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority may have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes.

*Public interest arguments in favour of disclosure*

45. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. He also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.
46. The complainant did not submit any specific arguments in favour of disclosure of the information withheld under regulation 12(4)(e).

*Public interest arguments in favour of maintaining the exception*

47. The Council has argued that there are occasions when it needs private thinking space in order to consider proposals, share views and develop policy. It stated that the information withheld under regulation 12(4)(e) consists of: *"an early exchange of views and opinions in relation to preliminary enquiries raised by Redwaters about possible development opportunities. With regard to the proposals for the Hill top site, no decision has yet been made regarding the possible disposal of the land. Furthermore, any future planning application which may be received would be subject to full scrutiny and a formal decision making process"*.

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<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

*Balance of the public interest*

48. The Commissioner considers that there is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. Arguments should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.
49. In balancing the public interest arguments in this case the Commissioner has given due weight to the position that the public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure might have on council staff's willingness to contribute uninhibited and robust advice.
50. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the public interest is more likely to favour disclosure.
51. It seems clear to the Commissioner, having considered the Council's submissions, that the process is ongoing as is the broader process of decision making. He, therefore, considers that the public interest in not disclosing the information ahead of the appropriate stage in the statutory process carries significant weight.
52. The Commissioner accepts that there is a general public interest in public engagement in planning processes, particularly where they relate to far-ranging issues which impact on local residents. However, except in cases where there are specific concerns that a process is not being correctly followed, where sufficient information is not being made available or where there is evidence of malpractice, the Commissioner does not consider that this general interest justifies bypassing information disclosures made outside the statutory planning regime.
53. Whilst the Commissioner accepts that disclosure of the information might well aid transparency he considers that this would be to the detriment of the ongoing deliberation process which the withheld information records. In short, there is a stronger public interest in the Council being able consider the available options in this matter

in order to inform a stronger decision making process. He also considers that the disclosures already made by the Council in relation to this matter and the existing planning statutory framework provide opportunities for public engagement.

### *Conclusion*

54. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and he therefore accepts that where properly cited the information in Batch 3 should be withheld under this exception.

### **Regulation 12(5)(b) – course of justice**

55. This has been cited in respect of some information in Batches 2 and 4.
56. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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”*. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
57. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
58. The category of privilege the Council is relying on is advice privilege. In this case the advice was provided directly to the Council by its legal representatives. The information withheld under regulation 12(5)(b) is correspondence exchanged between Redwaters / Redwaters legal advisers and the Council in relation to an agreement.
59. Having viewed the withheld information, the Commissioner considers that none of the information withheld in Batch 2 under regulation 12(5)(b) engages this exception. This is either because it is not from a solicitor or because legal professional privilege was

waived when the Council sent the information to external recipients. The Commissioner therefore requires the Council to disclose the documents set out in Annex A under Batch 2.

60. The Commissioner accepts that the remaining information which is withheld under this exception in Batch 4 can be considered to be legal advice provided by solicitors to their clients (the Council) as there is no suggestion that the privilege attached to this information has been 'waived' by subsequent disclosure.
61. However, the Commissioner is mindful that there must be an "adverse" effect that would result from the disclosure of the information. He recognises that disclosure of legal advice could undermine the important common law principle of legal professional privilege and that disclosure may adversely affect a lawyer's capacity to give full and frank legal advice and discourage clients from seeking legal advice.
62. In view of the above, the Commissioner is satisfied that disclosure of the related information would be likely to adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged.

*Public interest arguments in favour of disclosure*

63. The Council recognises that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
64. The Commissioner likewise acknowledges there is a public interest in ensuring openness and transparency in the operations of a public authority. The advice in question relates to matters around the potential development of the Hill Top site and there is an argument that disclosure of advice which would impact on the development of the site is in the public interest as it relates to a public space and sporting facility.

*Public interest arguments in favour of maintaining the exception*

65. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
66. The Council has argued that it is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice

be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges, and may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

*"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."*

67. In addition the Council referenced decision notice *FER0558296*<sup>5</sup> which concerns a request to Cornwall Council about the use of some of its land, and highlighted that:

*"The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority."*

68. The Council said it had considered the above and had concluded that there are no factors which would equal or outweigh the particularly strong public interest arguments which favour withholding this information.

#### *Balance of the public interest*

69. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner (EA/2007/0055)* were clear:

*"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of*

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<sup>5</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1424156/fer\\_0558296.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1424156/fer_0558296.pdf)

*disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption” (Para 41).*

70. However, the public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.

### *Conclusion*

71. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are factors that would equal or would outweigh the particularly strong public interest inherent in this exception. The Commissioner has decided that the Council has properly applied regulation 12(5)(b).

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

72. This has been applied to information in all 4 batches, including PDF 1 in Batch 3.
73. 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”*.
74. 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?

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

75. 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.

76. The withheld information in this case relates to a proposed development of land for housing and to the regeneration of the cricket club on land which is owned by the Council. In particular, the information withheld under this exception consists of Redwaters' financial appraisals and projected costs for the proposed development.
77. Having considered the Council's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information relates to a commercial transaction, namely the provision of land for development. This element of the exception is, therefore, satisfied.

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

78. In considering this matter 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.
79. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
80. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v A N Clark (Engineers) Ltd [1969] RPC 41v Clark* suggested that the 'reasonable person' test may be a useful one. He explained:

*"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."*

81. In *Bristol 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.



82. In 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 would have realised that that was what the developer was doing<sup>6</sup>."*

83. The Commissioner notes that, in this case, the withheld information forms part of an agreement between the Council and Redwaters. The information is not trivial and the Council has confirmed that it is not in the public domain.

84. In relation to the 'reasonable person' test, another relevant question is whether the information was shared in circumstances creating an obligation of confidence. The Commissioner considers that this can be explicit or implied, 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.

85. The Commissioner considers that, where information relates to the management of land as a commercial proposition, particularly where such processes are incomplete, it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information; however, for the purposes of this element of the exception, the Commissioner is satisfied that the information is subject to confidentiality by law.

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

86. In order to satisfy this element of the exception, 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.

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<sup>6</sup>[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)

87. In the Commissioner's view 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 the disclosure.
88. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This 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".*
89. The Council has argued that disclosure of the withheld information *would prejudice* the commercial interests of Redwaters and has advanced arguments which explain the envisaged harm that might result from disclosure of the various elements of the withheld information.
90. In relation to details of financial arrangements between the Council and Redwaters, the Council has stated that disclosure of this information would result in damage to Redwaters' ability to negotiate best arrangements in other similar future contracts, or place them at a disadvantage with potential competitors in future competitive exercises. The Council has also argued that the disclosure of details of Redwaters' working practices could mean that competitors would gain an unfair advantage in similar future bids.
91. The Council confirmed that Redwaters has objected to the release of the draft Heads of Terms, the exclusivity agreement and its financial appraisal of the scheme on the basis that disclosure of this information would directly affect Redwaters' commercial interests, having the potential to disrupt its negotiations for land, jeopardise the prospect of an agreement being reached and would involve the disclosure of sensitive information that could be used by its competitors.
92. As noted above, in order for the exception to be engaged, it needs to be shown that any harm resulting from disclosure would be more probable than not to occur.

93. The Council stated that, in this case, the information relates to the proposed sale and development of land. It argued that confidentiality is provided by law, namely the common law. Firstly, it said the information has the necessary quality of confidence in that it is not trivial and is not in the public domain. Secondly, it said given the context of the negotiations for the land, and the nature of the relationship between it and Redwaters (and given the nature of the information itself), the information was clearly shared in circumstances creating an obligation of confidence. The confidentiality is protecting a legitimate economic interest, ie Redwaters' interest in purchasing and developing the land, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations and avoiding disclosures which would otherwise result in a loss of revenue or income. Given the above, the Council argued that such confidentiality would be adversely affected by disclosure of the information.
94. The Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing; however, he considers that it is for authorities to fully explain the relevant causes and effects in any given instantiation of this principle. In this case, the Commissioner considers that the Council has failed to do so.
95. In order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. The Commissioner considers that the Council's arguments, whilst identifying possible effects, fail to make these effects sufficiently concrete and fail to identify the causal link with the withheld information.
96. Much of the information withheld under regulation 12(5)(e) relates to an exclusivity agreement, and associated correspondence, between the Council and the developers, Redwaters. This agreement was signed on 14 May 2009 and ended on 13 May 2013. The Commissioner does not consider this agreement to be commercially sensitive; it contains standard paragraphs and ended over two years ago.
97. In addition, in the Commissioner's view, the Council has applied this exception in a 'blanket fashion' to both fully withheld and partially withheld documents when some of the information in those documents does not in any way relate to regulation 12(5)(e).

*Conclusion*

98. Consequently, the Commissioner has concluded that regulation 12(5)(e) is not engaged and the information withheld under this exception should be disclosed as per Annex A.

**Regulation 12(5)(f) – interests of the person who provided the information to the public authority**

99. The Council argued that some of the withheld information in Batches 1 to 4 was exempt from disclosure on the basis of regulation 12(5)(f) which states that:

*'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

*(f) the interests of the person who provided the information where that person—*

*(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*

*(iii) has not consented to its disclosure'*

100. In the Commissioner's view the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.

101. With regards to engaging the exception, as recognised by the Information Rights Tribunal, a four stage test has to be considered, namely:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

- Has the person supplying the information consented to its disclosure?<sup>7</sup>

*Adverse effects on the interests of the person who voluntarily provided the information*

102. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
103. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.
104. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (ie once the application of the exception has been established). However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur, reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

*The Council's position*

105. The Council said that strands (i), (ii) and (iii) of regulation 12(5)(f) are satisfied as Redwaters proactively initiated discussions with the Council in relation to their proposals to develop the land in question and, for this reason, were under no obligation to provide the Council with this information. It also said that the Council would not be entitled to disclose this information apart from under these regulations and Redwaters have not consented to its disclosure; rather Redwaters have strongly objected to its release. The Council stated the adverse effects of disclosure for Redwaters are "*broadly*

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<sup>7</sup> John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)

*the same as those described in relation to our application of Regulation 12(5)(e) above”.*

*The Commissioner's position*

106. Given the context within which the Council was provided with the withheld information by Redwaters, ie as part of pre-planning application discussions, the Commissioner is satisfied that the information was provided voluntarily. Furthermore, it is clear that the developer has not consented to the disclosure of the withheld information. Moreover, the Commissioner agrees with the Council's assessment that it was not entitled to disclose the withheld information apart from under the EIR.
107. Consequently, the Commissioner is satisfied that the second, third and fourth criteria set out at paragraph 101 are met.
108. However, the Commissioner is not persuaded that the first criterion is met. That is to say, he does not believe, based upon the submissions provided to him, that disclosure of the withheld information would harm the interests of the developer. In reaching this conclusion the Commissioner wishes to emphasise that as stated above there is a high threshold for engaging this exception; the public authority must demonstrate that the likelihood of harm occurring is more probable than not. Moreover, it needs to identify a causal link between disclosure of the information and any adverse effect.
109. In the circumstances of this case, the developer has stated that disclosure of the withheld information would harm its commercial interests. In support of this position the developer has said that disclosure would have the potential to disrupt their negotiations for the land, jeopardise the prospect of an agreement being reached and would disclose information which could be used by its competitors to their detriment.
110. However, without such supporting evidence the Commissioner can only conclude that the suggestion that disclosure would harm the developer's commercial interests is a speculative argument. Whilst it is possible for the Commissioner to assume why some parts of the withheld information may harm the developer's commercial interests it is not his role to do so. Rather, in order for this exception to be engaged the onus is on the Council to provide evidence which demonstrates a clear link between the disclosure of the withheld information and any adverse harm to the developer's commercial interests.

111. Finally, the Commissioner does not dispute the Council's suggestion that those opposed to the proposed development would be interested in the withheld information. However, he is not persuaded that the availability of such information would necessarily adversely affect the interests of the developer. Rather, the Commissioner believes that the Council's suggestion that the availability of such information would act against the developer's interests generally is too broad an argument to be anything more than speculative. The Commissioner acknowledges that the information could be used by those submitting objections to any subsequent planning application. However, he does not accept that this could or would necessarily result in an unfair decision by the Local Planning Authority. First, because such a body is presumably capable of making an objective and reasoned decision, regardless of the submissions it receives from those objecting to a particular development. Secondly, because of the nature of the pre-planning process, some of the information may well no longer be directly relevant to the subsequent planning application that was submitted.

#### *Conclusion*

112. Consequently, the Commissioner has concluded that regulation 12(5)(f) is not engaged and the information withheld under this exception should be disclosed as per Annex A.

#### **Regulation 13(2) – personal data**

113. This has been cited in respect of some information in Batches 1 and 4.

114. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.

115. In order to engage regulation 13 the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1998 (the 'DPA').

116. Section 1(1) of the DPA defines personal data as:

*"data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*

117. Information is exempt from disclosure on the basis of regulation 13(1) if it is personal data of which the applicant is not the data

subject, ie third party personal data, and either the first or second condition at regulation 13(2) is satisfied.

118. In order to determine whether a public authority may disclose personal data under the regulation 13 of EIR, the public authority must consider whether such disclosure would not contravene the first data protection principle which states:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

119. In order to satisfy the first data protection principle the public authority must conclude that the processing is fair to the data subjects and also would satisfy at least one condition from Schedule 2 of the DPA, and, where the requested information is sensitive personal data, at least one condition from Schedule 3 of the DPA.

120. The Commissioner has examined the withheld information and notes that the redactions cover names, addresses and contact details for a variety of individuals which would clearly constitute personal data within the meaning of the DPA.

*Would the disclosure of the names and contact details contravene any of the Data Protection principles?*

121. The Commissioner recognises that disclosure under the EIR represents disclosure to the wider world. When considering the reasonable expectations of the data subjects he has considered whether they would be likely to expect that their personal data would be disclosed to anyone who requested it.

122. The Commissioner notes that the withheld names and contact details for the individuals involved relate purely to them in their professional capacity. He has carried out his own internet searches and has found that the vast majority of the information withheld under regulation 13(2) is already in the public domain, including work mobile numbers. Additionally the individuals concerned are at a senior level within their respective organisations and, as such, the Commissioner does not consider that they would expect their details to remain private.

123. However, the Commissioner has also determined that some of the withheld information relates to the names and contact details of non-senior employees. The Commissioner considers that the



disclosure of this personal information would be unfair as those individuals would have no reasonable expectation that their names and contact details would be put into the public domain by the Council as their details are not already in the public domain.

### *Conclusion*

124. The Commissioner therefore finds that disclosure would be fair for the vast majority of the personal details withheld under this exception and that the exception is not engaged. He therefore requires the Council to disclose the withheld information listed in Annex A under Batch 1 and Batch 4.

125. However, he has also determined that the Council is correct to withhold the names and contact details of non-senior employees in the various documents where redactions under regulation 13(2) have been made. The Commissioner considers that the disclosure of this personal information would be unfair as those individuals would have no reasonable expectation that their names and contact details would be put into the public domain by the Council.

126. In the absence of fairness, the Commissioner has not gone on to consider whether the disclosure of the withheld letters would satisfy any of the conditions contained in Schedule 2 of the DPA.

### **Regulation 5(2) - Duty to make environmental information available on request and regulation 14(2) – Refusal to disclose information**

127. Regulation 5(2) of the EIR states that information should be made available: *"as soon as possible and no later than 20 working days after the date of receipt of the request"*. In this case, neither request was answered until 133 working days after receipt. The Council therefore breached regulation 5(2) in this regard. It is also of concern that the Council subsequently located further documents in scope of the request which were provided even later.

128. If a public authority wishes to withhold information in response to a request, regulation 14(2) requires it to provide the requester with a refusal notice stating that fact within 20 working days after the date of the request. The Council failed to do this in relation to both requests thereby breaching regulation 14(2) of the EIR.

### **Regulation 11 – Representations and reconsiderations**

129. Under regulation 11: *"an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these*

*Regulations in relation to the request*". In other words, the EIR includes a statutory right for applicants to request an internal review, so long as they submit it within 40 working days of receiving the response. The public authority then has 40 working days in which to carry out its internal review.

130. In this case, the Commissioner asked the Council to carry out an internal review in conjunction with responding to his investigation; however, the Council breached regulation 11 of the EIR by failing to carry out an internal review within 40 working days.

## **Other matters**

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131. The Commissioner finds it particularly disappointing that the Council breached the statutory time limits in respect of responding to the requests, and to carrying out an internal review, because the Council was being monitored by the Commissioner for non-compliance with time limits in its handling of requests from February to April 2015<sup>8</sup>. The Commissioner has made a record of this delay and the Council's failure to carry out a timely internal review in this case. This may form evidence in future enforcement action against the Council should evidence from other cases suggest that there are systemic issues that are causing delays / failure to carry out internal reviews.

132. During this investigation, the Council failed to mark up the application of exceptions within the withheld information, which resulted in the Commissioner having to request this on a number of occasions, with follow-up queries due to the lack of clarity. This has caused considerable delay in investigating this case. The Commissioner would therefore remind the Council that, when it is applying exemptions or exceptions to future requests, it should ensure that it knows where these apply prior to sending any response to the requester. Without doing so, it may appear to the Commissioner that full consideration has not been taken prior to issuing a refusal notice.

133. Additionally, some of the documents purported to have been withheld have been disclosed to the complainant (such as PDF 11 in

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<sup>8</sup> <https://ico.org.uk/media/action-weve-taken/monitoring/1432444/list-of-ico-timeliness-monitored-bodies-01022015-30042015.pdf>

Batch 2 and an email of 21 August 2013 from the Council to the councillors, which was withheld in full in Batch 3 PDFs 5 and 6, but which was disclosed to the complainant with some minor redactions as part of Batch 4). This is despite the Council having had several months to sort out the withheld information.

134. Additionally, in providing the withheld information to the Commissioner, the Council failed to provide all the attachments referred to in the accompanying emails. It did, however, provide him with some of the attachments. This has resulted in the Commissioner being unclear as to exactly which version of the attachments have been disclosed or not. Where that is the case, the Commissioner has ordered disclosure of those attachments in Annex A.

## Right of appeal

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135. 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)

136. 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.

137. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**