

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 December 2020

Public Authority: Wirral Metropolitan Borough Council

Address: Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant requested from Wirral Metropolitan Borough Council ("the Council") information regarding a Private Document Pack from a Business Overview and Scrutiny Committee meeting. The Council disclosed a redacted version of the information from which it withheld some content under regulation 12(5)(e) of the EIR (commercial confidentiality).
2. The Commissioner's decision is that the Council has failed to demonstrate that regulation 12(5)(e) is engaged. The Commissioner also finds that in not responding to the complainant's initial request or internal review request within the statutory timeframe, the Council has breached regulation 5(2) and regulation 11 of the EIR.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information withheld under regulation 12(5)(e).
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. This request relates to the development of a golf resort in Hoylake. The Council stated that it introduced the concept and that the Nicklaus Joint Venture Group (NJVG) won the opportunity to take the project forward to build and run the resort. The area proposed to be developed for the golf resort is green belt land. The Council invited the public to give feedback on the golf resort proposal and this feedback is published on its website¹. The Council has also published figures from an initial consultation exercise undertaken over six days in 2015 regarding the Hoylake Golf Resort. This showed that 33.82% of people stated that they fully supported the proposals, 36.44% of people stated that they supported the proposals but had some concerns and that 29.74% of people stated that they did not support the proposals². The Council stated that this development will create jobs locally and generate revenue for the Council along with supporting growth in the tourism economy of the area. It issued a media release in 2015 to explain its position³. The Council has published answers to common questions about this development on its website⁴. Many of these questions concern the environmental and financial impact of this development.

6. In its meeting of 27 June 2019, the Business and Scrutiny Committee were asked to consider all aspects of the golf resort proposition in order to make informed representations to Cabinet. In the published minutes of 27 June 2019, the Council stated it had received an application from NJVG for a loan to progress to the next stage of the project. It stated that this application formed part of an existing Development Agreement between the Council and NJVG where if certain conditions were met, the Council could offer a loan opportunity to NJVG to continue to the next stage. However, these conditions were sequential to the first condition –

¹https://www.wirral.gov.uk/sites/default/files/all/planning%20and%20building/Local%20plans%20and%20planning%20policy/Hoylake%20golf%20resort/Public%20comments%20on%20the%20Hoylake%20Golf%20resort%20proposals_pdf.pdf

² <https://www.wirral.gov.uk/business/regeneration/hoylake-golf-resort/common-questions-about-hoylake-golf-resort>

³<https://www.wirral.gov.uk/sites/default/files/all/planning%20and%20building/Local%20plans%20and%20planning%20policy/Hoylake%20golf%20resort%20media%20release%20-%2010%20July%202015.pdf>

⁴ <https://www.wirral.gov.uk/business/regeneration/hoylake-golf-resort/common-questions-about-hoylake-golf-resort>

that a Funding and Phasing agreement has been met. The Funding and Phasing report was considered by the Business and Overview Scrutiny Committee on 27 June 2019 (the private document pack for which is the subject of this request).

7. A motion passed by the Committee at this meeting recommended to Cabinet that this development should be funded on the open market, rather than through Council borrowing. In turn, in the subsequent Cabinet meeting of 8 July 2019, a final decision was made for the Council not to loan the NJVG the £26m they had requested in order to build the golf resort, hotel and housing in Hoylake. The Council's decision was the subject of a BBC news article published the same day⁵. Another related news article reported on 250 campaigners who gathered in protests outside a Council meeting regarding the development earlier in the year⁶. It is clear that news of this development has been widespread, divisive and subject to public campaigns.
8. The committee resolved to recommend to Cabinet that, *"the Council's investment profile and limited resources would be better served if this business venture was funded on the open market, rather than through Council borrowing, and it is therefore recommended that Cabinet do not enter into a separate agreement to fund the Celtic Manor project at this time."*⁷
9. The published minutes of 27 June 2019 also states that *"under section 100 (A) (4) of the Local Government Act 1972, the public be excluded from the meeting during consideration of the following items of business on the grounds that they involve the likely disclosure of exempt information as defined by the relevant paragraph 3 of Part I of Schedule 12A (as amended) to that Act. The Public Interest test has been applied and favoured exclusion"*.

⁵ <https://www.bbc.co.uk/news/uk-england-merseyside-48910198>

⁶ <https://www.bbc.co.uk/news/uk-england-merseyside-47370558>

⁷ <https://democracy.wirral.gov.uk/documents/g8124/Printed%20minutes%2027th-Jun-2019%2018.00%20Business%20Overview%20and%20Scrutiny%20Committee.pdf?T=1>

Request and response

10. On 27 June 2019, the complainant wrote to the Council and requested information in the following terms:

"I'd like to make an Environmental Information Regulations 2004 request for pages 3-52 (inclusive) of the Private Document Pack for Wirral Council's Business Overview and Scrutiny Committee meeting on the 27th June 2019.

With regards to the form and format of the information (regulation 6) I am requesting that it is provided electronically in .pdf format (Adobe Acrobat) with the original page numbers in the footer.

I remind you of your duty under reg. 9 to provide advice and assistance and look forward to your response within 20 working days."

11. Having not received a substantive reply, the complainant again wrote to the Council on 10 September 2019 and requested an internal review as he had not received any response to his request. In his internal review request, the complainant stated:

"Furthermore, in relation to any claims that Wirral Council may have that it can't release the report on commercial confidentiality grounds, I'll point out that an identical report went to Wirral Council's Cabinet on 8th July 2019, there was no resolution passed to exclude the press and public at this meeting, see the minutes published on your website here <https://democracy.wirral.gov.uk/document...> and therefore the report requested is open to public inspection (see Local Government Act 1972, s.100C(1)(d)), therefore any claim to commercial confidentiality can't be justified."

12. The Council issued a response to this request on 26 November 2019. It disclosed some of the withheld information but redacted some citing regulation 12(5)(e) of the EIR ("commercial confidentiality").

Scope of the case

13. The complainant contacted the Commissioner on 11 November 2019 to complain about the way his request for information had been handled.

14. The scope of this notice is to determine whether the Council was correct to apply regulation 12(5)(e) of the EIR in order to withhold some of the requested information.
15. The Commissioner will also consider whether the Council complied with its obligations under regulation 5(2) and regulation 11 of the EIR.

Reasons for decision

Is the information environmental

16. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
17. In its initial response to the request, the Council stated *"the information requested is considered to be 'environmental information' under*

Regulation 2(1) (c) of the Regulations; being information on plans, activities, measures etc. affecting or likely to affect the elements of the environment”.

18. The information requested is the “Private Document Pack” for the Committee meeting of 27 June 2019. In responding to this request, the Council provided redacted information in the form of two documents.
19. The requested information concerns the financial structure and proposals as submitted by NJVG to the Council for the development of land in Hoylake for the golf resort. It also includes an external due diligence report that the Council has undertaken of the NJVG funding and phasing agreement. All of this information relates to significant development of land. The Commissioner therefore considers that the withheld information is environmental under regulation 2(1)(c) as the proposed developments will impact elements of the landscape. She has therefore considered this complaint under the EIR.

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

20. Regulation 12(5)(e) states that:

“For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

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

21. The Commissioner’s published guidance⁸ on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?

⁸ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

- Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
22. The redacted information as disclosed in response to the request stated that NJVG (The Nicklaus Joint Venture Group) is a Special Purpose Vehicle (SPV) formed with the sole purpose to deliver the Hoylake Golf Resort development. It includes information about NJVG's request for a £26m loan from the Council and details of the Council's considerations of the possibility of this loan.

The Council's submissions

23. The Council provided limited submissions to the Commissioner as part of this investigation. However, in these it confirmed that it wished to maintain its reliance on regulation 12(5)(e), stating that the requested information related to a current contract.
24. The Council also provided the Commissioner with a copy of IPW's (the same external company that did the due diligence report) report which comments on the disclosure of the requested information under the FOIA. It appears that the Council sought this advice from IPW at the time of responding to this information request. In this, IPW detail the reasons for each redaction in the information. The IPW arguments are broadly summarised as follows:
- The financial terms between Redrow Homes and NJVG are not in the public domain and are subject to confidentiality clauses. IPW argue that disclosure could be in breach of the agreements and could result in legal action by NJVG and Redrow against the Council. IPW state that disclosure may cause Redrow to withdraw from the process and if they did withdraw, disclosure would significantly inhibit any commercial negotiations with alternative partners.
 - IPW argue that the financial terms for Celtic Manor to operate the facility are subject to confidentiality clauses between NJVG and Celtic Manor. IPW argue disclosure would be in breach of the agreement and could result in legal action by NJVG and or Celtic Manor against the Council. It may also cause Celtic Manor to withdraw from the process. If they did withdraw, disclosure would significantly inhibit any commercial negotiations with alternative providers.
 - The proposal for Redrow Homes and McCarthy and Stone to partner NJVG is in the public domain but the financial terms are not. IPW argue, *"we would expect them to be subject to confidentiality clauses between NJVG and the house building partners"*. IPW argue disclosure would be in breach of the agreements and could potentially result in legal action by NJVG and the housebuilders against the Council. It may also cause

either partner to withdraw and disclosure would significantly inhibit any commercial negotiations with alternative partners.

- IPW argue disclosure would undermine the Council's position in respect of confidential ongoing discussions surrounding an event and if released may result in the event being lost by Hoylake and *"dependent on details of the confidentiality arrangement with between the Council and the R&A could have legal consequences"*.
 - Some information is commercially sensitive information of NJVG and its proposal and therefore IPW argue the information belongs to NJVG. IPW argue that if the overall project costs were to be disclosed it may adversely affect NJVG's ability to deliver the project and be of significant value to any competitor of NJVG.
 - Disclosure may also adversely impact the ability of NJVG to complete the land acquisition at the agreed prices to enable the development to proceed.
 - Disclosure of some information may impact the ability of NJVG to attract investors. Disclosure of the forecasted profits would be in breach of the agreement with Celtic Manor and would be of significant benefit to any of Celtic Manor or NJVG's competitors.
 - Disclosure of the Council's recycled land receipts may impact the Council's position and funding on other projects.
 - Disclosure of some information would be in breach of the NJVG's commercial agreements with its partners. It may impact NJVG's ability to attract other partners and equity investors and be of benefit to its competitors.
 - Disclosure may have an impact on the ability of the NJVG to acquire the necessary land from some of the third parties and deliver the project.
 - Disclosure of the proposed interest rate may have an impact on NJVG's ability to attract alternative funding and equity investors. IPW argue disclosure would also affect the Council's ability to set interest rates on other projects and would be seen to set a precedent.
25. As the Council's submissions in response to the Commissioner's investigation were limited, the Commissioner has also considered the contents of the Council's initial response to the request within which it provided more explanation about its application of regulation 12(5)(e).
26. In its initial response to the request, the Council explained that it was disclosing a redacted version of the requested information which

comprised of two documents: *“an internal report on the requirement of the first condition in the Development Agreement, a Funding and Phasing Plan provided by NJVG”* and *“an external due diligence report on the NJVG funding and phasing proposals, which sets out and reviews commercial information provided by NJVG”*. It argued:

“It is known publicly that the cabinet did not approve the Funding and Phasing Plan submitted. However, this project is still live: Wirral Borough Council and NJVG are still parties to a Development Agreement and NJVG is currently seeking an alternative means of funding for the Development. The disclosure at this stage of the confidential commercial information would have a serious impact on the ability of the NJVG to find such an alternative solution.”

27. The Council's supporting arguments in its response to the request largely reflected the points made by IPW as outlined at paragraph 24 above.

Commissioner's considerations: is the exception engaged?

28. The Commissioner initially considered whether the exception is engaged with reference to the four criteria which must be met, namely; the information is commercial or industrial in nature, the information is subject to a duty of confidence under either the common law duty of confidence, contract, or a statutory bar, the confidentiality is protecting a legitimate economic interest and that economic interest and thereby its confidentiality would be adversely affected by disclosure of the information.
29. The Council said that as it considered the first three elements of the test for this exception to have been met, it considered the fourth test met: the confidentiality would be adversely affected by disclosure.

Is the withheld information commercial or industrial in nature?

30. The Council considered that the information was commercial in nature as it relates to *“proposed commercial activities of the Council and of the Nicklaus Joint Venture Group (NJVG), set out in the Development Agreement between the Council and NJVG dated 8 December 2016”*.
31. Having viewed the withheld information, the Commissioner considers that the withheld information is commercial in nature as it relates to the proposed commercial activities of the Council and NJVG. These activities are the financial structures and proposals for the development of the golf resort between the Council and NJVG as set out in their Development Agreement.

Is the withheld information confidential under the common law of confidence, contract or a statutory bar?

32. The Council explained that there is a legal requirement for the redacted information to remain confidential due to a mutual contractual obligation between the Council and NJVG. In response to the request, the Council stated *"we can confirm that the legal requirement to keep the redacted information confidential is a mutual contractual obligation between the Council and NJVG provided in the Development Agreement."* In its submissions to the Commissioner the Council also stated *"disclosure will be in breach of the contract."* It argued that this contract is current and in force.
33. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain. It is clear to the Commissioner that the information in this category is not trivial in nature. The Commissioner also understands that the information has not been placed in the public domain.
34. However, the Council has not provided any evidence of these contractual clauses regarding confidentiality of the withheld information. The Council have not referred to any common law duty of confidence as it has referred to this mutual contractual obligation with the Council and NJVG. However, without sight of these legal clauses which state that this information should remain confidential, the Commissioner cannot accept that the withheld information is confidential under a particular contract.
35. The Commissioner considers that it is reasonable to assume that the information has been shared between the Council, NJVG and the third party companies in circumstances creating an obligation of confidence. However, the Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information. The Council have not provided convincing evidence or arguments to demonstrate that this information is subject to confidentiality provided for by the law.

Is the confidentiality protecting a legitimate economic interest?

36. In the Council's response to the request it explained that it considered, *"disclosure of the redacted information would undermine the relationship between Wirral Borough Council and NJVG; adversely affect Wirral Borough Council's bargaining position and prejudice the commercial interests of Wirral Borough Council and NJVG; and affect Wirral Borough Council's and NJVG's ability to do similar business with others in the future."*

37. The Council has stated *"the confidentiality is designed to protect the legitimate economic interests of Wirral Borough Council and NJVG."* From the information and submissions provided, the Commissioner understands the legitimate economic interest the Council has identified to be the bargaining positions of both NJVG and the Council, both in relation to this specific matter and in future bargaining processes.
38. The Commissioner considers that to satisfy the third criterion, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. 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.
39. The Council's position is that as contracts have been exchanged, the developers are in the process of raising funds and therefore disclosure may *"potentially jeopardise the project and is very likely to affect the confidence in the developer's fund raising capabilities and majorly disadvantage the parties to the contract."*
40. In respect of timing, it argued that at the time of the request, *"the (now redacted) commercial information requested was highly sensitive. As the funding and completion of the Development is very much alive, it is still highly sensitive. Disclosure would cause serious harm to the legitimate economic interests of Wirral Borough Council and NJVG. We state this having consulted the ICO guidance, which cites to the implementation guide to the Aarhus Convention on defining 'legitimate economic interest'."*
41. The Council provided several arguments in its initial response to the complainant as to why it considers disclosure would adversely affect the legitimate economic interests identified. As referenced at paragraph 27, the Council's supporting arguments largely reflected the ones outlined by IPW at paragraph 24. Firstly, the Council explained that NJVG had sought a loan of £26m from the Council. The Council argued that the withheld information contains details of the PWLB interest rate (the rate at which the Council can borrow money). It stated that while the interest rate is in the public domain, the interest rate at which the Council *will lend* money is not in the public domain and is therefore commercially sensitive for both the Council and NJVG. It argued that disclosure of this information would affect NJVG's ability to attract alternative funding and equity investors. It also argued that disclosure would affect the Council's ability to set interest rates on other projects and *"would be seen to set a precedent"*.

42. It is unclear what precedent the Council is referring to here. The Commissioner interprets the Council to be referring to the precedent of the interest rate at which the Council will lend money on other projects however as the Council has not clearly stated this, she cannot assume this is the case. Regardless, the bar for an adverse effect under the EIR is a high one and the Commissioner considers this to be a speculative argument that does not demonstrate a highly likely adverse effect on the Council.
43. The Council further argued that the withheld information contains details of the first amount that NJVG would draw down from the loan it seeks, and the sum relating to the amount NJVG is paying for the land. The Council considers this sum to be commercially sensitive and that disclosure would affect NJVG's ability to acquire the necessary land from some of the third parties. In turn, the Council argue this would adversely affect NJVG's ability to deliver the development.
44. The Council also argued that the withheld information contains the financial details and commercial elements of the proposal for Redrow Homes and McCarthy & Stone to partner NJVG on this project. The Council argue if this information were to be disclosed, either of these prospective partners may choose to withdraw from the process. The Council argued that disclosure would significantly inhibit NJVG in any commercial negotiations with alternative partners and affect NJVG's ability to complete the land acquisition at the agreed prices.
45. The Council argued that the withheld information also contains financial terms for Celtic Manor to operate the completed hotel and championship golf course. The Council argue if these details are disclosed, Celtic Manor may withdraw from the process. The Council state that disclosure would significantly inhibit NJVG's ability in any commercial negotiations with alternative providers.
46. The Council stated that the withheld information contains details of the equity investment NJVG are seeking, the proposed Council receipt and NJVG's projected profits. It stated that this information is all commercially sensitive. The Council argued that disclosure would impact NJVG's ability to attract investors and that disclosure of NJVG's projected profits would be of benefit to any competitors of NJVG.
47. The Council explained that the withheld information also contains detailed forecast costs of the Development which the Council stated are subject to amendment and refinement. It argued this is commercially sensitive information, arguing disclosure would adversely affect the ability of NJVG to deliver the project and would be of significant value to any competitor of NJVG.

48. Finally, the Council explained that the withheld information contains details forecast overage payable by NJVG which it considers to be commercially sensitive. The Council argue disclosure would adversely affect NJVG's ability to deliver the development and would be of significant value to any of NJVG's competitors.
49. All of the above arguments concern the legitimate economic interests of NJVG, not those of the Council. However, the Council has not provided any evidence to suggest that it has consulted with NJVG about the adverse effect of disclosure. It is not sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
50. Therefore, Commissioner does not consider that the Council has clearly demonstrated how this information is protecting a legitimate economic interest because the Council has not provided evidence of any consultation with the third party, NJVG.

Would the confidentiality be adversely affected by disclosure?

51. Regulation 12(5) refers to an adverse effect on various interests. The Commissioner's view is that the phrase "adversely affect" implies harm to something; in other words, disclosing the information would harm the interest specified in the exception. In this respect, "adverse effect" is equivalent to "prejudice" in FOIA and there are similarities between the exceptions in regulation 12(5) and the "prejudice-based" exemptions in FOIA. However, the threshold for what constitutes adverse effect in EIR is different to that for prejudice in FOIA, as explained below.
52. The Information Tribunal, in *Benjamin Archer v the Information Commissioner and Salisbury District Council* ([EA/2006/0037](#)⁹ 9 May 2007) ("*Archer*"), identified some key elements of the adverse effect test at paragraph 51:
 - "*First, it is not enough that disclosure should simply affect [the interests referred to in the exception]; the effect must be 'adverse'.*
 - *Second, refusal to disclose is only permitted to the extent of that adverse effect.*

⁹ <http://informationrights.decisions.tribunals.gov.uk//Public/search.aspx>

- *Third, it is necessary to show that disclosure 'would' have an adverse effect - not that it could or might have such effect.*
 - *Fourth, even if there would be an adverse effect, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'.*
 - *All these issues must be assessed having regard to the overriding presumption in favour of disclosure.*
 - *The result, in short, is that the threshold to justify nondisclosure is a high one."*
53. To engage the exception, a public authority must be able to show that there would be some adverse effect on those interests specified in the exception. It is not enough to show that the information is related to those interests. As long as it can be shown that disclosure would produce *an* adverse effect as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test.
54. Public authorities must also be able show how the adverse effect would happen. This is equivalent to the "causal link" in establishing prejudice under FOIA.
55. For a public authority to apply an EIR exception, it must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect.
56. Our interpretation of "would adversely affect" is supported by the decision of the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030, 17 October 2006)* ("*Hogan*"), at paragraphs 28–34. The Tribunal in *Hogan* was considering a prejudice-based exemption in FOIA; "prejudice" in FOIA is considered to be equivalent to "adverse effect" in EIR. The *Hogan* Tribunal said at paragraph 33 that the term "would prejudice" means: "*the occurrence of prejudice to the specified interest is more probable than not*".
57. The prejudice-based exemptions in FOIA use the phrase "would or would be likely" to prejudice. The *Hogan* Tribunal went on to say that "would be likely" meant "*a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not*". Unlike the FOIA exemptions, however, the EIR regulation 12(5) exceptions do not contain the phrase "would be likely", so they can be

applied only where it is more probable than not that the adverse effect would happen.

58. It is not possible to prove beyond doubt that the adverse effect would happen, but a public authority must still show that:
- the causal link between disclosure and effect is so convincing that the adverse effect is clearly more likely than not to happen. This could be the case even if the adverse effect would happen only once or affect only one person or situation; or,
 - disclosure is more likely than not to have an adverse effect, given the potential for the adverse effect to arise in certain circumstances, and how frequently these circumstances arise (ie the number of people, cases or situations in which the prejudice would occur).
59. The fact that EIR uses only “would” and not “would be likely” means that the test for engaging these exceptions is more stringent than that for prejudice-based exemptions in FOIA. A public authority cannot engage an exception if it cannot show that the adverse effect is more likely than not to happen (ie if there is a less than 50% chance).

Conclusion

60. For this exception of commercial interests to apply under the EIR, the arguments need to be strong on the adverse effect. However the Council has not made a strong case to the Commissioner to demonstrate this. The majority of the Council’s adverse effect arguments relate to NJVG’s economic interests, but they have not provided evidence of arguments from any consultations with NJVG. On the basis of the evidence provided there is not enough evidence of an adverse effect to NJVG.
61. Ultimately, the Commissioner considers the Council have not evidenced its arguments about contractual clauses of confidentiality and it has not provided evidence to confirm that it has consulted with the relevant third parties. Therefore, the Council has not demonstrated that an adverse effect of more than 50% chance would arise from disclosure of this information. As the Council has not demonstrated this, the Commissioner has no other option than to find the exception has not been engaged and order disclosure of the information to the complainant.

Regulation 5(2) – time for compliance

62. Regulation 5(1) states that: *“a public authority that holds environmental information shall make it available on request.”*

63. Regulation 5(2) states that such information shall be made available "*as soon as possible and no later than 20 working days after the date of receipt of the request.*"
64. The Commissioner considers that the request in question constituted a valid request for information under the EIR.
65. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the Council has breached Regulation 5(2) of the EIR.

Regulation 11

46. Regulation 11 of the EIR states that:

- (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
- (3) *The public authority shall on receipt of the representations and free of charge—*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
- (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*
- (5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—*
 - (a) *the failure to comply;*
 - (b) *the action the authority has decided to take to comply with the requirement; and*
 - (c) *the period within which that action is to be taken.*

66. From the evidence presented to the Commissioner in this case it is clear that the complainant only requested an internal review as he had not received a response to his initial request. However, in failing to carry out an internal review within 40 working days the Council has also breached Regulation 11 of the EIR. The Commissioner does not require any remedial steps.

Other Matters

67. In bringing this complaint to the ICO, the complainant also stated that

*"disclosure of partial information ("**disclosed information**") on 26/11/19 was done in a way that resulted in some duplicate and blank pages. There is also some confusion regarding the numbering system (for example page 12, then another unnumbered page, then page 13). The pages numbers are also missing from some pages (which makes checking even more difficult)."*

68. Whilst details of the presentation of disclosed information are not generally a matter that would be covered in a decision notice, having reviewed the withheld information and the redacted version of information disclosed to the complainant, the Commissioner considers the way in which the information was provided to be generally satisfactory.

Right of Appeal

69. 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@justice.gov.uk

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

70. 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.
71. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF