

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

Decision notice

Date: 1 April 2015

Public Authority: London of Hackney
Address: Hackney Town Hall
Mare Street
London
E8 1EA

Decision (including any steps ordered)

1. The complainant has requested the council to disclose copies of all Financial Viability Assessments it received in connection with planning applications 2013/1583 and 2013/3186 and copies of any reports commissioned by the council to assess these statements.
2. The council disclosed some information but refused to disclose certain elements of the Financial Viability Assessments it does hold under regulation 12(5)(e) of the EIR.
3. The Commissioner has reviewed all remaining withheld information and he is satisfied that regulation 12(5)(e) of the EIR applies. In terms of how the request was handled, the Commissioner has found the council in breach of regulation 11 of the EIR in this case.
4. The Commissioner does not require any further action to be taken.

Request and response

5. On 4 October 2013, the complainant wrote to the council and requested information in the following terms:
6. "Ref 2013/1386 & 1387 Land at Wilmer place (and 2013.1583 & 1584);
Legal ref LHR021867

Please provide

7. 1) a copy of the Financial Viability statement submitted by the applicant in this matter (we understand it is identical in all four applications; if not then all of them), and of

2) any reports commissioned by the Local Planning Authority to assess the above statements"

(Planning reference 2013/1386 and 1387 were inputted incorrectly by the complainant when making this request. The planning reference should read – 2013/3186 and 3187)

8. On 24 October 2013, the complainant emailed the council to chase the matter up, as he had not to date received a formal response.

9. The council responded on 30 October 2013. It released a redacted version of a Financial Viability Assessment dated May 2013. It however refused to disclose the redacted information under sections 41 and 43 of the FOIA.

10. The complainant contacted the council the same day to question why his request had not been considered under the EIR, to query what recorded information is held and why information had been redacted from the document he had just received.

11. The complainant received no response so sent further emails to the council on 6 November 2013 and 13 February 2014 to chase the matter up.

12. As he received no further contact, the complainant wrote to the council again on 19 February 2014. He stated that he had received no further contact from the council and trusted that an internal review was underway.

13. The council acknowledged receipt of this letter on 25 February 2014 and confirmed that an internal review would be undertaken.

14. As the complainant heard nothing further, he chased the matter again on 16 April 2014 and confirmed that he would be contacting the Commissioner to raise a formal complaint with him.

15. The complainant contacted the Commissioner the same day to complain about the council's handling of his request.

16. The Commissioner wrote to the council on 29 April 2014 and requested that an internal review is completed in 20 working days.

17. The council carried out an internal review on 22 May 2014. Although it upheld the application of sections 41 and 43 of the FOIA to the withheld information, it accepted that the requested information fell within the definition of environmental information. It advised the complainant that under the EIR to wished to rely on regulation 12(5)(e).
18. The complainant raised a further complaint with the Commissioner on 16 August 2014.

Scope of the case

19. The complainant contacted the Commissioner on 16 August 2014 to complain about the way his request for information had been handled. The complainant stated that he was unhappy with the delays he had suffered and the council's decision to withhold information under regulation 12(5)(e) of the EIR.
20. During the Commissioner's investigation the complainant questioned whether further recorded information to that identified (one Financial Viability Assessment dated May 2013) was held by the council. It also came to light that some information relevant to the terms of his request was held but post-dated the information request that was made (a report commissioned by the council to review the Financial Viability Assessment dated 28 November 2013). The complainant argued that this information should be included within the scope of this case so as to avoid further unnecessary bureaucracy and delay.
21. Dealing with what recorded information is held by the council which falls within the scope of this request, by way of an Information Notice that was served on the council on 17 December 2014, it was established that the council holds two versions of the Financial Viability Assessment dated May 2013. The first Financial Viability Assessment was received by the council on 9 May 2013 in connection with planning application 2013/1583, which was granted on 8 August 2013.
22. The second Financial Viability Assessment was received by the council on 26 September 2013 although the first page of this assessment still quoted the original date of 'May 2013'. The council explained that the second assessment was essentially the same as the first; it was only the financial figures within the report and the appendices attached that differed and had been updated to support a second planning application 2013/3186. At the time of the request, this application was still under consideration.

23. With the exception of the following sections, the financial figures throughout both reports and the appendices attached to each have been withheld under regulations 12(5)(e) and 12(5)(b) of the EIR:
 - 1) Financial figures contained in paragraph 3.14 of both reports.
 - 2) The financial figure contained in paragraph 3.31 of the report submitted in May 2013 (the updated figure in the September 2013 version is still being withheld).
 - 3) Appendix A of both reports.
24. Items one to three above were disclosed towards the end of the Commissioner's investigation. The remainder of this notice will address the remaining elements of these reports and the application of regulation 12(5)(e) of the EIR in the first instance. The Commissioner will only go on to address the council's late application of regulation 12(5)(b) of the EIR if he finds that some or all of the outstanding information is not exempt from disclosure by virtue of regulation 12(5)(e) of the EIR.
25. Turning now to the question of whether the report dated 28 November 2013 commissioned by the council to review the Financial Viability Assessments can be included within the scope of this investigation, it is the Commissioner's decision that this information is outside the scope of the request that was made and therefore his investigation under this case reference.
26. The Commissioner can only consider the recorded information held by the council at the time the request was made; 4 October 2013. The report in question post-dates this request and was therefore not held at the time of the request. Although the Commissioner may understand the complainant's viewpoint and would not wish to subject the complainant to any unnecessary time and expense, he does not have any remit to consider recorded information that was not held at the time of the request. The complainant has been advised that he would need to make a further request to the council for this information and go through the same procedure outlined above before the Commissioner can give any consideration to the potential disclosure of information contained within the report in question.
27. Although the council did initially deal with this request under the FOIA and seemed to still uphold this approach at the time of the internal review it completed in May 2014, it is the Commissioner's view that the request is a request for environmental information and therefore it should have been considered under the EIR from the outset.

28. The request is for an economic analysis or cost benefit assumption of a measure (planning application) which is likely to affect the elements of the environment. The requested information therefore falls within the definition of environmental information at regulations 2(1)(c) and (e) of the EIR and can be argued to be likely to have an effect of the elements of the environment outlined in regulation 2(1)(a) of the EIR.

Background

29. The Commissioner understands that the complainant's request relates to two planning applications submitted to the council for the redevelopment of a site within the district centre of Stoke Newington. The applications involve the demolition of buildings on the site and the site's redevelopment to include a food store on the ground floor of the intended development and a number of units above. The first planning application of relevance to this request is planning application 2013/1583 which was received by the council on 9 May 2013 together with a Financial Viability Assessment addressing the 106 agreement implications. Planning permission was granted on 8 August 2013.
30. A further planning application was then received by the council on 26 September 2013 - planning application 2013/3186. A further Financial Viability Assessment was submitted as well with updated financial figures.
31. The second planning application was still under consideration at the time of the request and no decision had been made at this time as to whether to grant permission or not.

Reasons for decision

Regulation 12(5)(e)

32. Regulation 12(5)(e) of the EIR 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.
33. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
 - the information is commercial or industrial in nature;

- the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
34. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
35. The Commissioner will consider the remaining elements of the two Financial Viability Assessments together. As the development overall was still not underway by the time of the request and it is clear that the council had not reached a decision on the second planning application by this time, the Commissioner considers the financial information contained in both Financial Viability Assessments (considering the limited amount of time between each as well) should be treated in the same manner when considering the adverse effects of disclosure advanced by the council and GL Hearn Ltd, on behalf of the developer, in support of this exception.
36. The Financial Viability Assessments were prepared by an independent assessor GL Hearn Ltd on behalf of the developer, Newmark Properties Ltd (the developer). The May 2013 report was submitted to the council in support of planning application; 2013/1583 and the September 2013 report was submitted to the council in support of a revised planning application; 2013/3186. Both reports detail the developer's proposals for meeting the council's 106 agreement provision and the financial implications and analysis of these proposals for it, the council and the proposed development overall.
37. Dealing with the first bullet point first, it is clear that the Financial Viability Assessments are commercial in nature. They relate to the commercial activities of the council and the developer in relation to the planned development of a site in Stoke Newington. The council confirmed that it was still in commercial negotiations with the developer at the time of the request in relation to this proposal and had only just received a further planning application and the updated Financial Viability Assessment.
38. For the above reasons, the Commissioner is satisfied that the requested information is commercial in nature. As a result, he will now go on to consider the second bullet point of paragraph 33 above.

39. The Commissioner considers "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
40. The council stated that it owes the developer a common law duty of confidence due to the nature of the information itself, its sensitivity and commercial nature. It argued that these reports were provided to the council in conjunction with the planning application process to highlight the developer's financial assessment and viability of the proposals put forward. At the time of the request the council and the developer were still in the process of negotiation and finding a proposal that is both financially viable for the developer itself and in accordance with the 106 obligations the council is required to meet. The council stated that the information is not of a trivial nature and is in fact commercially sensitive. The information is not more widely known or in the public domain and so has the necessary quality of confidence on which a duty of confidence is owed to the developer.
41. The Commissioner has reviewed the requested information and he is satisfied that due to its contents and the circumstances at the time of the request that the council owes the developer a duty of confidence. He accepts the information is the developer's assessment of the viability of the proposed development and is not otherwise publicly available. The information relates to ongoing commercial negotiations between the developer and the council and so is not trivial in nature. The Commissioner therefore accepts that the requested information has the necessary quality of confidence.
42. Turning now to the third bullet point, the council argued that given the contents of the withheld information disclosure would adversely affect the commercial negotiations that were ongoing at the time of the request between the council and the developer. The council stated that disclosure would result in the developer being reluctant to deal with the council any further due to the fear that sensitive commercial information could be potentially released to the public at a particularly crucial stage in negotiations. The council stated that if the developer felt it could no longer rely on the council to keep commercial information confidential it would be reluctant to continue working with the council in relation to this development and others in the future.
43. More specifically, in relation to each redaction within the reports, the Commissioner received the following arguments from the developer's professional adviser; GL Hearn. For ease, the Commissioner will address the redactions made to each report collectively by reference to each paragraph. As stated previously, with the exception of part 2) of paragraph 23 above, the exact same type of information has been redacted from both reports. Part 2) of paragraph 23 above will be

addressed in order but only the financial figure redacted from the September 2013 Financial Viability Assessment will be discussed.

Paragraph 3.7

44. GL Hearn argued that the redacted figure from this paragraph of the reports details the average rate per square foot for the proposed private residential space. It argued that disclosure of the agreed private sales value for the development would adversely affect the developer's ability to negotiate with buyers, especially in respect of off-plan sales which could occur at any point after the grant of planning permission. It explained that even for late sales releases, buyers could try and extrapolate the sales values from the Financial Viability Assessment using publicly available indices. However, these indices do not reflect changes to specific local markets, scheme changes post-planning or changes to scheme design or specification.
45. For example, GL Hearn stated that following the grant of planning permission, the developer may decide to increase the specification of the residential units which would also increase their construction costs. The market would be expected to pay more for an enhanced specification. However, buyers with access to the original opinion of value could simply try and pay either that price or an indexed-linked price which would not reflect the property's true value. This would prejudice the developer's ability to secure the best price and cover their enhanced construction costs.
46. In addition, it advised that more importantly it considered revealing the developer's opinion of the private sales value would adversely impact on its ability to negotiate with a third party seeking to acquire the whole development site or the completed development.
47. For example, it explained further that development sites such as this would normally be offered to the market and bidders would undertake their own due diligence as to achievable values and costs and so on. A range of bids would normally be expected and the bidder who takes the most "bullish" view on sales values will often be able to pay the most for the land. Having the developer's opinion of the value in the public domain would inevitably reduce the spread of bids and therefore the developer would be unlikely to achieve the same sale price compared to a situation where bidders had to arrive at their own opinions on value and bid 'blind'.
48. The Commissioner notes the circumstances at the time of request. He is aware that the second planning application had not been granted permission and the September 2013 Financial Viability Assessment was still subject to potential change and negotiation. He also notes that the

project had not moved onto to any actual development and was still therefore at proposal stage. GL Hearn argued that proposals of this nature can be sold off to third parties wishing to acquire the whole development site once permission is granted or the whole development once it is completed. The Commissioner accepts that disclosure of this information at the time of the request would adversely affect the developer's ability to negotiate free, fairly and competitively with such third parties. He agrees that revealing the developer's opinion of the private sales value would release to respect clients the specific financial information on which the developer considered the development viable and profitable. Disclosure would provide valuable information to such clients which would not otherwise be available and possibly lead to such clients structuring any bid they wish to make to what they consider the developer will accept. Such effects would adversely affect the developer's ability to negotiate competitively and ultimately receive the best possible deal.

49. The Commissioner does not consider the arguments carry as much weight for the potential private sales to private individuals. He considers private individuals wishing to purchase one of the private residential units would be governed by market influences and market prices at that time rather than potentially out of date financial information relating to the developer's initial assessment of financial viability. The Commissioner considers that if specifications were to change and higher specifications were ultimately fitted, this would be reflected in the market price for the unit in the housing market at that time and private individuals would be more inclined to act on this information rather than the information in question here.
50. Nonetheless, the Commissioner accepts that there was still every prospect of commercial negotiations being entered into between the developer and third parties once planning permission had been granted. He accepts that disclosure of this information would adversely affect such potential future negotiations and prejudice the commercial interests of the developer and this is sufficient basis on which to accept the application of this exception to this information.

Paragraph 3.9

51. The first redaction in this particular paragraph of the reports is the Gross Development Value of the private sales units. G L Hearn stated that this figure is a multiple of the rate per square foot and for the reasons explained above it considers disclosure would adversely affect the legitimate economic interests of the developer.
52. The Commissioner understands that if this information was disclosed it would be possible for one of the developer's competitors or prospective

clients to reverse-engineer, from other information available in the public domain, the agreed average rate per square foot for the proposed private residential space. For the same reasons explained above in respect of the redaction made to paragraph 3.7 of the reports, the Commissioner is satisfied that disclosure would adversely affect the legitimate economic interests of the developer concerned. He is therefore satisfied that regulation 12(5)(e) of the EIR applies to this information.

53. The further two redactions made to this paragraph relate to the developer's assessment of grounds rents for the development and the appropriate capitalisation yield for assessing the developer's capital value. GL Hearn argued that it is common practice for developers to sell on the freehold reversion in their developments. It explained that disclosure of the value the developer has put on its freehold reversion would limit the developer's ability to negotiate with prospective freehold purchasers.
54. Again for the same reasons as explained above, the Commissioner is satisfied that disclosure of this information at the time of the request would adversely affect the commercial interests of the developer and so regulation 12(5)(e) of the EIR applies. There was every prospect of such negotiations being entered into in the near future at the time of the request and therefore the Commissioner is satisfied that disclosure of this information would adversely affect the commercial interests of the developer.

Paragraphs 3.19 and 3.20

55. GL Hearn confirmed that the redacted figures in these sections are the developer's commercial view of the value of the completed affordable housing units based on their financial modelling and the specific details of a financial offer it had received from one Registered Provider for all the affordable housing units. At the time these Financial Viability Assessments were drafted and, at the time of the request, no deal had been reached with the Registered Provider concerned. It was simply an offer put to the developer for consideration and no contract had been entered into between the two parties.
56. GL Hearn advised that the offer put forward by the Registered Provider was put forward a confidential basis to encourage commercial negotiations to commence on the potential wholesale purchase of all affordable housing units.
57. Disclosure at the time of the request would have resulted in the Registered Provider seeking to withdraw its offer and potentially taking legal action against the developer for its unlawful disclosure of

information it considers to be commercially sensitive. Disclosure of the offer and the developer's own valuation of the completed affordable housing units at the time of the request would adversely affect any commercial negotiations with the Registered Provider and potentially any other providers the developer may wish to consider. If the Registered Provider concerned and other potential providers knew the developer's valuation of this element of the development it would enable them to tailor their offers to reflect the valuation placed on it. This may prevent the developer obtaining the best price and stifle competition.

58. The Commissioner has given this information detailed consideration. He is satisfied that disclosure would adversely affect the commercial interests of the developer and therefore that regulation 12(5)(e) of the EIR applies.
59. It is clear that at the time of the request the developer had received an offer for the affordable housing units from one Registered Provider. No decision had been made or contract entered into. The disclosure of this offer at the time of the request would adversely affect the interests of the Registered Provider and the commercial interests of the developer concerned.
60. Disclosure may result in other providers outbidding the Registered Provider concerned thereby damaging the ability of provider in negotiation with the developer to secure the affordable housing it requires. The developer may also wish to seek other offers from other providers. If other providers had prior knowledge of the developer's valuation of its affordable units this would adversely affect fair and frank negotiations and the ability of the developer to obtain a more competitive deal.

Paragraph 3.23

61. GL Hearn advised that the figures redacted from this paragraph of both reports relate to the completed value of the proposed supermarket investment. Similar to the residential values already discussed above, GL Hearn confirmed that disclosure would reveal the developer's opinion of the value of the proposed supermarket investment and this would unfairly prejudice their ability to negotiate with a buyer. The developer is a property investment company which not only develops property but also trades property.
62. GL Hearn explained that the value of the supermarket is based on a rent and yield calculation. Revealing the developer's opinion of the appropriate yield to apply to the rental income would signal to the market that that was the price the developer would accept for the asset. If that information was not in the public domain, some bidders may

make a different assessment of the appropriate yield and be prepared to pay more for the asset. GL Hearn stated that the developer would then face a tangible loss of value because those higher bids would be less likely.

63. Again, the Commissioner has given this information detailed consideration. It is apparent that at the time of the request no negotiations had taken place between the developer and prospective buyers. Revealing the developer's value of the asset prior to such negotiations and any firm deal being reached would prejudice the developer's ability to secure the best deal and the best price for this asset. As GL Hearn has stated, the developer is a property investment company; developing and trading in property for profit. Disclosure of the developer's opinion of the value of the supermarket and the rent and yield calculation used would enable bidders to structure their negotiations towards the value the developer has placed on the asset rather than entering into negotiation without the benefit of this information and putting forward an honest bid. Disclosure would reduce the chance of the developer receiving higher bids and this would damage the developer's legitimate economic interests.
64. As such the Commissioner is satisfied that regulation 12(5)(e) of the EIR applies to this information.

Paragraph 3.24

65. The figure redacted from this paragraph is the aggregate of the private residential, affordable housing and food stores. GL Hearn confirmed that disclosure of this information would adversely affect the developer's ability to negotiate with a buyer of either the development site or the completed scheme when this time arises for reasons it has previously explained above. Disclosure would signal to prospective investors the aggregate price the developer has placed on the residential and affordable housing and the supermarket development. Prior knowledge of this figure would hinder fair negotiations taking place and prejudice the developer's ability to achieve a fair price. It would reduce the possibility of the developer receiving higher bids and therefore result in a tangible loss of value for the developer.
66. Again for similar reasons explained above, the Commissioner is satisfied that regulation 12(5)(e) of the EIR applies to this information. Considering the circumstances at the time of the request and the fact that no negotiations had taken place between the developer and its prospective clients, the Commissioner is satisfied that disclosure of this commercial figure in both reports would adversely affect the developer's ability to compete fairly in the market place and secure the best possible deal it can for this development.

Paragraph 3.26

67. The redacted figure from this paragraph is the assessment of the total build cost for the development provided to the developer from another external adviser. GL Hearn stated that disclosure of this figure would severely impact on the developer's ability to enter into a competitive building contract with a contractor. Disclosure prior to any such negotiations would reveal to a contractor interested in the development the figure the developer had used in their appraisals for the assessment of the total building costs. This would adversely affect the developer's ability to secure the best possible deal available and ultimately value for money. GL Hearn confirmed that this figure can easily be artificially inflated by a prospective contractor to reflect the passage of time to produce a more current valuation.
68. The Commissioner has reviewed this information. He is satisfied that due to the circumstances at the time of the request and the fact that no negotiations had taken place with any prospective contractors that disclosure would adversely affect the developer's commercial interests.
69. Disclosure of the developer's assumed costs of construction prior to any deal being reached with a building contractor would reveal to a contractor interested in the development the developer's commercial position upfront. This would hinder the developer's ability to negotiate fairly and achieve the best deal it can. It would also result in prospective contractors tailoring their own estimates to those of the developer and reducing the possibility of a contractor putting forward a more favourable bid. Such consequences would adversely affect the commercial interests of the developer.
70. Again, for the above reasons, the Commissioner is satisfied that this information is exempt from disclosure under regulation 12(5)(e) of the EIR.

Paragraph 3.31 (September 2013 Financial Viability Assessment only)

71. GL Hearn confirmed that this figure represents the allowance for the section 106 contributions which was used within the development appraisals based on the developer's planning consultant's advice.
72. It explained that it did not necessarily have any issue with the May 2013 figure contained in the first Financial Viability Assessment (hence the disclosure of this information during the Commissioner's investigation) but it remained of the opinion that the figure contained in the September 2013 remained exempt from disclosure. GL Hearn stated that this was because the associated section 106 agreement provides for reassessment of viability after an agreed period.

73. The Commissioner does not necessarily agree with this argument. He is aware that section 106 agreements do provide for later reassessment and potential change after an agreed period. But he does not consider that this is a valid reason for refusing to disclose this information.
74. However, he does note that at the time of the request the second planning application was still under consideration and the council argued that it was still in negotiation with the developer over the Financial Viability Assessment and the section 106 arrangements. Given that the developer and the council were in the midst of negotiations at this time and no firm 106 agreement had been reached, the Commissioner is satisfied that disclosure of this information at the time of the request would have adversely affected the legitimate economic interests of the council and the developer concerned. He has therefore concluded that regulation 12(5)(e) applies.

Paragraphs 3.37, 3.39, 3.42 and 3.48

75. The figures redacted from these paragraphs of both reports are the residual land value (the amount the developer considers another developer could afford to pay for the land), the existing use value of the existing accommodation on the site and the existing use value of the existing accommodation on site with some of the existing space being valued as residential use.
76. For similar reasons to those already discussed above, GL Hearn has argued that disclosure would adversely affect the developer's ability to negotiate with a buyer of the development site or a buyer of the existing asset. It argued that disclosure would adversely affect the developer's ability to negotiate with occupiers on the site or prospective occupiers with regards to rent reviews or new tenancies and so on. GL Hearn also said that disclosure would adversely affect the developer's ability to negotiate with third parties in respect of the existing residential accommodation on site.
77. For reasons he has already explained above, the Commissioner is of the view that this information is exempt from disclosure under regulation 12(5)(e) of the EIR. It is clear that at the time of the request the proposed development was still going through the final stages of the planning process. A further application had been submitted and a fresh section 106 agreement and these were still under consideration at the time the request was made. No commercial negotiations had commenced between the developer and third parties for any elements of the proposed developer – whether the proposed supermarket, affordable housing or private accommodation or overall construction. The Commissioner has accepted above and, accepts here, that the

commercial figures redacted from the two agreements would adversely affect the commercial interests of the developer concerned.

78. The Commissioner accepts that disclosure of this information would reveal valuable commercial information about the developer's plans and cost analysis to its prospective clients and investors. Prospective buyers would have valuable information upfront before entering into negotiations with the developer. This would hinder the developer's ability to compete fairly within the market place and secure the best possible terms and price it can.

Appendices

79. Appendix B and C are a detailed breakdown of the estimated building costs for the project. For the same reasons explained in paragraph 67 to 70 above, the Commissioner is satisfied that regulation 12(5)(e) of the EIR applies. He accepts that the estimated total figure would adversely affect the commercial interests of the developer if it was disclosed. It therefore follows that a detailed breakdown of how this figure was arrived at would be even more valuable to contractors wishing to engage with the developer over the construction of the development.
80. Appendix D is the development appraisal which details all the revenue, cost and profit assumptions which are mentioned throughout the body of each Financial Viability Assessment. The financial figures mentioned throughout the body of each Financial Viability Assessment are addressed above and for the same reasons discussed for each redaction, the Commissioner accepts that regulation 12(5)(e) of the EIR applies.
81. Appendix E is a more detailed summary of the existing use value of the existing accommodation on site, prepared for the developer by an external adviser. Again, the Commissioner has addressed existing use values above in paragraphs 75 to 78 and for the same reasons applied there, he is satisfied that regulation 12(5)(e) of the EIR applies to this appendix.
82. As the Commissioner is satisfied that regulation 12(5)(e) of the EIR applies to all remaining withheld information in both Financial Viability Assessments, he will now go on to consider the public interest test.

Public interest test

83. The council addressed the public interest test in its internal review response of 22 May 2014 to the complainant and in its various submissions to the Commissioner during his investigation.
84. The council stated that it understood that disclosure would further the understanding of, and the public debate relating to planning permission.

It accepted that disclosure would facilitate the accountability and transparency of the council itself in relation to the decision to approve the first planning application of relevance to this request and assist the public in understanding more clearly how the 106 agreement has been agreed with the developer.

85. However, the council stated that it was of the view that there were stronger public interest arguments in favour of maintaining the exception in this case. It stated that organisations would be reluctant to supply the council with commercially sensitive information in future which would undermine the ability of the public authority to fulfil its role and that would not be in the public interest. The council also confirmed that disclosing the information in the middle of its negotiations with the developer would weaken the council's own bargaining position.
86. The Commissioner has given the public interest test detailed consideration.
87. The Commissioner is of the view that there is a public interest in overall transparency and accountability, particularly in the area of planning and the granting of permission. He accepts the public should have access to information that enables them to understand more clearly why planning permission has been granted or rejected in a particular case as such decisions have a great impact upon the community and environment in which they live.
88. The Commissioner also considers that there is a public interest in 106 agreements and how these agreements have been reached between the planning authority and the applicant. 106 agreements can contain various clauses but often they address affordable housing requirements and to what extent the developer can offer affordable housing to the council whilst maintaining the financial viability of the development in commercial terms.
89. The Commissioner believes there is a public interest in making information available to the public to enable them to understand more clearly how affordable housing agreements are reached and the extent of that commitment in terms of meeting the public authority's objectives to secure more affordable homes for the community and the overall profit to be gained by the developer.
90. However, in this case, the Commissioner considers there is a stronger public interest in maintaining the exception due to the specific circumstances at the time of the request and the very fact that no commercial negotiations had been entered into between the developer and its own prospective clients. As the Commissioner has stated above, the outstanding information would be very useful to a building

contractor wishing to enter into an agreement with the developer over the construction of the development or very useful to, say, a third party which is interested in purchasing some or all of the development – whether it be the private or social housing element or the proposed supermarket.

91. The Commissioner has accepted that the disclosure of this information would adversely affect the developer's ability to compete fairly in the market place and secure the best deal and terms it possibly can. Disclosing truly commercial information is not in the public interest. It damages the commercial interests of third parties and would lead to negative consequences for the public authority. The public authority itself has invested a significant amount of time and money in the proposed development. If it was forced to disclose commercially sensitive information to the world at large, it is fair to say that future clients and third parties would be reluctant to share such information with the public authority in future and may be deterred from entering into commercial negotiations and arrangements with it at all.
92. While the Commissioner accepts that there is a public interest in knowing how 106 agreements are reached and in the public being able to scrutinise the agreement to see whether more favourable terms could have been achieved by the planning authority concerned. In this case, due to the circumstances at the time of the request and the adverse effects disclosure would cause to the developer concerned, he is of the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.
93. He therefore requires no further action to be taken. And, as the Commissioner is satisfied that the council correctly relied upon regulation 12(5)(e) of the EIR for all remaining information, there is no need for the Commissioner to go on to consider the council's late application of regulation 12(5)(b).

Procedural breaches

94. The Commissioner notes that the complainant requested the council to reconsider his request again the same day the council issued its refusal notice; 30 October 2013. The complainant then had to chase the matter up on 6 November 2013 and 13 February 2014 and complain to the Commissioner before the council responded. It was not until 25 February 2015 that the council acknowledged that the complainant was requesting an internal review and this exercise was not then completed until 22 May 2014.
95. The Commissioner considers the complainant's email of 30 October 2013 should have instigated the internal review process from this point

onwards and it therefore should have responded within 40 working days from this date; 27 December 2015.

96. As the council took a further five months to carry out an internal review, the Commissioner has found the council in breach of regulation 11 of the EIR in this case.

Other matters

97. The Commissioner considers the council's overall co-operation and quality of responses has been less than satisfactory throughout the Commissioner's investigation. This had led to the matter being prolonged unnecessarily and hindered the Commissioner from being in a position to make a decision. An information notice had to be served on the council for the Commissioner to acquire a copy of all the withheld information falling within the scope of the request and it was only after the complainant questioned the council's interpretation of what information it believed it held that further recorded information was identified.
98. The Commissioner believes the handling of this particular case should be reviewed by the council and recommends measures and improvements are made to its overall FOIA/EIR functions to ensure a similar situation does not arise in the future.

Right of appeal

99. 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

100. 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.

101. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF