

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

Decision notice

Date: 17 September 2015

Public Authority: Winchester City Council
Address: City Offices
Colebrook Street
Winchester
Hampshire
SO23 9LJ

Decision (including any steps ordered)

1. The complainant has requested a viability assessment for the proposed redevelopment of an area of Winchester's city centre known as the Silver Hill development. The Council disclosed some information but withheld other information provided by the contractor and a high level summary of that information produced by the Council for its elected members under regulation 12(5)(e) – confidentiality of information the disclosure of which would adversely affect economic interests.
2. The Commissioner's decision is that the exception does not apply to all the withheld information. The exception is engaged in respect of the remaining information. However regulation 12(5)(e) is subject to the public interest test and the Commissioner finds that although the public interest favours maintaining the exception for the majority of this information, other information should be disclosed in the public interest.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information not covered by the exception
 - Disclose the information which is covered by the exception, but for which the public interest favours disclosure.

This information will be identified in a confidential annexe supplied exclusively to the Council.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 December 2014, the complainant wrote to the Council and requested information in the following terms:

“The viability assessment for the Silver Hill development”

6. The Council responded on 26 January 2015. It provided the Affordable Housing Statement submitted by the developer in support of its planning application for the development together with a report which the Council had commissioned from a consultant. The report entitled ‘Silver Hill, Winchester, Viability Assessment’ examined the substance of the developer’s Affordable Housing Statement.
7. The Council also confirmed that it held other information on the financial viability of the development. The Council withheld this information under regulation 12(5)(e) – commercial confidentiality.
8. As the decision to withhold this information was taken by a senior officer, the Council decided to forgo the opportunity to internally review its handling of the request and advised the complainant that she was free to complain directly to the Commissioner.

Scope of the case

9. The complainant contacted the Commissioner on 25 February 2015 to complain about the way her request for information had been handled. She explained that she was seeking the financial information provided by the developer which had persuaded the Council that the development would be unviable if the contractor was obliged to meet certain obligations that had been placed upon it.
10. The Commissioner considers that the matter to be decided is whether the withheld information on the financial viability of the scheme is exempt from disclosure under regulation 12(5)(e) and if so whether that exception can be maintained in the public interest.

Background

11. The Silver Hill development is a scheme to redevelop a 2.17 hectare site within the historic city centre of Winchester. The Council is a major landowner of the site and in 2004 entered into a development agreement with a private sector contractor for the development of the site. As a consequence the Council has two distinct roles in the development. As landowner it is development partner in the scheme and as the planning authority it has a separate role in determining planning applications for the site. The withheld information is held by the Council in its capacity as landowner and development partner.
12. The development agreement provides that the contractor should submit development proposals for the site which, following the Council's approval as development partner, the contractor will pursue through the planning process. Providing the proposals satisfy certain conditions, the Council, as development partner, is required to grant a lease of the development site to the contractor. One of those conditions was that the development must show an acceptable, competitive profit on expected costs of 10%. The Commissioner has confirmed with the Council that this threshold of a 10% profit is in the public domain. The other significant condition contained in the development agreement is that 35% of the housing included in the scheme would be affordable housing.
13. A development proposal was submitted and agreed by the Council, both as landowner and as planning authority in 2009. The Council has referred to this proposal as the '2009 scheme'. The 2009 scheme provided for 100 new affordable homes. A number of factors, including the effects of the 2008 recession, caused the scheme to be delayed.
14. A new scheme was negotiated in 2014, the '2014 scheme'. This was largely based on the 2009 scheme but changes, including the omission of a bus station, freed up more land for retail space. The 2014 scheme was agreed by the Council as development partner in August 2014 and granted planning permission by the Council as the relevant planning authority in December 2014. A significant aspect of the 2014 scheme was that it no longer included any affordable housing. This was on the basis that the contractor had submitted a financial appraisal which satisfied the Council that the contractor could not make the agreed competitive profit while still providing the affordable housing.
15. At the time the complainant made her request the new 2014 scheme had only recently been granted planning permission by the Council. Following the outcome of a judicial review of the Council's decision not to put the new scheme out to competitive tender in accordance with the European Procurement Regulations, the 2014 scheme was abandoned

and it is understood that the contractor has now reverted to pursuing of the 2009 scheme. However the High Court did not deliver its decision in the judicial review case until February 2015. This means that at the time the request was made, and subsequently refused, the 2014 scheme was very much the live option being pursued by the Council and the contractor.

16. A simple internet search quickly reveals that the proposed Silver Hill development is controversial. There is a very active local campaign group which opposes the development on the basis of its architectural merits. The issue has attracted a great deal of local media attention as well being covered in the national press.

Reasons for decision

Regulation 12(5)(e) Confidentiality of Commercial or industrial information.

17. Regulation 12(5)(e) of EIR states that a public authority can refuse to provide environmental information if the disclosure would adversely affect –

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

18. The exception can be broken down into a four stage test as follows:

- The information must be commercial or industrial in nature,
- The information must be confidential,
- That confidentiality must be protecting a legitimate economic interest,
- Confidentiality must be adversely affected if the information was disclosed.

19. All four elements of the test must be met if the exception is to be engaged, however the Commissioner considers that once the first three elements are satisfied it is inevitable that the fourth test will also be satisfied.

20. The exception can apply not only to information provided in confidence to a public authority, but also to information jointly agreed by the public authority and a third party and to information generated internally by

the public authority itself, so long as such information is capable of being protected by the law of confidence.

21. The Commissioner has been provided with copies of the withheld information. It is not extensive, consisting of a limited number of spreadsheets supplied by the contractor together with a high level summary of that information which the Council produced, based on the contractor's spreadsheet, and which was provided to elected members when agreeing to the 2014 scheme as development partner in August of that year. The information provided to the Council by the contractor consists of a main spreadsheet detailing the estimated development value of individual elements of the scheme (for example the different blocks of retail units) and a breakdown of the estimated costs involved which when one is subtracted from the other produces a net development value for the scheme and hence the profit as a percentage of the costs incurred. This is the basis of the summary produced for elected members. In support of its main spreadsheet the contractor has also provided supplementary tables containing further information on (i) construction and other costs, (ii) the estimated rental values for the commercial property and (ii) the value of the residential property. The Commissioner has asked the Council whether this is the full extent of the additional information it holds and it has confirmed that it is. For completeness the Council explained that when examining the profitability of the scheme and the robustness of the contractor's affordable housing statement, its consultants had access to further information in a 'data room', by which the Commissioner understands the consultants had the opportunity to inspect more detailed information at the offices of the contractor.

Is the information of a commercial or industrial nature?

22. Having viewed the information held by the Council the Commissioner is satisfied that being information on the viability of a property development it is unquestionably information of a commercial nature. The first of the four tests is satisfied.

Is the information confidential?

23. The Council has stated that this information is not in the public domain and the Commissioner accepts this is the case.
24. The Council has informed the Commissioner that throughout its dealings over the scheme, the contractor made it clear that the financial information it provided to the Council was highly sensitive from a commercial point of view and should not be disclosed. The Council has also provided the Commissioner with a copy of a letter from the contractor which makes it clear that the information was provided on the

presumption that it would be treated as confidential and so is protected by a common law obligation of confidentiality. This is also reinforced by the way in which the information was treated by the Council with only a high level summary being made available to the elected members.

25. The information is clearly not trivial as it sets out amongst other details the estimated values of the commercial and residential properties to be built, together with estimated construction costs.
26. In light of the above the Commissioner is satisfied that the information was provided in circumstances that would give rise to a duty of confidentiality and that the information itself is confidential in nature. The second test established by the exception is satisfied.

Does the confidentiality protect legitimate economic interests?

27. The third test is that the confidentiality protects a legitimate economic interest. The contractor's interests are to make an acceptable, competitive profit on its investment in the development. This is clearly a legitimate economic interest. The Council also has an economic interest in the information as the 2014 scheme provided that the Council would take a share of any profit over and above a certain level. It is also noted that the Council would receive ground rents based on the rental values achieved for the retail units. The Commissioner is satisfied that the confidentiality of the information extends not just to the contractor's interests but also the Council's.
28. Having established that the interests the Council is seeking to protect are legitimate economic ones, the real issue under the third test is whether the duty of confidentiality which exists is required to protect those interests. In other words whether the disclosure of this information would prejudice the profitability of the scheme.
29. When considering this test it is important to have regard for the situation that existed at the time the request was made and responded to. The 2014 scheme was very much alive, planning permission had just been granted and the developer would have been seeking to progress the development. The fact that the 2014 scheme was later abandoned is not a relevant factor.
30. The Council now accepts that some of the information that it is withholding could be released. This includes the column headings across the top of the spreadsheets and the items of revenue and expenditure listed down the side of the various tables. As the Council is now content to disclose this information, the Commissioner will use these headings and descriptions of revenue and expenditure when explaining his findings in respect of the information which the Council still wishes to

withhold. The Council is also now prepared to disclose some of the information contained in the body of the spreadsheets and tables, including the source of some of the figures, for example the valuers who provided valuations for the residential properties. The Council also recognises that the details of the floor areas for the different units and the total number of residential units are shown on the plans submitted as part of the planning process. At the time of the request these would have been available to the public via the Council's website and the Council is now prepared to disclose these details too. However the Council maintains that the remainder of the financial information contained within the body of both the spreadsheets provided by the contractor and the high level summary prepared for elected members was commercially sensitive at the time of the request. It further argues that as the contractor is now pursuing the original 2009 scheme, on which the 2014 scheme was substantially based, the information is still commercially sensitive.

31. At the time of the request the contractor had not yet acquired all the parcels of land comprising the development site. Once the site had been secured the contractor would not have undertaken the construction of the development itself. Rather it would have contracted the work out to construction companies and the contractor had not yet negotiated these construction contracts. Leases still had to be negotiated with prospective tenants of the retail units and the residential properties would have to be disposed of. Therefore the Commissioner recognises that releasing information that could prejudice the negotiation of land purchases, construction contracts, commercial leases or the sale of residential property has the potential to affect the contractor's profit.
32. In presenting its arguments in support of its application of the exception the Council has consulted with the contractor.
33. The Commissioner will start by looking at the impact of disclosing more financial information on the revenue generated by the residential units and then the commercial units, which are mainly retail units. He will then consider the estimated costs of the development.

The financial information relating to the residential units

34. The 2014 scheme excluded any element of affordable housing. The residential properties were therefore to be disposed of at their full market value. Those values were provided by a national residential valuer and estate agent. The valuations would have been based on comparable properties within the area and adjusted according to the professional judgement of the valuer. It is likely that very similar valuations could be produced based on the details available from the Council's planning website by others with an understanding of the local

property market. Furthermore the marketing of residential property is a far more open process than it is for commercial properties and the details and asking price of the flats would be freely available at the time they were to be disposed of. Finally the valuations were produced in May 2014 and as it is understood that the construction period for the development would be around three to three and a half years, they would have been considerably out of date by the time the properties came on to the market. Whilst the Commissioner acknowledges that the July 2014 values could be inflated in line with projected house price increases, the time lag between producing the valuations and the sale of the homes further undermines the need to protect this information. For these reasons the Commissioner does not accept that information on the estimated value of the residential property is commercially sensitive. The exception is not engaged in respect of this information. The Commissioner will provide a confidential annexe to Council identifying the information to be disclosed.

Financial information on the commercial property

35. The next set of information to be considered is the information relating to the value of the commercial, mainly retail, property included in the development. This includes the estimated rental value of the properties, the ground rent to be levied by the Council, the net income and net development value for different blocks within the development. The Council's position is that disclosing this information would prejudice the contractor's negotiations for the letting of these units because potential tenants would use the figures as a maximum they were prepared to agree. The Commissioner accepts the logic of this argument. He has had regard for any time lag between the production of these estimated rental values and the opening of such negotiations. The Commissioner understands that it was proposed that units to be let and opened as they were completed. It is plausible that some negotiations for the first units to be completed would have commenced soon after the development was granted planning permission. It is also plausible that negotiations to secure prime tenants would have commenced upon the granting of planning permission. Therefore certainly some of the information on rental values would have been very sensitive at the time of the request.
36. However other units may only have been let nearer the completion of the development. The Commissioner has accessed a press report from a local newspaper's website, the Hampshire Chronicle, which shows the contractor anticipated that many of the shops would open within two and half years of construction work starting. This suggests to the Commissioner that there would be some potential for some of the information to be out of date by the time of the relevant negotiations. The speed with which such information would become out of date

depends on the volatility of market conditions and the public inquiries held in respect of the compulsory purchase orders required to assemble the development site for the 2009 scheme are of relevance here. These inquiries took place in 2012 and one newspaper reported that at that time the contractor was confident that the 2009 scheme, which did include affordable housing, would be profitable. This point was put to the Council which explained that it considers it entirely plausible that market conditions in 2012 were such that the contractor could have genuinely anticipated the 2009 scheme would have yielded the required 10% profit, but by 2014 conditions had changed rendering a scheme which included affordable housing unprofitable, or at least prevented it yielding a competitive profit. The Commissioner considers this demonstrates the potential for estimates to become outdated over a relatively short period. This reduces, but does not extinguish, the need for this information to remain confidential in order to protect the economic interests of contractor and Council.

37. The Commissioner finds that the detailed information on the estimated rental values for the commercial property is sensitive and its disclosure would prejudice the contractor's, and so the Council's, economic interests.
38. However within the information on rental values there is some which the Commissioner does not accept is commercially sensitive. This comprises of the following information from the main spreadsheet, (i) the ground rents which the contractor has agreed to pay the Council, (ii) the percentage value shown under the heading 'Yield' and (iii) percentage value shown under the heading 'Purchaser's Costs. It also includes (iv) the figures under the heading 'Quoting Rent' from the table provided by the contractor on rental values. Finally it includes (v) the aggregated development value of the retail properties from the main spreadsheet and (vi) the equivalent figure presented in the high level summary provided to elected members. This information will be identified in the confidential annexe to this notice.
39. Taking each one of these in turn, the Commissioner considers that the amount payable to the Council in ground rent would ultimately become public knowledge through the Council's own accounting procedures. What is sensitive however is the percentage of the estimated rental values which the ground rents represent. This is sensitive for two reasons. Firstly the Commissioner understands that this rate was the result of negotiations between the contractor and Council. Its disclosure could therefore undermine the contractor's position when negotiating similar terms in respect of other developments. The Council has confirmed that the contractor is currently involved in another major development project elsewhere in the UK. Secondly if the percentage rate by which the ground rent is calculated was disclosed this would

allow the actual ground rent values to be reverse engineered to produce the estimated rental values. For these reasons the Commissioner finds that the percentage rate shown in the heading to this column is commercially sensitive, but that the actual ground rent payable shown under that heading is not.

40. The Yield and Purchaser's Costs can be dealt with together. The Council has advised the Commissioner that these figures are standard values or industry norms. As such the Commissioner finds there are no grounds for withholding this information.
41. The Quoting Rent shown in the second supplementary table provided by the contractor is the rent at which the commercial units would be marketed. As such the Commissioner does not accept that this information is commercially sensitive.
42. In respect of the aggregated retail value of the development, which appears in both the main spreadsheet and the summary provided to elected members the Commissioner finds that this figure is too high level to divulge commercially sensitive information.
43. Before moving onto consideration of information on the costs of the development the Commissioner will look at two further points relating to the revenue/value of the scheme. The first is associated with the rental values. Included in the second supplementary table provided by the contractor are the names of target tenants which the contractor would hope to attract to particular units. These retailers are those which attract shoppers, creating a thriving shopping centre so increasing demand for the other retail units. The Commissioner put it to the Council that it would not difficult for someone to compile a list of top high street retailers that might appear on such a list and that the retailers themselves would be fully aware of their bargaining strength. Whilst the Council accepted this may be the case it argued that retailers would not know which actual unit the contractor hoped to attract the retailer to. This may be so, but the Commissioner considers that this would become apparent when any approach was made to, or received from, a target tenant. The Council has also argued that if the contract failed to attract those tenants it would be forced to pursue other tenants who, if the list of target tenants had been disclosed, would know they were, effectively, second choice. The Commissioner is not satisfied that this would impact on the relative negotiating positions.
44. The final issue to be considered before looking at the costs of the development is the financial information on the revenue to be generated from car parking spaces. This is shown in contractor's main spreadsheet and the Council's high level summary. The number of parking spaces that were to be provided under the 2014 scheme was available from the

contractor's planning application. The Commissioner considers it would not be difficult for anyone with local knowledge to estimate the likely car parking fees that could be charged and that those with some knowledge of the retail sector would be able to estimate the level of usage of those facilities. However the Council has explained that these figures relate to the net income that would be generated which takes account of assumptions on management costs. The contractor has also informed the Council that it is also possible that at some point in the future it may wish to sell the car parking off as a separate concern. When pressed on this point however the Council accepted that there was no current plan to sell off the parking.

45. The Commissioner considers that for this third test of the exception to be met the risk of a disclosure adversely affecting the contractor's economic interests must be more substantial than remote. In the absence of a settled intention to sell off the car parking spaces the Commissioner is not satisfied that the likelihood of an adverse effect occurring meets that threshold. The exception is not engaged in respect of the financial information on the car parking.

Financial information on the costs of the development

46. The costs are set out in two of the spreadsheets provided to the Council by the contractor including the main spreadsheet. They are also reflected in the high level summary produced by the Council itself. The costs itemised in the information include the costs of acquiring the different parcels of land which comprise the development site, the actual construction costs together with various other costs including the cost of letting and marketing the property and an amount for contingencies. The Commissioner will consider these cost items in the order in which they are presented on the high level summary produced for elected members as this appears to reflect the logical order in which the costs are incurred.
47. The first of these items is one for costs already incurred by the end of 2013. On the contractor's main spreadsheet this figure is broken down into a number of different elements. However in the summary produced for elected members by the Council it is simply shown as one total figure. This total figure does not allow any analysis that would reveal its constituent parts. The very fact that it relates to costs which have already been incurred means that it cannot prejudice the amount spent on the different items that the figure relates to. The Commissioner therefore finds that this total figure is not commercially sensitive.
48. The next figure in the summary relates to the site acquisition costs. The Commissioner recognises that a substantial proportion of these costs would relate to the Council's land holding and is therefore less sensitive

as he anticipates that the figure would ultimately have entered the public domain through the Council's own accounting procedures. Nevertheless there are other parcels of land that the contractor would have had to acquire and to disclose information on the budget which the contractor had allocated to this task could undermine its negotiating position. The Commissioner is satisfied that in respect of this information the duty of confidence protects the economic interests of the contractor and the Council.

49. Values for site acquisition are followed by the actual construction costs. In the spreadsheets provided by the developer the construction costs are broken down into blocks relating to individual elements of the development. In respect of these costs the Commissioner accepts that had the contractor progressed the 2014 Scheme, as was its intention at the time of the request, disclosing the detailed information on how much had been budgeted for individual elements of the development would undermine the contractor's ability to negotiate the best possible deal when contracting this work out. The Commissioner understands that different elements of the contract would be contracted out to different companies. Those companies would obviously seek to negotiate a price up to the estimated costs. The Commissioner has had regard for the fact that the negotiations to which this information relates would have commenced soon after the request was received. Therefore there would be little risk of the figures being out of date at the time the contracts were negotiated. The Commissioner therefore accepts that the confidentiality of this more detailed information does protect the legitimate economic interests of the contractor.
50. However also included in the information provided by the contractor, and the summary created by the Council, are total figures for the construction costs. The Council has argued that disclosing even this high level information would be prejudicial as it could be analysed to reveal the more detailed information. The Commissioner has considered this argument. He has attempted to reverse engineer these high level figures to obtain figures which approximate to the detailed construction costs provided in respect of the individual elements of the development and has not found it possible to do so. The Commissioner therefore rejects this argument and concludes that these high level figures do not engage the exception. The actual figures in question will be identified in the confidential annex provided exclusively to the Council.
51. There is one further item listed in the high level summary relating to construction costs. This figure, referred to as 'construction costs post unconditional date' appears to relate to a smaller element of the development and is further broken down in the more detailed, main spreadsheet provided by the contractor. Therefore the Commissioner is prepared to accept that this value is capable of revealing what the

contractor would be prepared to pay for particular elements of the development and so undermine his negotiating position when tendering for those works. Both the figure in the summary and in the contractor's spreadsheets would prejudice economic interests if disclosed.

52. The letting and marketing costs associated with the development are the next item shown in the summary. To disclose these would undermine the potential negotiations with letting agencies and so adversely affect the economic interests of the contractor and Council. These costs are followed by a cost relating to the Council itself.
53. The item relating to Winchester City Council appears to be an amount due to be paid the Council. As such the Commissioner anticipates that it would ultimately enter the public domain through the Council's own accounting procedures. Whilst the Commissioner recognises that revealing the contractor's budget in respect of costs to be paid to other parties could undermine the contractor's negotiating position, such an argument for withholding this figure could not be sustained as the Council itself is already privy to the information. This figure does not engage the exception.
54. The next figure relates to the amount budgeted for contingencies. It is based on a percentage of the total construction costs discussed in paragraph 49 above. The Council has explained that the percentage used is an industry norm and that disclosing this information would allow construction companies to calculate the actual construction costs and so undermine the contractor's position when negotiating contracts with those companies. The Commissioner accepts that disclosing this figure would reveal the total construction costs. However as already explained, the Commissioner is satisfied that the high level figure for construction costs is not commercially sensitive. This being so there are no grounds for withholding the figure for contingencies.
55. The aggregated total of the costs so far considered produces, what is shown in the high level summary as, a figure for 'total costs'. This is very high level figure which in the Commissioner's opinion reduces its commercial sensitivity. The Commissioner does recognise that his decisions that a number of its constituent parts should be disclosed will impact on the sensitivity of this figure but finds that any estimates for the other items that are commercially sensitive, such as land acquisition, would be too crude to be of any real use to other parties. What is important to keep sight of though is the sensitivity of the figures for the contractor's profit and for profit shown as a percentage of costs. The Commissioner has therefore considered whether disclosing the total cost figure would allow the contractor's profit to be calculated with any degree of accuracy. The Commissioner is satisfied that this is not

possible and therefore the figure for total costs does not engage the exception.

56. The next two items shown in the high level summary will be considered together. These are the interim income and the interest paid on loans to fund the development. The Commissioner is satisfied that to disclose the interest rate which the contractor has managed to obtain when funding the project is commercially sensitive. It would be helpful to rivals to know this figure when competing against the contractor in any future competitive tendering exercises. The figure for the interim income does not appear to the Commissioner to be of any great commercial sensitivity on its own. However if this was disclosed together with other information, namely the figure for the net development value, it would be very simple to calculate the value of the interest payments. The Commissioner will now consider the net development value together with the other two remaining items in the high level summary. It should be noted that even if these final items do engage the exception, regulation 12(5)(e) is subject to the public interest test, which would need to be considered before determining whether those figures could be withheld.
57. The last three values to be considered are the net development value, the profit and the profit shown as percentage of costs. The net development value is the product of the total costs, discussed in paragraph 55 adjusted by deducting any interim income but including any the interest payments, both of which were discussed immediately above. This value for the net development costs is then deducted from the total development value of the scheme to reveal the contractor's profit which is then shown as percentage of those net development costs. The Council, based on submissions from the contractor, considers the profit, shown both as a monetary value and as a percentage return on costs, to be commercially sensitive. As the Commissioner has already determined that the high level figures relating to the value of the development, including the total development value (see paragraphs 34, 42 and 45) should be disclosed, the net development cost cannot be disclosed without revealing the profit.
58. The Council's concern is that to disclose details of the contractor's profit margins would have an adverse effect on the contractor both in terms of the Silver Hill development and on its wider business interests. The Commissioner is unpersuaded that such a disclosure could affect the viability of the Silver Hill development as it is unclear what value the information would be to those with whom the contractor still needed to negotiate, whether these be tenants for the retail units, or the companies tendering for construction contracts.

59. In respect of the Council's argument that the information would adversely affect the contractor's wider business interests, it has explained that the contractor will wish to enter into competitive tendering processes in the future and therefore knowledge of the profit margins it is willing to accept would give rivals an unfair advantage. The Council has also submitted that knowledge of what profit margins the contractor expected on such developments would also affect its dealings with the financial institutions, regarding the interest rates they would charge to fund future developments. However the Commissioner considers that to a large extent what the contractor would accept as an acceptable profit margin has been revealed by earlier disclosures relating to the terms of the 2004 development agreement, ie the 10% profit threshold below which the contractor would not be prepared to undertake the development. This significantly reduces any damage that disclosing this information would have to the economic interests of the contractor. Nevertheless the Commissioner accepts that there is potential for there to be a limited prejudice to the contractor's economic interests if the figures for net development value, profit and profit as a percentage of costs, were disclosed.

Would confidentiality be adversely affected?

60. The final test established by regulation 12(5)(e) is that disclosing the information would adversely affect the confidentiality required to protect the relevant economic interests. As explained earlier the Commissioner considers that once the first three tests have been satisfied in respect of any particular element of the withheld information, it is inevitable that this fourth test is also satisfied in respect of that information.

61. The Commissioner has found that some of the withheld information does satisfy the first three tests and so also the fourth test. This information engages the exception provided by regulation 12(5)(e), it includes the following:

- Detailed information on rental values, including the estimated value of the retail units and the net income from those units (see paragraph 35),
- The rate of ground rent expressed as a percentage, negotiated with the Council, for the commercial properties (see paragraph 39),
- Site acquisition costs (see paragraph 48)
- The detailed construction costs of individual elements of the development (see paragraph 49)
- Construction costs post conditional date (see paragraph 51)

- Marketing and letting costs (see paragraph 56)
- Interim income and interest (see paragraph 56)
- Net development value, profit and profit on cost (see paragraph 59)

Public interest test

62. Regulation 12(5)(e) is subject to the public interest test as set out at regulation 12(1)(b). The test provides that even if the exception is engaged it can only be withheld if:

“... in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

63. In favour of disclosing the information the Council recognises the public interest in the people of Winchester knowing about the development project and understanding the decision making process in respect of the development which will have a significant impact on the community. The Council has also noted the particular public interest in providing information which would allow people to challenge those decisions. It has also recognised the public interest in disclosing information that would promote accountability and transparency in the spending of public money. However the Council has concluded that the public interest in maintaining the exception outweighs these arguments in favour of disclosure.
64. The Commissioner is not satisfied that the Council has attached sufficient weight to the public interest in disclosing the information. There are a number of factors which greatly increase the value in disclosing information on the decision making process and in particular on the spending of public money and whether the Council obtained the best deal for the community it serves. These factors include the fact that the 2014 scheme excluded any affordable housing. This represents a loss of 100 such homes. The Commissioner considers this is significant as the Council's own website identifies the lack of affordable housing in the area as a problem. Average house prices are over £350,000 and the Council has given a long term commitment to delivering an additional 300 new affordable homes as a priority. There is therefore a clear public interest in disclosing information which would reveal whether the Council optimised any opportunity provided by the Silver Hill development to secure a large proportion of the much needed affordable housing. The Commissioner does acknowledge that the Council disclosed the consultant's report on the contractor's affordable housing statement and the viability of the 2014 scheme. The report did confirm that the Silver

Hill development was not viable if it included the provision of affordable housing and this goes some way to meeting the public interest in the decision to proceed with a scheme which did not provide affordable housing.

65. However it is also understood that neither the 2014 scheme, nor the original 2004 development agreement, which paved the way for the 2009 scheme were ever competitively tendered for. The Commissioner would like to point out that his understanding of the situation is that in 2004 the Council would not have expected there to be any requirement to put the development agreement out to tender. Nevertheless this factor combined with the loss of affordable housing adds significant weight to the public interest in disclosing information which would allow the public to understand whether the Council had managed the proposed redevelopment in a competent manner and had obtained best value through the original development agreement and the 2014 scheme.
66. Another public interest factor in favour of disclosure relates to the controversy over the architectural merits of a scheme which will have major impact on a historic city centre. The information itself does not relate directly to design aspect of the development, however any debate on the architectural merit would be informed by a better understanding of the viability of the scheme as it stood at the time of the request and the financial benefits that the Council, and therefore the local community, would have derived from the 2014 scheme. That is, those opposed to the development would be able to reach a more informed view of whether the 2014 scheme represented the best solution for a site which all parties seem to agree requires regeneration.
67. There is also a public interest in providing information that relates to the use of viability assessments within the development process. This factor does not concern the Council's handling of the Silver Hill development but on the wider issue of central government policy in this area. The government's National Planning Policy Framework requires planning authorities to have regard for market conditions and in broad terms means that a planning authority should not impose planning obligations, such as the inclusion of affordable housing, on a developer if this means the proposed scheme will not produce a competitive return which provides sufficient incentive for the developer to proceed with the development. There is legitimate debate around whether this is an appropriate consideration when determining planning decisions. Without making any comment on its merits, the Commissioner acknowledges that there is an argument that development rights should be focussed solely on the sites and buildings in question and not take account of the financial circumstances of the landowner or developer. The Commissioner recognises that in this case the information on the

viability of the scheme was provided by the contractor when negotiating the 2014 scheme with the Council as landowner rather as part of the planning process. Nevertheless the Commissioner finds that the experience of the Silver Hill development would further inform that debate.

68. Turning to the public interest factors in favour of maintaining the exception these relate mainly to the need for the Silver Hill area to be redeveloped. When conducting internet searches for information and comments on the development the Commissioner did not find any arguments in favour of leaving the site in its present condition. The Commissioner is therefore satisfied that there is broad agreement that the site is in need of redevelopment. The Council has argued that the present site threatens the attractiveness of the city centre for tourists, shoppers and has a negative impact on residents.
69. The Council is concerned that if information was released which would undermine the contractor's negotiating position with potential tenants, construction contractors and landowners this would reduce the contractor's profit to a level at which the scheme would become unviable. This would mean the scheme risked being abandoned. The Commissioner is always cautious when considering such arguments as there is a natural tendency for those wishing to protect their economic interests to make their arguments as forcibly as possible.
70. However the Commissioner does accept such a risk exists. In the event the 2014 scheme was abandoned as a consequence of the judicial review. It is understood that as a result the contractor has reverted to the 2009 scheme. The Commissioner considers the potential for the 2009 scheme to be revisited if for any reason the 2014 scheme had to be abandoned, could have been anticipated at the time of the request. This does not mean that disclosing information which would undermine the viability of the 2014 and so risk it being abandoned is inconsequential, it is not. Since the 2014 scheme was largely based on the 2009 scheme, the disclosure of the requested information would threaten the viability of that scheme too and the Council would have recognised that there was in effect no fall-back position. The Council would have had to restart the whole process of redeveloping the Silver Hill development again. The Council considers that could easily take five years. This would mean that the problems associated with the current site would continue and probably become worse over that period. The Commissioner also recognises that having to restart the development process would mean the money and other resources already expended on the 2009 and 2014 scheme would have been wasted.
71. When considering the harm caused by disclosing information on the contractor's profits margins the Commissioner accepted that this would

prejudice its ability to compete for similar contracts in the future and there a public interest in preventing this damage to the legitimate economic interests of the contractor.

72. It has also been argued that there is a public interest in preserving the principle of confidentiality and that to disclose the requested information in this case would stifle the free exchange of information between private developer and public authorities. The Commissioner gives little weight to this argument. This is because both the Council and contractor should have recognised that absolute confidentiality cannot be assured with the advent of the Freedom of Information Act and the Environmental Information Regulations. Furthermore it is questionable that contractors would forgo the opportunity to develop sites through a reluctance to share information with public authorities. It should also be remembered that in this case the disputed information was provided by the contractor when negotiating the 2014 scheme with the Council as its development partner. The contractor would have been well motivated to provide information which it hoped would persuade the Council to accept its new proposals.
73. Having weighed up the competing public interest arguments the Commissioner finds that the public interest in favour of disclosing the net development value, profit and profit on cost, as shown in the high level summary outweighs the public interest in maintaining the exception. This information would provide further transparency of the Council's reasons for accepting the 2014 scheme and the extent to which this scheme represented the best deal achievable. In light of the limited damage the Commissioner found disclosing this information would have on the contractor's economic interest, this significantly outweighs the public interest in maintaining the exception. This information should be disclosed and will be identified in the confidential annexe to this notice.
74. However in respect of all the remaining, more detailed, information which if disclosed would undermine the contractor's negotiations with land owners, construction companies and prospective tenants, so threatening the viability of the 2014 scheme, the Commissioner finds that the public interest favours maintaining the exception.

Right of appeal

75. 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

76. 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.
77. 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

Pamela Clements
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