

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

Decision notice

Date: 4 October 2018

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

Decision (including any steps ordered)

1. The complainant made a request to Salford City Council (the Council) for information relating Stama Development (Salford) Limited and the development of the land at Crescent Police Station, Salford. The Council refused to comply with the request under regulation 12(4)(b) EIR as it considers the request to be manifestly unreasonable and in the alternative it considers regulation 12(4)(e), 12(5)(b), 12(5)(e), 12(5)(f) and 13(2) EIR would apply to some of the information requested.
2. The Commissioner's decision is that the Council was correct to handle the request under EIR rather than FOIA. She considers that the Council incorrectly applied regulation 12(4)(b) EIR and regulation 13 EIR to some of the redactions it has been applied to. The Council was however correct to apply regulation 12(4)(e), 12(5)(b), 12(5)(e) and regulation 13 EIR to the remaining redactions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information in redacted format (as marked on the copy provided to the Commissioner during her investigation) however removing the redactions made under regulation 13 EIR to the names identified in the confidential annex attached to this Notice.
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 9 June 2017 the complainant requested information of the following description:

"Please provide all information, documentation and correspondence that is held by the Council and its employees and/or its agents and their employees (to include Urban Vision Partnership Ltd) in relation to i) Stama Development (Salford) Limited and ii) the development of the land at Crescent Police Station, Salford."

6. On 10 July 2017 the Council responded. It dealt with the request under the EIRs as it considers that the information requested is environmental. It refused to disclose the requested information under regulation 12(5)(b) EIR.
7. The complainant requested an internal review on 13 July 2017. The Council sent the outcome of its internal review on 11 August 2017. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner 29 September 2017 to complain about the way the request for information had been handled. The complainant considers the request should have been dealt with under FOIA rather than EIR and was dissatisfied with the exception applied.
9. During the course of the Commissioner's investigation, upon agreement between the Council and the complainant, the 'party to party' material was scoped out of the request and therefore this material has not been considered for disclosure under FOIA within this Notice. In terms of the withheld information, the Council additionally applied regulation 12(4)(b) EIR to the request and in the alternative considers regulation 12(4)(e), 12(5)e), 12(5)(f) and 13(2) would apply in addition to regulation 12(5)(b) to some of the requested information.

10. The Commissioner initially considered whether the request has been dealt with under the correct legislation, EIR rather than FOIA. She then went on to consider whether the Council was correct to refuse to comply with the request under regulation 12(4)(b) EIR and then went on to consider the application of regulation 12(4)(e), 12(5)(b), 12(5)(e), 12(5)(f) and 13(2) EIR to the information the Council considers to be exempt from disclosure.

Reasons for decision

Regulation 2

11. Regulation 2(c) EIR defines environmental information as "measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect" the state of the elements of the environment.
12. The requested information in this case relates to the development of the land at Crescent Police Station, Salford. The Commissioner does consider that this is a measure relating to a planning application which is likely to affect the state of the elements of the land in question.
13. The Commissioner does therefore consider that this information is environmental under regulation 2(c) EIR and this request should be considered under EIR.

Regulation 12(4)(b)

14. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
15. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable.
16. A request can be manifestly unreasonable for two reasons: Firstly where it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources.
17. In this case the Council has said that it considers the request to be vexatious. In its submission to the Commissioner it did also say that "Although the council is applying this exemption on the basis that the request is vexatious, if the council had to complete the exercise of collating all of the relevant information held, the council may also need

to consider the potential applicability of the second strand of this exception i.e. to comply with the request would place an excessive and disproportionate burden on the council. This could only be fully explored once the council has an overview of the full extent of the information held. There is undoubtedly a significant volume of information, and in assessing whether complying with the request would present a disproportionate burden, the council can also factor in to its consideration the time it would take to determine whether exceptions apply to particular information.” The Council did subsequently compile the requested information and did not present any further submissions relating to the cost of complying. The Commissioner has therefore focused her investigation on whether the request can be classified as vexatious.

18. There is no definition of the term “vexatious” in the Freedom of Information Act, however the issue of vexatious requests has been considered by the Upper Tribunal in the case of *The Information Commissioner and Devon County Council v Mr Alan Dransfield* (GIA/3037/2011). In the Dransfield case the Tribunal concluded that the term could be defined as “manifestly unjustified, inappropriate or improper use of formal procedure.” The Tribunal identified four factors likely to be relevant in vexatious requests:
 - The burden imposed by the request on the public authority and its staff
 - The motive of the requestor
 - Harassment or distress caused to staff
 - The value or serious purpose of the request.
19. The Upper Tribunal’s decision established the concepts of “proportionality” and “justification” as being central to any consideration of whether a request for information is vexatious.
20. The key to determining whether a request is vexatious is a consideration of whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear it is necessary to weigh the impact of the request on the public authority against the purpose and value of the request. To do this a public authority must be permitted to take into account wider factors associated with the request, such as its background and history.
21. The Council has explained that the request has been made in the context of potential litigation and, given the disclosure rules which apply in that arena, it considered it opportune to reference comments made by the Tribunal in the Dransfield case (albeit in connection with

the application of section 14 of the FOIA). The Council went on that the Tribunal's view was that a vexatious request could be described as "*[the] manifestly unjustified, inappropriate or improper use of a formal procedure.*" This is the point the council has sought to make in this case.

22. The Commissioner is aware that there is potential litigation between the Council and the complainant in this case. However the information that can be obtained by a potential litigant under the civil disclosure rules is not the same as the right to access environmental information under the EIRs. The fact that there is potential litigation between a public authority and another party does not prevent that other party from making a request under information rights legislation. The Commissioner does not therefore accept that the Council has demonstrated that the request is manifestly unreasonable in this case upon this basis. She does however acknowledge that given that there is potential litigation there may be other exceptions contained within the legislation that may prevent disclosure of some of the information requested.
23. The Commissioner therefore finds that the Council has incorrectly applied regulation 12(4)(b) EIR to the request in this case. The Commissioner has therefore gone on to consider the other exceptions applied in this case.

Regulation 13

24. Regulation 13 EIR provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in regulation 13(2)(a)(i) is satisfied.
25. One of the conditions, listed in regulation 13(2)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
26. Although this legislation was superseded by the Data Protection Act 2018 following the General Data Protection Regulation (GDPR) coming into force on 25 May 2018, as the request in this case was made prior to this date the relevant legislation to applicable at the time of the request was the 1998 Act.
27. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,

- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
28. In this instance the withheld information includes the names and contact details of staff and in one instance more substantive correspondence was redacted which relates to a personal matter raised by a particular individual.
 29. The Commissioner does consider that this is information from which the data subjects would be identifiable and therefore does constitute personal data.
 30. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure would be fair.
 31. The Council has explained that the names and contact details of members of staff have been redacted from the requested information. It said that the roles of individuals whose names and contact details have been redacted include planning officers, development officers, regeneration officers, surveyors, and legal officers.
 32. The Council explained that while this information relates to these individual's professional activities rather than their private life, the officers in question are not senior members of staff and are not decision-makers in relation to the matters in hand. As such, the council considers that they would not reasonably expect their details to be made public in response to a request for information and, therefore, that disclosure would have breached the first Data Protection principle (with reference to the regime in place at the time of the request).
 33. The more substantive redaction made under this exception related to a personal matter raised by an individual who would not reasonably have expected any such details to be placed in the public domain.
 34. Upon viewing the names and contact details of staff redacted from the information, the Commissioner considers that there are six names that have been redacted which can't be considered to be junior members of staff. Given the roles they occupy the Commissioner does not consider it would be unreasonable for these individuals to have some expectation that their names would be disclosed in this context. These names have been identified in the Confidential Annex attached to this Notice. In relation to the more substantive redaction, the Commissioner is satisfied that it relates to a personal dispute, and that the individual concerned

would not have a reasonable expectation that this would be disclosed into the public domain.

35. Other than the six names identified, the Commissioner is satisfied that the other data subjects would have an expectation of privacy with regard to their personal information and that their names would not be released into the public domain.
36. The Commissioner considers that in relation to direct contact details, all data subjects (including the six names identified) would have a reasonable expectation that this information would not be disclosed into the public domain.
37. In relation to names (other than the six identified), contact details and the more substantive redaction relating to a personal matter, the Commissioner has gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subjects.
38. The Commissioner considers that there is a wider public interest in transparency and accountability, particularly given the contentious nature of the development in question, however the redacted staff names and contact details would provide very little more, given the junior roles of the majority of those staff.
39. After considering the nature of the withheld information and the reasonable expectations of the data subjects the Commissioner considers that disclosure under EIR would be unfair and in breach of the first principle of the DPA. She considers that any legitimate public interest would not outweigh the rights of the data subjects in this case.
40. Therefore the Commissioner's decision is that regulation 13 EIR is engaged to all information to which it has been applied apart from where the six names identified in the Confidential Annex have been redacted.

Regulation 12(4)(e)

41. Where regulation 12(4)(e) EIR has been applied along with other exceptions, the Commissioner has considered regulation 12(4)(e) in the first instance. The Commissioner has not however considered this exception in relation to communications between the Council and its legal advisers as these communications have been considered under regulation 12(5)(b) EIR.
42. Regulation 12(4)(e) of the EIR states that a public authority may refuse

to disclose information to the extent that the request involves the disclosure of internal communications. It is subject to a balance of public interest test.

43. The Commissioner's published guidance¹ on this exception addresses the issue of internal communications. Essentially, an internal communication is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.
44. The Council has made redactions to the withheld information under this exception. The Council acknowledged that the correspondence to which this exception has been applied includes communications between the Council and its planning, highways and regeneration functions. These are delivered through a joint venture company called Urban Vision (UV) which is jointly owned between the Council and a commercial partner. The Council remains the responsible authority for the delivery of these functions.
45. In *Salford City Council and Redwater Developments v The Information Commissioner* [EA/2015/0276]², it was decided that:

[38] On the evidence before us and in particular from the witnesses giving evidence to us, we are persuaded of the importance and need for "safe space". We are satisfied on the facts of this case that the Council as a public authority needs space to think and act in private.

[39] Mr Norbury's evidence described clearly how, inter-alia Urban Vision discharges "core functions" on behalf of the council with respect of its disposal of land. He described how Urban Vision are not merely an advisory service which the council bought in, but are an integral part of the council decision making process and further in discharging and implementing those decisions.

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

²

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1949/Salford%20City%20Council%20EA.2015.0276%20\(04.07.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1949/Salford%20City%20Council%20EA.2015.0276%20(04.07.17).pdf)

46. The First Tier Tribunal therefore found that communications between the council and UV are internal where it is carrying out functions on behalf of the council.
47. The Commissioner considers that whilst the information in this case relates to a different land transaction the principle is the same as decided in EA/2015/0276. For this reason the Commissioner does consider that the redactions made under this exception, even where the communication includes UV, relate to internal communications. She has therefore gone on to consider the public interest test in relation to this information.

Public interest test

Public interest in favour of disclosure

48. The council does recognise that there is a public interest in the public having some understanding of the proposal for the land and its development

Public interest in favour of maintaining the exception

49. The Council explained that the internal communications have taken place in the context of a complex property/land transaction and a parallel planning process in relation to a proposed development of the land and property in question and latterly, in relation to potential litigation regarding the conduct of the proposed transaction after the applicant was unable to meet the terms of the agreement for lease.
50. The basis for applying the exception is that the Council needed a private space for internal deliberation and decision-making and that private space needs to continue to be protected. Many of these communications consist of discussions about the Council's approach and strategy through the course of the ongoing commercial negotiations (often requiring legal input), for example to emerging issues in relation to the potential need to enforce contractual terms (i.e. within the Agreement for Lease) and in relation to attempts by the developer to renegotiate the agreed sale price for the land which were all geared towards ensuring the Council secured the best outcome for the site in terms of the capital receipt.
51. It went on that the importance of a safe space for public authority decision-making is very well established. It said that this importance is recognised by the Information Commissioner in her guidance on regulation 12(4)(e) EIR, at paragraphs 49-50:

"The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live..."

52. At the time these communications took place the Council was trying to decide what to do about a complex matter of substantial importance. While a considerable amount of time may have passed since the prospect of litigation was raised in November 2016 and since the planning application was determined in April 2017, this matter is not concluded/closed. The matter remains live on two counts: First, the land/property asset remains unsold and undeveloped. The future of the site is still to be resolved. The site will be remarketed at a future date and it is important that the Council is able to conduct commercial discussions. Disclosure of the highlighted information within the internal communications and the insight this provides on the Council's commercial strategies and approach to land transactions would have a detrimental impact on the Council's position going forwards - it would be damaging to the Council's ability to secure the best and most favourable outcome for this site in future and may impact on the Council's interests in relation to the conduct of land transactions more generally.
53. Second, there remains the prospect of potential litigation with the complainant and the council considers that the safe space needs to be maintained so that information which may be pertinent to litigation is not accessible to the other party other than in conjunction with the legal process. While the Council is claiming Regulation 12(5)(b) in regard to information which attracts legal privilege (legal advice and litigation privilege) the council considers that the 'safe' space' arguments set out can be argued in terms of the impact placing information in the public domain may have on potential proceedings by enabling the other party to have premature access to information outside of the due legal process. The council considers, therefore, it is critically important to ensure the 'safe space' continues to receive protection in this case.

Balance of the public interest

54. The Commissioner considers that there is a very strong public interest in the Council operating in an open and transparent way. There has been substantial local interest in this prospective development and given that one of the incentives of the development was to generate planning payments/fees to inject back into affordable housing within the area this strengthens the public interest in disclosure.

55. In this case the Council has explained that at the time of the request there were ongoing negotiations regarding the land transaction, related contractual matters and planning/development requirements.
56. While a considerable amount of time may have passed since the prospect of litigation was raised in November 2016 and since the planning application was determined in April 2017, this matter is not concluded/closed. The matter remains live because the land/property asset remains unsold and undeveloped. The future of the site is still to be resolved. The Council has said that the site will be remarketed at a future date and it is important that the Council is able to conduct commercial discussions. Disclosure of the highlighted information within the internal communications and the insight this provides on the council's commercial strategies and approach to land transactions would have a detrimental impact on the council's position going forwards - it would be damaging to the council's ability to secure the best and most favourable outcome for this site in future and may impact on the council's interests in relation to the conduct of land transactions more generally. The matter also remains live due to the potential litigation between the Council and the applicant.
57. The fact that the matter is still very much live provides weight to the argument that the Council requires a 'safe space' to deliberate and discuss the issue internally to make decisions as to how to progress to reach resolution both in terms of the dispute and discharging sale of the land in question for development.
58. Given the timing of the request, the Commissioner considers that the public interest in preserving the Council's 'safe space' outweighs the public interest in disclosure in this case.

Regulation 12(5)(b)

59. Regulation 12(5)(b) EIR can be applied to withhold information where disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial, or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
60. In reaching a decision as to whether the Council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of

justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.

61. The council has sought to rely on the exception in the first instance as it said disclosure would adversely affect the course of justice in relation to the circumventing of established litigation disclosure processes (i.e. the civil procedure rules). The Commissioner’s guidance under section 42 FOIA (which is the equivalent exemption under FOIA covering LPP) explains that:

“Making a disclosure only to a party’s opponent and to the court is an example of a restricted disclosure in the litigation context. In litigation, the parties have to disclose the information they intend to rely on in court to their opponent and to the court. Disclosures made only to the court and to an opponent are ‘restricted disclosures’, which remain confidential from the rest of the world, unless the information is later disclosed in open court. Since these disclosures do not enter the public domain, they may continue to be protected by LPP for the purposes of FOIA.”

62. The Commissioner has already explained above in the context of regulation 12(4)(b) that she does not consider that access to environmental information under EIR is circumvented by the fact that information may be accessible by relevant parties to legal proceedings under the Civil Procedure Rules. This is because these are two distinct means of access, one on a restricted basis to interested parties and one being disclosure into the public domain. She does not accept the engagement of regulation 12(5)(b) EIR on this basis.
63. The Council has however confirmed that in the alternative the exception is relied upon as disclosure would adversely affect the course of justice as some of the information requested is subject to legal professional privilege (LPP), it has argued this on the basis of legal advice privilege as well as litigation privilege.
64. The Council said that legal advice privilege applies to confidential communication between lawyers and their clients made for the purpose of seeking or giving advice. The e-mails that have been identified as subject to legal advice privilege have either been sent to or sent by the Council’s legal representatives for the purpose of seeking or giving advice. More specifically, it explained that legal advice was sought and provided a number of times by and to property and development officers in relation to complex contractual matters and other emerging issues arising from ongoing negotiation regarding the land transaction, related

contractual matters and planning/development requirements. It went on that some of this advice is also referenced and detailed within other internal communications not involving the council's legal advisers. The council considers that legal advice privilege extends to cover these 'secondary' references to advice and these are marked up accordingly.

65. For ease of reference the Council provided the Commissioner with the names of its legal advisers, it explained that the Solicitors have Manchester City Council email addresses. It confirmed that Salford City Council and Manchester City Council have a shared legal service however it said that the legal advice sought and received is 'internal' legal advice.
66. The Council also said that litigation can reasonably be considered to have been in prospect from November 2016. In this case the request was made on 9 June 2017. So at the time of the request litigation was prospective and so the Commissioner does accept that litigation privilege would also apply.
67. The Commissioner is satisfied that regulation 12(5)(b) EIR would apply to redactions covering information either sent to or sent by the Council's legal representatives relating to this dispute.
68. Based upon the Council's submissions the Commissioner does consider that advice privilege and litigation privilege would apply and therefore regulation 12(5)(b) EIR is engaged in relation to the majority of redactions to which it has been applied. However the Commissioner does not consider this exception would apply to some of the internal communications between non-legal members of staff which discuss or reveal the substance of the legal advice however these redactions have already been found to be covered by regulation 12(4)(e) EIR above.

Public interest test

Public interest in favour of disclosure

69. The council does recognise that there is a public interest in the public having some understanding of the proposal for the land and its development.

Public interest in favour of maintaining the exception

70. The Council has acknowledged the following public interest arguments in favour of maintaining the exception:
 - The course of justice encompasses the ability of *any* party (including a public authority) involved in a potentially contentious matter to consider legal matters on a confidential basis. If the

council would be unable to do so, then a party to a potential transaction or, indeed, an opponent would have an insight into the Council's legal thinking, but the Council would have no corresponding insight on the other side. Central concepts of fairness and ensuring a level playing field would otherwise be compromised and therefore the course of justice would be adversely affected.

- It is well established that there is very weighty public interest in maintaining the confidentiality of lawyer-client communications. Two Tribunal judgements reflect this - *Kiraldie v Information Commissioner & Thanet District Council*; July 2006 and *GW v IC, Local Government Ombudsman and Sandwell MBC* [2014] UKUT 0130. In the *Kiraldie* case the Tribunal commented that the exception "*exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.*" When dealing with such an important issue, the Council needs to be able to communicate freely with its legal advisors in confidence. Otherwise, its communications will be more guarded (with an eye on potential disclosure), less open and thus less robust: the process of lawyer-client advice will be weakened, which is contrary to the interests of justice and to the public interest.

Balance of the public interest

71. As set out above, the Commissioner considers that there is a very strong public interest in the Council operating in an open and transparent way. There has been substantial local interest in this prospective development and given that one of the incentives of the development was to generate planning payments/fees to inject back into affordable housing within the area this strengthens the public interest in disclosure.
72. In this case the Council has explained that at the time of the request there were ongoing negotiations regarding the land transaction, related contractual matters and planning/development requirements. Whilst the Commissioner is aware that the planning application was rejected on 6 April 2017 she is also aware that litigation became prospective prior to this in November 2016 suggesting that the application is still very much

in dispute. The legal advice was therefore live and still being relied upon at the time of the request.

73. The Commissioner therefore accepts that there is a very strong public interest in protecting LPP, in this case enabling the Council to seek legal advice to fully inform its decision making. It is also in the public interest that the advice received is protected whilst the issue remains live and is still being relied upon to ensure a level playing field and not providing an unfair advantage to the other party to the dispute in this case.
74. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception in this case.
75. In summary the Commissioner does consider that regulation 12(5)(b) EIR has been correctly applied to communications to which the Council's qualified legal advisers were party to. She does not consider that the application of regulation 12(5)(b) EIR extends to communications referencing and detailing advice provided not involving the Council's legal advisers. However having viewed the withheld information, she is satisfied that all such communications would be covered by regulation 12(4)(e) EIR above.

Regulation 12(5)(e)

76. The Council has applied regulation to 12(5)(e) EIR to make some redactions to which regulation 12(4)(e), 12(5)(b) and regulation 13 EIR have not been applied.
77. Regulation 12(5)(e) of the EIR says 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. Regulation 12(5)(e) is subject to the public interest test.
78. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

79. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
80. The Council has explained that the withheld information relates to a potential commercial transaction. This includes communications in relation to ongoing commercial negotiations regarding a proposed land sale, related contractual matters i.e. the agreement for lease etc, detailed financial information regarding the viability of the development proposal e.g the council's view of the viability of the project upon assessing the developer's viability appraisal.
81. As the withheld information relates to a commercial property transaction, the Commissioner is satisfied that the first condition at paragraph 75 has been met.

Is the information subject to confidentiality provided by law?

82. In her guidance the Commissioner advises that, in this context, this will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
83. The Council has argued that the withheld information is subject to the common law of confidence.
84. In assessing whether the information has the necessary quality of confidence, the Commissioner has considered whether the information is more than trivial, whether or not it is in the public domain and whether it has been shared in circumstances creating an obligation of confidence. A useful test to consider with regard to the latter is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
85. The information is certainly more than trivial, relating as it does to a contentious commercial property transaction which subsequently became the subject of potential litigation. The Commissioner understands that the specific information requested in this case is not currently in the public domain.
86. The Commissioner also considers that a reasonable person who was provided with the requested information would consider that the information had been provided to him or her in confidence.

The Commissioner is therefore satisfied that the information in question is subject to confidentiality provided by law and the second condition at paragraph 75 has been met.

Is the confidentiality provided to protect a legitimate economic interest?

87. The First Tier Tribunal (Information Rights) confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosing the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
88. In the Commissioner's view it is not enough that some harm *might* be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
89. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors"
90. In this case the Council argued that the publication of this commercial information would undoubtedly be damaging to its economic interests in securing the best outcome for this site e.g. disclosure of the proposed sale price would impact on the capital receipt the council is able to realise for the land in future. Developers bidding for the site in future will likely limit the amount of money they would bid for the site based on knowledge of the previously agreed price.
91. More generally it said that disclosure of the commercial negotiations would reveal the Council's approach, strategy and this would impact on its interests in relation to other proposed transactions and development proposals affecting Council owned land. Again, the knowledge developers would gain from this information would enable them to tailor their bids/negotiating positions in a way which is favourable to their economic interests but to the detriment of the Council. In addition, disclosure of full details of the Council's assessment of

viability appraisals would give developers a very powerful insight into the Council's position and strategy in relation to development in Salford.

92. Furthermore, the council's assessment contains significant financial detail taken from the developer's viability appraisal. Disclosure of this information would very clearly impact on both the developer and the Council's economic interests. It would directly impact on the developer's economic interests as it would give competitors a valuable insight into their approach to schemes of this nature. Disclosure would impact on the Council's economic interests as, having learnt from evidence provided by the developer in the Tribunal case *Salford City Council and Redwater Developments v The Information Commissioner* [EA/2015/0276] that the council was involved in, such information is hugely valuable in a commercial environment. If other developers would fear that the Council would disclose their detailed financial appraisals they may be very reluctant to develop in Salford.
93. Having considered the submission the Council has provided the Commissioner is satisfied the third of the criteria at paragraph 75 has been met. This is because in this case the contract for the sale of this land has been terminated and therefore disclosure of the withheld information will have economic and commercial repercussions in terms of the future of this site and the council's ability to effectively negotiate the future sale of this land.

Would the confidentiality be adversely affected by disclosure?

94. As the Commissioner has concluded that disclosure would adversely affect the Council's legitimate economic interests, it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.
95. Since the necessary four criteria have been met the Commissioner is satisfied that the information that the Council has withheld engages the exception under 12(5)(e) and she has gone on to consider the public interest.

Public interest test

Public interest in disclosure of the information

96. The council does recognise that there is a public interest in the public having some understanding of the proposal for the land and its development.

Public interest in maintaining the exception

97. As the contractual arrangements in relation to the land in question have broken down in this case, the land is yet to be sold and therefore it would not be in the public interest to disclose commercially confidential information which would hinder the Council's negotiating position in the future.

Balance of the public interest test

98. The Commissioner recognises the media interest in this contentious matter and the public interest in it generally. She recognises too that the requested information may be of interest to the complainant specifically in this case, however the complainant's interests are not necessarily tantamount to what is in the public interest.
99. The Commissioner considers that there is a strong public interest in the Council withholding the requested information in this case given the ongoing dispute between itself and the contractor and the fact that the land in question is yet to be sold so that the Council can secure the best value for itself and the tax payer, in any future negotiations for sale. Regulation 12(5)(e) EIR was therefore correctly applied in this case.
100. Regulation 12(5)(f) EIR has additionally been applied in this case, however as all redactions made would be covered by regulation 13, 12(4)(e), 12(5)(b) or 12(5)(e) EIR (apart from the six names identified in the confidential annex and in relation to which regulation 12(5)(f) has not been applied), regulation 12(5)(f) EIR has not been considered any further.

Right of appeal

101. 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

102. 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.

103. 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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