

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

Date: 23 October 2014

Public Authority: Cheshire East Borough Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested information relating to plans to develop a theme park, 'BeWILDerwood' on part of Tatton Park in Cheshire. The council provided some information but withheld other information on the basis that the exception in Regulation 12(5)(b) (course of justice) and 12(5)(e) (commercial confidentiality) and Regulation 12(4)(a) (information not held) applied.
2. The Commissioner's decision is that the council has correctly applied Regulations 12(5)(b) and 12(5)(e) to the information in this case, and that the balance of the public interest rests in favour of the exceptions being maintained.
3. As regards the council's application of Regulation 12(4)(a), he considers that the request to which this was applied was ambiguous. The council considered that it referred to information which it did not hold, whereas the Commissioner considers that in reality it does encompass information which is held by the authority. However, although Regulation 12(4)(a) was not therefore applied correctly the Commissioner considers that this information is exempt from disclosure by virtue of Regulation 12(5)(e).
4. The Commissioner does not require the council to take any steps.

Request and response

Requests for information

5. On 20 March 2013 the complainant wrote to the council and requested information in the following terms (the numbering of the requests relates to the numbers provided by the complainant):

1.) I should like to see the reports from Addleshaw Goddard, EC Harris and PWC.

6. This was refused by the council. The report by Addleshaw Goddard was refused under Regulation 12(5)(b) and the remaining two reports under Regulation 12(5)(e).

2.) I should like to see the business plan put before the council by Bure Valley and the officers' analysis of it. I think it is also important to know which officers reviewed this plan as the Director of Places, the Chief Legal Officer and the Chief Financial Officer in place at the time have all left the council in light of Lyme Green. Therefore, if they were the officers who analysed the plan, I would question their ability to do so. What were the qualifications of the officers that CEC thought them capable of this analysis?

7. The request for the business plan was refused by the council under Regulation 12(5)(e). Details of the reviewers were provided but not their identities or the qualifications of the officers concerned.

Direct questions which the complainant asked the council

8. The complainant also asked a number of questions of the council. The Regulations provide the public with a right to request information held in recorded form by an authority; they do not require an authority to answer direct questions which are put to it by the public. However in *Richard Day v Information Commissioner EA/2006/0069* the First-tier Tribunal said that an authority's duty was to consider whether it held any relevant information which could directly answer the questions and to consider whether that information could be disclosed to the complainant.
9. The council responded to many of the questions by providing a direct response to the questions. It did not necessarily refer to any recorded information when doing so but simply answered the question she had asked directly.

10. Although the council sought to be helpful by providing direct answers its response did not always directly refer to any recorded information it held. It did not consider whether any relevant information was held or could be provided but simply answered the questions. The Commissioner has detailed some of the questions and the council's responses below.
11. Having said this, the information which would answer the questions which was held by the council is contained within the reports which the complainant asked for in parts 1) and 2) of her request. The council therefore had in fact considered whether the information it held should be disclosed but had decided it was exempt, as outlined above.
12. The Commissioner's consideration as to whether the council has complied with the requirements of the Regulations as regards these questions is therefore included within his consideration of the exceptions applied to the reports and the business plan.
13. Questions 6, 7 and 8 were:

6.) Did legal advice (cf. question 1) state that CEC did not have to go through an EU procurement process? On what was this advice based? (cf. my request for this report).

7.) See 6 re choice of Bure Valley. Did Addleshaw Goddard advise this? If so, on what was this opinion based? (cf. my request for their report). Who identified Bure Valley as the only developer capable of providing a project in Tatton Park, Officer, Councillor, other? Please name the individuals and their qualifications.

8.) See 6 for compliance with Council's own procurement processes. Did Addleshaw Goddard advise this and, if so, on what was this advice based? (cf. my request for their report).

The council responded to these requests by stating that there was no requirement for the project to be advertised in the Official Journal of the European Union and by clarifying why that was the case. The Commissioner notes however that the reports hold information relevant to the questions which were asked and he has therefore considered these further below.

14. Question 9 (a) was:

9.) a) You have not answered the question of how the cost estimate was built up only a vague reference to an experienced project manager

from Bure Valley. I should like details of the cost as the site in Norfolk is totally different from Tatton Park (Grade 11 Listed Park and Garden, Ancient Woodland, protected species, including red listed and List 41 etc.) and therefore far more complex.*

The Commissioner considers that this question is, to an extent, ambiguous. It could either be a request for details of who developed the cost estimate or it could be a request for further details on the costs estimated for the project itself, or both.

15. The council responded to the requester by stating that there was a fully costed plan from Bure Valley. In its subsequent response to the Commissioner it clarified that it does not hold information on how the cost estimates were built up and it said therefore that Regulation 12(4)(a) applies (information not held). It said that the developer had supplied an overview of costs but it was the developer's information, not the council's. It also clarified that that information would need to be reviewed and updated if planning approval was granted.
16. The Commissioner assumes that the council's application of 12(4)(a) related to details as to how and by whom the cost estimates were built up. The estimate was developed by and on behalf of the developer and the council stated to the complainant in response that *"They employed a project manager, quantity surveyor and design people to produce their plans. They also obtained their own quotes from suppliers"*.
17. However having considered the wording of the request, and in particular the section containing the request itself; *"I should like details of the cost"*, together with the withheld information, the Commissioner is satisfied that information held by the council in both the business plan submitted by the developer and in a separate document which the council provided to the Commissioner does provide details of the cost estimates.
18. The council does therefore hold information falling within the scope of this request and that information is held within the reports which the council has withheld from the complainant as outlined above.
19. Whilst the Commissioner therefore considers that Regulation 12(4)(a) is not applicable to this information he has considered the information under Regulation 12(5)(e). He has considered it under this exception as details from this information were also included with the business proposal which the developer presented to the council, which was clearly intended to be held in confidence. The business plan was withheld under this exception.

20. Question 9 continued:

"b) CEC has not told me to what degree of accuracy the cost estimate was approved.

c) CEC has not told me, if estimates prove to be insufficient, how additional funds to complete the project will be secured."

As regards b) & c) the council stated that the cost estimates were based upon the previous experience of the developer when creating the attraction in Norfolk. It said however that it would require a further estimate to inform the final preparation of terms and conditions of a loan agreement. The council has therefore responded to these questions.

21. Questions 12 and 13 were:

"12.) Which professional reports, deposited with Planning Application 12/1166M, were paid for by Cheshire East Council?"

"13.) Which professional reports, which are required by the Reg. 22 Letter, have been or are to be paid for by CEC?"

The council responded to these questions in its initial response. It provided details of the surveys it had paid for and clarified that these would have been required 'whatever the development was'.

22. The complainant also said that she had not received a response to the following questions. For ease the questions have been labelled a to f by the Commissioner:

"a) How will the "Step In" protect Community Charge Payers of CheshireEast. If Bure Valley fail to run the project successfully, will the assets which CEC will take over, be worth the £5 million loan? What forms of security have been agreed with Bure Valley other than the assets in Tatton Park and the rights to run the attraction if they fail? What tax planning methods have been made?"

The council said that it had responded to this question in its initial response.

"b) Kim Ryley stated on BBC's television and radio that Bewilderwood was owned by a family trust and could therefore not borrow money but the Tatton Park Report 2 states that the family trust lent the money to [name redacted] to develop Bewilderwood in Norfolk. Which is correct?"

The council responded to this question.

"c) In Tatton Park Report 2, Section 9, Risks, Para 1., it is stated that key risk factors to both finance and reputation would be made if the attraction was not opened by March 2013. As there is yet no approved plan (as of March 2013) (and if one is passed in the next couple of months the bird breeding season would prevent construction work in trees and hedges where birds are breeding until September), would you tell me what financial loss to CEC now is and what it will be by the Autumn of 2013?"

The council did not provide a specific figure for the estimated loss through slippage. It said that a period of one year's slippage has been profiled and that this has been accommodated in Tatton Park's current planning. The council also pointed out to the Commissioner that, following a previous request, the complainant has a copy of the Tatton Park Report 2 and this already highlights that the initial budget set aside for all pre-development work was £240,000. It says that there is no impact on this cost caused by project slippage and, should the planning application succeed, the scheme will pay back any such costs. It added that Paragraph 7.6 of the Cabinet report referred to the potential for financial returns to the Council. As such, this provides an indication of the potential shortfall associated with slippage in the scheme (i.e. opportunity cost of not realising the returns). In providing this the council did provide the information it held indicating the potential cost of the delay.

d) Have the proposed agreements with Bure Valley been drawn up ready for signature? If they have, can I have copies?

The council responded to this question by stating that the agreements were still being drawn up.

f) Will the loan cover the costs?

The council responded to this question.

23. Following an internal review of its responses to the complainant's questions, the council wrote to the complainant on 14 May 2013. It upheld its initial decision to withhold any further information.

Scope of the case

24. The complainant contacted the Commissioner on 15 May 2013 to complain about the way her request for information had been handled. She considers that the information which she has asked for should be disclosed given the strong public interest in knowing more about the planned development and its financing, and given her opinion that the development should have been put to tender.

The withheld information considered by the Commissioner

25. The council provided copies of reports to the Commissioner along with its arguments for withholding these documents from disclosure.
26. The reports which the complainant requested in 1) and 2) above are the reports which the council has provided to the Commissioner as the withheld information and which are considered further below.
27. The Commissioner's consideration of the information held in these reports also addresses the information falling within the scope of the complainant's outstanding questions, to the extent that he considers relevant information to be held by the council.

Reasons for decision

Regulation 12(5)(b)

28. Regulation 12(5)(b) of the EIR states that information may be withheld where 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.
29. The council said that the report it received from Addleshaw Goddard LLP is subject to legal professional privilege. The advice is comprised of three separate reports. It highlighted that one additional document, a cabinet report dated 1 August 2011, had already been disclosed previously as a result of a prior request, dealt with in case FER0457702. It said that the remaining information is subject to legal professional privilege and that it was exempt from disclosure.
30. The Commissioner is satisfied that the report is legal advice, produced by professional legal advisers for the council regarding the development. The Commissioner is therefore satisfied that the advice is subject to legal professional privilege.

31. The Commissioner and the First-tier Tribunal have outlined in previous decisions that a disclosure of information which is subject to legal professional privilege might have an adverse effect upon the course of justice.
32. In *Archer v ICO & Salisbury District Council* [EA/2006/0037] the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.
33. In reaching a decision as to whether disclosure would have an adverse effect it is therefore necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & EA/2005/0030] in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
34. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the Regulations. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
35. The Commissioner has therefore borne in mind the fact that ordering disclosure of this information is likely to have an indirect adverse effect upon the course of justice simply because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by the request when making his decision.
36. A disclosure of legal advice relied upon by one party upsets the level playing field which is meant to apply in the adversarial process in court. If the advice is still 'live' then for the purposes of the Regulations it is likely that its disclosure would have an adverse effect upon the course of justice. Potential legal challengers would have an unfair advantage as they would have access to the advice, which might allow them to

identify weak points in their opponents' arguments and better formulate their own.

37. The council said that at the time of the request the planning application was extant and negotiations with the developer, Bure Valley Adventures Limited ("Bure Valley") were yet to be concluded. It outlined the possibility of a number of legal challenges being made as the project moved forward, and highlighted that the advice was therefore still 'live' for the purposes of the EIR.
38. The council also highlighted that if planning permission is ultimately approved it will be open to members of the public to ask the Secretary of State to "call in" the decision or to seek a judicial review of the Planning Committee's decision.
39. It therefore considered that there remains an element of uncertainty as to whether any form of challenge or complaint might be capable of being made. The advice remains live because of this possibility and therefore a disclosure of the advice would adversely affect the course of justice as any legal challenge would be made with knowledge of the content of the council's legal advice. This would mean that the council was at a disadvantage when presenting its legal arguments to the court. The council considered that these factors were of very considerable weight in favour of maintaining the exception.
40. The Commissioner is satisfied that the advice was still 'live', and that there are a number of areas of potential legal challenge to the development. The development will impact upon a public park and will have an impact on the environment, including the infrastructure surrounding the park. The likelihood is also that a completed development will draw a larger number of visitors to the park, thereby increasing the likelihood of increased traffic in the surrounding areas.
41. He is therefore satisfied that, given the nature of the project, it is more likely than not that at some point an interested party may launch a legal challenge to the proposals, or at least consider the possibility of doing so. The Commissioner is therefore satisfied that disclosure of the legal advice would have an adverse effect upon the course of justice.

The public interest

42. In accordance with the Regulation 12(1) the Commissioner must therefore consider the public interest in the information being disclosed in spite of the exception applying. The test to be applied is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest in the information being disclosed

43. The central public interest involved in the disclosure of this information relates to the fact that the development will cause an impact upon the current environment in a notable public park. Tatton Park's website describes that park as "*one of the UK's most complete historic estates*". The creation of a 'theme park', albeit with a natural and environmentally friendly approach such as proposed, will undoubtedly have an impact on the environment at the development site and the surrounding area.
44. Bewilderwood is intended to draw greater visitor numbers to the park. This will in itself have an environmental impact as more people use the area and greater numbers of cars and other vehicles carry passengers to and from the park. This will impact upon the environment itself, on those living near to the park and on users of the local roads.
45. The creation of the visitor attraction within the public park is therefore likely to be controversial, particularly among those interested in maintaining the Tatton Park environment in its current state and those living locally.
46. The complainant notes that the council has not tendered for the project and has not published its intentions in the Official Journal of the European Union. This is the publication in which all tenders from the public sector which are valued above a certain financial threshold must be published under European Law. The council's position is that there is no legal requirement for it to publish details of its intentions in this case.
47. However, given the nature and value of the project, there may be competitors who would challenge the council's position on this point.
48. The lack of an open tendering process may be considered particularly important in this case because the council is providing a loan to the developer. If the project was put to tender then it is possible that another developer, offering an alternative funding model, would not have required any loan of public money from the council.
49. The complainant has also asked what would occur if the development failed at any point. She wishes to know whether, and how, the council has considered this and what the council's contingency plans would be to recover the loan.
50. The Commissioner has borne in mind that if interested parties do have concerns over the council's compliance with European Procurement rules, they could take their own legal advice and consider mounting a challenge. Interested parties are not therefore prevented from challenging the council's position by this information being withheld.

However, while this might be relevant in respect of potential competitors, the ability to obtain "rival" advice does not address the argument in favour of a more detailed public explanation for the council's stance which, in the Commissioner's view, would be enhanced by disclosure.

51. The council has said there might also be legal challenges regarding the loan, on the basis that 'state aid' is being provided to the developer, which would be contrary to European law. Again, the Commissioner considers that disclosure of the information might help address any such concerns and allow for the council's position to be publicly scrutinised.
52. However the Commissioner is satisfied that the information which has been disclosed in the Tatton Park 2 report provides some transparency which allows other interested parties and the public to consider the appropriateness of the council's actions. The Commissioner notes that this includes a brief outline of the council's arguments as to why it was not required to publish the proposal in the Official Journal of the European Union.
53. Some details of the legal advice are therefore already in the public domain. However, the Commissioner does not consider that this diminishes the public interest in maintaining the exception in this case. The information already disclosed is not detailed compared to the actual advice. It reports on the steps which the council needs to take (or avoid taking) in order to ensure that the project is legally compliant.
54. In summary, the Commissioner recognises that there are strong arguments in favour of greater transparency in this case. Many of the questions put by the complainant would be answered by a disclosure of the withheld information. There are, however, arguments against disclosure.

The public interest in the exception being maintained

55. The Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle. In *Bellamy v the Information Commissioner and the DTI [EA/2005/0023]*, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
56. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of legal exchanges or it may deter them from seeking legal advice in the future.

There is a strong public interest in allowing public authorities to seek legal advice in confidence in order to allow them to ensure that decisions are appropriate and legally robust.

57. So there will always be a strong argument in favour of maintaining legal professional privilege, and for avoiding the consequent adverse impact on the course of justice, because of its very nature and the importance attached to it as a long-standing fundamental principle of English law. The Tribunal recognised this in the Bellamy case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

58. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above. Any disclosure which would have an adverse impact on the course of justice should be avoided unless there are clear and significant public interest arguments in favour of disclosure. As discussed above, the Commissioner does not consider that the application of this principle has been eroded in this case by the disclosure of limited information about the reasons for the council's legal stance.

Balance of the public interest arguments

59. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. Those involved in dealings with the public authorities may feel they have better understood the process if they know how a public authority reached its decisions and its legal justification for a particular course of action. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
60. The Commissioner notes that the public interest in maintaining this particular exception is strong, and to equal or outweigh that inherently strong public interest usually involves factors such as substantial amounts of expenditure being incurred, a large number of people being affected or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.

61. The Commissioner accepts that the development will have an impact on the park, involves a large loan, and that those living close to Tatton Park and in the surrounding area are likely to be affected by the development. However, following his examination of the information, the Commissioner has seen no indication that the council had misrepresented any legal advice it has received or any evidence of a significant lack of transparency where more would have been appropriate. It has given reasons for its decisions. The Tatton Park 2 report provides a brief overview of its legal position. Those opposed to the council's decisions are able to take their own legal advice should they so wish.
62. The council has the right (and arguably a duty) to seek legal advice as to whether its plans are legally robust and to act on the advice it receives. Although other parties may disagree with the council's position. If they believe that the council's actions are unlawful they can mount a challenge.
63. The Commissioner is therefore satisfied that in this case the public interest in avoiding an adverse effect on the course of justice, which is inherent in the established convention of legal professional privilege, is not countered by at least equally strong arguments in favour of disclosure of the withheld information. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure.

Regulation 12(5)(e)

64. Regulation 12(5)(e) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
65. The withheld information relates to a commercial agreement which the council is considering with the developer. It includes, to an extent, the core projected financial details of the project for councillors' consideration. It includes commercially sensitive details of the developer's current site in Norfolk and an overview of the cost estimates provided by the developer for proceeding with the project.
66. The Commissioner has determined that the withheld information should be considered as a single entity. He considers that it would be inappropriate and impracticable to consider the information on a line-by-line basis. The withheld information contains both statistical and descriptive material, some of which will already be in the public domain, but which together describe in detail the business model of the

developer on its existing site as well as its intentions for developing the proposed site at Tatton Park.

67. The application of Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*. All four elements are required in order for the exception to be engaged:

- a) The information is commercial or industrial in nature.
- b) Confidentiality is provided by law.
- c) The confidentiality is protecting a legitimate economic interest.
- d) The confidentiality would be adversely affected by disclosure.

a) Is the information commercial or industrial in nature?

68. The Commissioner is satisfied that the reports concern a potential commercial relationship between the council and the developer relating to the development of the site at Tatton Park. They also contain commercial details on the developer's current site in Norfolk. As such the information is commercial in nature and the Commissioner considers that this criterion is satisfied.

b) Is confidentiality provided by law?

69. The Commissioner is satisfied that the information relates to negotiations between the parties which both sides would have considered to be confidential. The information which was provided to the council was provided as part of a business proposal to the council and as such contains details of finances, projected profits, forecasted visitor numbers etc. The documentation outlines that the information is confidential and will only be provided to a select number of interested parties.

70. It is important to note that the plans are not the plans of the council but the plans of the developer, provided to the council in order for it to consider the proposal to lease the land and to provide a loan to the developer.

71. One document was created on behalf of the council which goes into details of the business case and the financial information which the developer provided. It advises the council as to the suitability of the proposals.

72. The Commissioner has applied the test in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as regards the existence of a duty of confidence. The test is

- Does the information has the necessary quality of confidence,
 - Was the information imparted in circumstances importing an obligation of confidence,
 - Would be an unauthorised use of the information to the detriment of the confider,
 - Would there be any defence to the breach of confidence
73. Information can be said to have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. The Commissioner is satisfied that the disclosure of the information to a limited number of selected parties does not affect the confidential nature of the withheld information in this instance.
74. Although some details have already been disclosed via the Tatton Park 2 report, the Commissioner does not consider that this amounts to a disclosure of the confidential material withheld in these reports. Although some general information has been disclosed, the content of the reports, which provides much more detail and depth of analysis, is not otherwise available to the public. The information is certainly not trivial in nature.
75. The Commissioner therefore considers that the withheld information has the necessary quality of confidence.
76. The Commissioner has then considered whether the information was imparted in circumstances importing an obligation of confidence. He is satisfied that the intention of the developer was that the information was provided in confidence for the use of the council to consider its proposals. The Commissioner is satisfied that both parties understood the intended confidentiality of the information. This is also made very clear in the documents themselves. The necessary obligation of confidence therefore exists between the parties.
77. The Commissioner considers that if the council disclosed this information the developer could take action against it for breaching a duty of confidence. He is satisfied that there would be no public interest defence which the council could argue to defeat such an action.
78. The Commissioner therefore considers that the information meets the necessary criteria for a duty of confidence to exist in law.
- c) The confidentiality is protecting a legitimate economic interest.*
79. The Commissioner is satisfied that the confidentiality of the information is intended to protect the legitimate economic interests of the parties.

The information relates to a potential commercial relationship between the parties regarding the development of the site. The confidentiality of that information is intended to protect the financial and economic interests of the developer as it outlines its proposals to the council and other interested parties. It also outlines, in detail, the developer's business model, and financial information about its current park development in Norfolk, which runs as a private business on private land.

d) The confidentiality would be adversely affected by disclosure.

80. The Commissioner is satisfied that if the information were to be disclosed then the confidentiality of that information would be adversely affected by the disclosure. This is self-evident on the facts of this case.
81. The Commissioner is therefore satisfied that all four elements required for the purposes of Regulation 12(5)(e) have been demonstrated in this case and the exception is engaged.

The public interest test

82. The Commissioner has therefore gone on to carry out the public interest test as required by Regulation 12(1). The test applicable is the same as in respect of Regulation 12(5)(b) above. When carrying out that test he has taken proper account of the presumption of disclosure required under Regulation 12(2).

The public interest in the information being disclosed

83. The public interest arguments in favour of the disclosure of this information are largely the same as those relating to the application of Regulation 12(5)(b). Therefore the Commissioner has taken these into account in his consideration of the public interest in maintaining Regulation 12(5)(e).
84. There are however subtle differences in this instance. The business proposals include detailed forecasts of the profits and visitor numbers.
85. There is a strong public interest in this information being disclosed. The number of visitors forecasted clearly impacts upon those currently living near the park and on local road users. It would give an indication of the potential traffic increases resulting from the development. The number of visitors will also affect the impact on the park environment itself. Clearly the more people who visit the site, the greater the impact upon that site.
86. The forecasted financial figures provide information which will demonstrate to the public when and how the council is likely to recoup

the public money it loans to the developer. It also outlines the safeguards which the council has considered should the new attraction not be as successful as planned. This is clearly important as it gives an indication of the basis for the council's financial decision making and the suitability of the arrangements for the long term. The intended loan is substantial and will obviously require funding from the council's current resources. This will impact upon the resources which the council has for other services or other projects at a time when funding is an issue for all local authorities.

87. Again, some of this information has already been given in the report to councillors, which was disclosed as a result of the complainant's previous request. However that report does not provide the depth of information which is in the main reports requested here.
88. The disclosure of the previous report reduces, to an extent, the public interest in disclosure of the withheld information in this case. It provides an overview of the council's actions together with an assessment of the potential associated risks. It explains very clearly the details of the arrangement it is entering in to with the developer and summarises the reasons why the council has given its initial agreement to lease the land and loan money to the developer. The public are therefore already aware of some of the details.

The public interest in the exception being maintained

89. There are two separate aspects of this case which engage public interest considerations:
 - a) the development in Tatton Park itself, and
 - b) the details of the arrangements between the council and the developer to agree to a loan and to lease a section of land from the council.
90. It is important to note that the arrangements between the council and the developer comprise a lease and a loan. There is no written agreement to develop the land, although clearly the understanding is that this is what the developer will do.
91. Clearly if the developer decides to develop the visitor attraction issues such as planning permission may still need to be addressed. The visitor attraction is the proposal of the developer, and some of the associated risks, relating to the impact on the environment and the effect on the surrounding areas will be dealt with via the normal planning process. The withheld information does not relate to this. The council has no

direct say in these plans, other than as the current leaseholder of the land (from the National Trust) and as the local planning authority.

92. As planning authority the council is required to act independently from any financial interest the land. This is subject to oversight from the Planning Inspectorate. The withheld information concerns the viability of the project rather than the actual implications for the environment. It does not include specific planning details and does not, for instance, include an environmental impact assessment for Tatton Park.
93. The central public interest argument for maintaining the exception in his case relates to the harm to the developer which would arise from the disclosure of its current business model for the site at Norfolk, and the proposed business model for the Tatton Park site. The proposals provide clear and specific details of the business model in place in Norfolk as a means of illustrating how the site would work and be likely to develop in principle at Tatton Park.
94. The council has highlighted how the information would provide a good overview of the developer's business model. If disclosed, this could be copied by other developers who are in direct competition with it. Both the Tatton Park site and its site in Norfolk could be affected. Whilst the current proposals are limited to the two parties and there is no suggestion that any direct competitors would seek to compete with the developer at Tatton there may be other areas close to this where a similar development could be sited. This competition would have a direct affect upon visitor numbers and therefore the forecasted profits at Tatton Park.
95. The council is a local authority which is subject to FOI, and to some extent the developer should have an expectation that information it provides to the council might be required to be disclosed. However where information outlines in detail the business model of a current, existing and profitable private business (on private land), an expectation that this sort of information would be protected from disclosure would be reasonable, given its commercial sensitivity.
96. The Council also argued that there is an economic interest in the success of the scheme. Duplication of the business model would result in reduced footfall to the development, which would have an adverse impact on the financial receipts generated by the scheme, and, in turn, on the prosperity of the local area. It said that if the relationship with the developer broke down at a crucial point in the process the project might fail in its entirety. The Council says that it would then need to review its policy in respect of Tatton Park generally. It considered that this amounted to a very considerable weight in the public interest in favour of maintaining the exception.

97. The Commissioner understands the council's argument here to be that the general public has a vested interest in the scheme being successful as it will bring greater prosperity to the area. The alternative is that Tatton remains as it is and the public miss out on the development, the economic benefits it will bring in to the park and more tourism for the surrounding areas and businesses. If the park is successful in attracting visitors then the economic prosperity that would bring would extend beyond the park itself to the businesses within the local area.
98. The developer has been open, detailed and transparent about its intentions, about the success of its Norfolk business and about the forecasts for the development at Tatton. This has allowed the council to fully consider and analyse the potential for the development and the risks involved. The provision of such detailed information has therefore facilitated the developer being able to reach agreement with the council over the project.
99. In addition to the commercial damage which would be likely to occur to the interests of the developer, the council would therefore be in a position where its ability to receive such information in confidence in the future might be compromised. Third parties would be cautious of providing details such as the business model of current successful business ventures as this would put the competitiveness of these at risk if they were disclosed. Without this information the council's decision making and its ability to give proper consideration to business propositions would be detrimentally affected. That would not be in the public interest.
100. There is also a public interest in developers being able to provide such detailed information when outlining their proposals without fear of prejudice to their existing businesses as a result of that information being disclosed.

Balance of the public interest

101. The Commissioner has considered the above arguments together.
102. The likelihood of the development being successful is an important factor in assessing its likely impact upon the environment overall. There is a public interest in providing an insight into the developer's current business success at its other attraction in Norfolk as this illustrates how its approach may affect the site at Tatton Park. This will provide clearer indication of the impact upon the environment - for instance details of the likely growth of visitor numbers to the attraction over the year will give a clearer view of the likely impact. There is also a clear public interest in the disclosure of information which would indicate whether the council has entered into a sound financial arrangement.

103. However the central public interest in withholding the information is that it provides confidence to developers that they can provide full details of their proposals, outlined and illustrated by detailed examples from their current businesses to illustrate their case. If the information were to be disclosed developers would be less likely to provide such detailed analysis of their current businesses in the future. This may diminish the prospect of successfully negotiated deals. In this case the provision of the information to the council ensured that the council was more fully informed when it made its decision to provide the loan and the lease, having access to commercially sensitive information about an existing successful business run along very similar lines to that proposed at Tatton Park. This allowed it to fully consider any risk involved and to balance this against the prospective benefits of the proposals in terms of the future prosperity and economic interests of the area. This factor carries significant weight in balancing the competing public interests in this case.
104. The Commissioner's decision is therefore, on balance, that the council was correct to apply Regulation 12(5)(e) to the information and that the public interest rests in maintaining the exception in this instance.

Other Matters

105. The complainant also asked the Commissioner to consider the following issues relating to her request:

"I have a question re. Question 2- Kym Riley's comment on the family trust and loan. CEC has implies that [name redacted] cannot borrow money on the open market because of rules of the family trust. The Family Trust appears not to own Bure Valley but merely loaned the monies to [name redacted] to build the Norfolk attraction. If you look at Companies House, you will see that [name redacted] and not the Trust is the company owner.

The Tatton Report 2, that the ICO required CEC to release last year, implies that the reason CEC were ready to loan the money to Bure Valley was that that they could circumvent EU Procurement Laws.

As a resident, I believe that the council is being disingenuous and feel that it is in the public interest to know the true reason why CEC are prepared to loan to such a huge amount of money, especially in these economically difficult times, to someone who has limited experience in this field. Is it because he cannot borrow money on the open market or is it to get round EU Procurement Law?"

106. The Commissioner has no powers to investigate such matters. The Commissioner can only consider whether the council has complied with the requirements of the Regulations when responding to a request for environmental information. The requests and questions which the complainant submitted to the council are as laid out above. This decision notice concludes the Commissioner's determination of the matters raised with him by the complainant.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF