

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 December 2014

Public Authority: Leeds City Council

Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed development at the Thorp Arch Estate in Wetherby. Leeds City Council disclosed some information and withheld other information under the exceptions for information in the course of completion (regulation 12(4)(d)) and adverse effect to the confidentiality of commercial information (regulation 12(5)(e)).
2. The Commissioner's decision is that Leeds City Council:
 - Disclosed the (non-excepted) information held and complied with regulation 5(1) of the EIR;
 - failed to issue a refusal notice in time and breached regulation 14(2);
 - Wrongly withheld information under regulation 14(d) and,
 - Wrongly withheld information under regulation 15(e).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the Draft Decision Notice and the Viability Assessment to the complainant.
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.

Background

5. The request relates to an outline planning application (reference 13/03061/OT) for a residential development outline planning application for a development that "...includes up to 2000 houses, associated community facilities, sports pitches, village centre, primary school, open space, enhanced bus service and relief road"¹.
6. The complainant has stated that the request was prompted by concerns that the site in question, a former Royal Ordnance Filling Factory, might be contaminated. The complainant has stated he raised the possibility that developing the site might potentially result in health risks to the local population and site workers. He has also raised concerns about the potential costs associated with decontaminating the site, should this be necessary.
7. At the time of the request (and at the time of writing) the council had not issued a decision in relation to the planning application.

Request and response

8. On 30 April 2014, the complainant wrote to Leeds City Council (the "council") and requested information in the following terms:

In connection with planning application PA 13/03061 – residential development of 2000 houses on Thorp Arch Trading Estate. I would like to request, under the Environmental Information Regulations 2004, all information held in any form by or on behalf of Leeds City council regarding contamination of the land at Thorp Arch Trading Estate, and regarding contamination of the building proposed for use as a primary school on the site (Queen Mary House, I believe).

¹ <http://democracy.leeds.gov.uk/documents/s106266/2%2013-03061-OT%20-%20Thorp%20Arch%20Final.pdf>

This should include (as well as all other information covered by the regulations) all reports and analysis produced by or for the Council, or for others but held by or on behalf of the Council, with regard to the extent of contamination of the land and likely remediation required to render the land suitable for any use, including residential development. It should include any information regarding risk analysis of decontamination proposals with regard to human health.

The information should include any information held regarding economic analysis, including cost benefit assumptions, held by the Council with regard to remediation of the site.

It should also include any information regarding proposals for publicly funded subsidy of any proposed decontamination, by whatever source."

9. The council responded on 17 June 2014. It disclosed some information to the complainant and confirmed that other information was not held.
10. Following an internal review the council wrote to the complainant on 12 September 2014. It disclosed further information to the complainant and confirmed that further information was being withheld under the exceptions for information in the course of completion (regulation 12(4)(d) and personal data (regulation 12(3)). The council also stated that a viability assessment was being withheld due to its "commercial sensitivity". In relation to this latter information the council confirmed that it would contact the complainant with further details in due course.

Scope of the case

11. On 7 October 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. During the course of the Commissioner's investigation the council issued a further response to the complainant which confirmed that the viability assessment was being withheld under regulation 12(5)(e) of the EIR.
13. The Commissioner confirmed with the complainant that his investigation would consider whether the council had disclosed all the relevant information it holds and correctly withheld information under regulation 12(4)(d) and regulation 12(5)(e).

Reasons for decision

Regulation 5 – duty to provide environmental information

14. Under regulation 5 of the EIR public authorities have a duty to provide environmental information on request.
15. In this case the council disclosed information to the complainant and confirmed that no further information is held. The complainant has disputed this and considers that more relevant information should be held by the council.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
17. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request). To assist with this determination the Commissioner approached the council with a number of standard questions used in such scenarios. The questions and summaries of the council's responses are reproduced below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

18. The council explained that the complainant's request for internal review raised a number of separate requests within its body and, in order to make sure that these were all picked up, the council broke it down into separate requests, labelled a) to j). These requests were then sent to the two planning officers responsible for the application to advise. Email inbox and electronic drive searches were undertaken by relevant officers².

² Parts a to j of the revised request are reproduced in the annex to this decision notice.

If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

19. The council confirmed that the relevant officers searched their email accounts, as well as their (and the service's) network drives/software for this information. It stated that no information was stored locally on desktop computers or laptops.

If searches included electronic data, which search terms were used?

20. The council stated that searches were undertaken using the term 'Thorp Arch', the planning application number (13/03061), and using the specific terms of the complainant's individual requests. It confirmed that, as the planning officers in question have worked closely on this application, they also had an intrinsic knowledge of the relevant information held. The council further stated that the complainant was also provided with all relevant documents stored on the council's CAPS software (the software used by the council in the administration of planning applications, which is used to host documents), excepting where this information was already available in the public domain.

If the information were held would it be held as manual or electronic records?

21. The council confirmed that information would be contained within electronic (email) records and on the council's CAPS system.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

22. The council stated that it was unable to categorically confirm that the council has never held any other information which would apply to the complainant's request. It confirmed that no information had been deliberately deleted or destroyed since the request was made.

If recorded information was held but is no longer held, when did the council cease to retain this information?

23. The council stated that, as much of the information in question concerns individual officer emails, it was unable to answer this question. It explained that it had implemented a limit on email storage capacity for officers and that its policy on good email management is to delete at regular intervals, and an electronic prompt is sent when an officer's mailbox is full. The council stated that, because of the nature of the work of the planning officers in question (in that they receive many large files via email) general policy is to use the prompts to clear mailboxes of emails/discussion threads that have run their course.

If the information is electronic data which has been deleted, might copies have been made and held in other locations?

24. The council confirmed that relevant information is also stored on the CAPS system and, as stated above, this information has been disclosed to the complainant.

Is there a business purpose for which the requested information should be held? If so what is this purpose?

25. The council stated that some of the requested information would be held to inform the planning decision.

Are there any statutory requirements upon the council to retain the requested information?

26. The council stated that there were no such statutory requirements.

Is there information held that is similar to that requested and has the council given appropriate advice and assistance to the applicant in line with the duty contained at regulation 9 of EIR?

27. The council stated that it was of the view that the requests were clear and, that it confirmed the scope with the complainant. It also confirmed that it had advised the complainant, both in respect of the EIR process and also more generally with respect to the status of the planning application throughout the period of the request.
28. In addition to the above queries the complainant has highlighted some of the correspondence disclosed by the council and suggested that it contains references to further information which has not been provided.
29. The focus of the complainant's concerns is on correspondence from May 2014 which refers to a meeting being set up to consider the options relating to a "scrape" of the site of the proposed development.
30. The Commissioner approached the council with these matters and the council confirmed that it discussed the issue with the relevant service area. The council stated that the officers in question confirmed that they do not hold any further recorded information and stated that the meeting in question was not formal – it was a discussion between officers (which is alluded to in the correspondence provided) and, therefore, there was no requirement for a minute or similar.

Conclusions

31. The Commissioner is mindful that the complainant has a keen interest in the matters identified in the request and that he would like to access all the relevant information in order to understand and form a judgement on the substantive issues.
32. The Commissioner is also mindful that it is for a public authority to decide what information should be recorded and retained in order to meet any statutory obligations or to carry out its public functions.
33. In light of the council's explanation of general searches conducted, the extent of the disclosures made, and its cogent response to the specific concerns raised by the complainant, the Commissioner is satisfied that, on the balance of probabilities, the council has correctly confirmed that no further relevant information is held. He has, therefore, concluded that the council complied with regulation 5(1) of the EIR.

Regulation 14 – refusal notice

34. Where a public authority is relying on an exception to withhold information specified in a request it must, under regulation 14 of the EIR, issue a refusal notice within 20 working days. A refusal notice must specify the reasons not to disclose the information, including any exception being relied upon and the matters considered in reaching a decision with regard to the public interest.
35. In this case, in relation to the withheld viability assessment, the council failed to issue a valid refusal notice within 20 working days. The Commissioner has, therefore, concluded that the council breached regulation 14(2) of the EIR.

Regulation 12(4)(d) – material in the course of completion

36. The council has withheld a draft decision notice for the planning application in question and a viability assessment under this exception.
37. Regulation 12(4)(d) provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data. By nature of being an unfinished document (by definition), draft documents will similarly engage the exception. A draft version of a document will still be considered an unfinished document even if the final version of the document has been published.
38. If the information in question falls into one of the categories above then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the

exception, however, any adverse effects of disclosure may be relevant to the public interest.

The Viability Assessment

39. The council confirmed that, in support of their application, Rockspring LLP (the "developer") submitted a viability assessment. The council has stated that the assessment was, at the time of the request, subject to change and confirmed that it had been withdrawn by the developer who was working on a revised version. The council has argued that the information, therefore, falls into the category of excepted information defined by regulation 12(4)(d).
40. The Commissioner's guidance clarifies that a document may be unfinished because an authority is still working on it at the time of the request or because work ceased on it before it was finalised and there is no intention to finalise it. Draft documents will also engage the exception. Similarly, the exception also applies to incomplete data, however, where an authority is using or relying on data at the time of the request then it cannot be considered incomplete simply on the basis that it might be modified or amended in the future.
41. In this case, the viability assessment was provided to the council by a developer in support of a planning application. There is no suggestion that the assessment was presented as an incomplete or draft document. The Commissioner considers that the fact that it has been withdrawn by the developer does not mean that it automatically falls into the categories defined by the exception – it is for public authorities to make this case. The fact that the viability assessment is to be superseded by a new document might simply mean that any data or facts accurate at the time of the request will be replaced by updated information at a later date. The council has not provided any evidence which contradicts this likely option.
42. The Commissioner considers that the viability assessment presented to the council and held at the time of the request was a complete, finished document. He has, therefore, concluded that the exception is not engaged.

The Draft Decision Notice

43. In this case, the council has confirmed that the draft decision notice is an unfinished document. The Commissioner has, therefore, concluded that the information engages the exception. He has gone onto to consider the public interest.

Public interest in disclosure

44. In considering the public interest in this case, the Commissioner is mindful that regulation 12(2) of the EIR instructs authorities to apply a presumption in favour of disclosure. The council has acknowledged this and has further stated that the planning application is a matter of substantial public interest.
45. The complainant has raised concerns about the potential environmental contamination of the site of the proposed development. The complainant has voiced concerns about the impact of these environmental issues on costs associated with decontamination, costs which he maintains will have an impact on the financial viability of the development. The complainant has argued that access to the information will ensure that the council has properly considered these factors before reaching a decision in relation to the application.
46. The complainant has also disputed the council's position that the information reflects a view that is subject to change and suggests that the application is in the "final throes", with a decision due to be made.

Public interest in maintaining the exception

47. The council has stated that it does not consider that there is a significant public interest in draft documentation which will enter the public domain once it has been finalised.
48. The council has argued that, as the application in question has not yet been determined, disclosing the information could potentially mislead the public into thinking that approval had been granted, which could result in confusion.
49. The council has also stated that the application will require approval by Plans Panel. Any proposed conditions will form part of the report which is presented to the panel and will be available in the public domain 5 days prior to the panel's consideration of the matter. The council, therefore, considers that the planning process caters for public engagement and addresses the public interest in transparency.

Balance of the public interest

50. In reaching a determination as to where the balance of the public interest lies the Commissioner has noted that a decision in relation to the planning application had not been reached at the time of the request.
51. The Commissioner acknowledges that, in some situations, the disclosure of information ahead of a decision being reached could have a damaging

impact on the process of deliberation. However, in any given case, he considers that it is for the public authority to identify what form the impact might take and to explain how disclosure of the specific information would result in the effects identified.

52. In this instance the council has explained that disclosure of the information might result in the public being misled or confused. The Commissioner does not consider that such arguments carry any significant weight because in most cases it should generally be possible for an authority to put disclosure into some form of context. The council has not provided any explanation why it would be difficult or would require disproportionate effort for it to correct any public misconceptions about the nature of the disclosed information.
53. In effect, the council's position in relation to the public interest in this case hinges on the validity of its argument that disclosure would result in public confusion and misperception. As, noted above, the Commissioner considers that the council has not provided any explanation why it would, in this instance, be unable to correct any public misperception or confusion. Had the council advanced arguments which identify that disclosure would invade the safe space of the decision making process, the Commissioner considers that the balance of the public interest might have been differently weighted.
54. Whilst the Commissioner acknowledges that the planning process provides for some public participation he has not been provided with compelling public interest reasons why the exception should be maintained in this specific case. Having considered the presumption in favour of disclosure provided by regulation 12(2) and the potential size and environmental impact of the development, the Commissioner has concluded that, in this instance, the public interest balance is weighted in favour of disclosing the information.

Regulation 12(5)(e) – commercial confidentiality

55. Regulation 12(5)(e) of the EIR provides 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".
56. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He 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?

57. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned 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 for profit.
58. The information in question is a viability assessment ("assessment") submitted by the developer for the purposes of supporting a planning application. The Commissioner notes that the assessment was produced for the purposes of supporting an application by the developer to further its commercial ends. The document relates to the financial viability of the proposed development and the developer's ability to pursue it and contains details of the developer's financial and economic modelling.
59. The Commissioner considers that the information is clearly commercial in nature, and has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

60. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
61. The council has stated that the developer and the council consider the assessment to be confidential and that this was made explicitly clear upon receipt, with the correspondence in question being marked as such. The council has argued that it is of the view that, even if confidentiality had not been explicitly expressed, it would still be implicit when receiving sensitive information of this nature.
62. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
63. The council has confirmed that the information is not otherwise accessible and that it is not trivial in nature. It also made reference to *Bristol City Council v Information Commissioner and Portland and*

Brunswick Squares Association (EA/2010/0012), where the Tribunal accepted evidence that it was "usual practice" for all documents containing costings to be provided to a planning authority on a confidential basis.

64. On the basis of the explanations provided by the council, the content of the withheld information and the above criteria, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence and that an explicit obligation of confidence between the council and the developer exists. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law and considers that this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

65. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
66. 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. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

"Determine harm. 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".

67. The council has argued that disclosure would cause harm to the economic interests of the developer. It has stated that releasing details of the developer's financial and economic modelling (including projected income from any development) would prejudice their commercial interest and allow competitors to take advantage of their methodology.
68. The council has argued that, if the planning application were to be approved, prospective builders and buyers of the units on the site would be party to the developer's estimated values for properties, which they could use to their advantage in any contract negotiation or sale. The council has further argued that this prejudice would also apply to

estimated costings for any environmental remediation, since prospective contractors could use access to these estimates as a bargaining tool.

69. The Commissioner considers that the withheld information contains financial modelling information and details of the developer's strategy in respect of the proposed development which are of significant commercial value. Disclosure of the withheld information would provide parties negotiating with the developer with a competitive advantage in these negotiations which would be to the detriment of its economic interests.
70. The Commissioner further considers that, if disclosed, the detail contained within the withheld information would provide third parties with knowledge which would not otherwise be available in a competitive market.
71. The Commissioner notes that effective financial modelling is at the heart of the information which regulation 12(5)(e) seeks to protect. The Commissioner is, therefore, satisfied that disclosure of the information could weaken the developer's edge by allowing competitors to copy the most innovative or successful parts of the model and use this and other financial information to the detriment of the developer's economic interests.
72. The Commissioner has concluded that the release of the information would adversely affect the interests of developer.

Would the confidentiality be adversely affected by disclosure?

73. The Commissioner considers that the disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publically available. In turn, this will also harm the legitimate economic interests which the Commissioner has identified above, which the confidentiality provided by law is there to protect.
74. The Commissioner has, therefore, concluded that this element of the exception is engaged and, as a result, finds that the exception is engaged.

Public Interest Test

75. Having determined that the exception available at regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest test.
76. Regulations 12(1) and (2) of the EIR provide:

"(1) ... a public authority may refuse to disclose environmental information requested if-

- (a) an exception to disclosure applies under paragraphs (4) or (5); and*
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure."

77. As the Information Tribunal noted in *Bristol City Council v the Information Commissioner (EA/2010/0012)*, regardless of the fact that disclosure of the requested information would involve a breach of confidence by the council, there is nevertheless a presumption that it should be disclosed to the requester and only withheld if, in all the circumstances at the time of the request, the public interest in maintaining its confidentiality outweighed the public interest in its disclosure³.

78. In determining where the balance of the public interest lies the Commissioner has considered arguments submitted by the council and the complainant.

Public interest in disclosure

79. The council has acknowledged that the planning application in question has attracted significant public interest. It has noted that a number of objections and concerns relating to land contamination issues on site of the proposed development site have been submitted via the council's website.

80. The complainant has argued that the critical questions in order to decide the planning application relate to the potential contamination remaining on the site. The complainant has stated that a sister site, built to the same design, in Blackburn was found to have extensive contamination when development was attempted. The complainant considers that the critical questions specifically relate to the direct effects of the contamination, and potential health risks to the local population, the site

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol CC v IC & PBSA \(0012\) Decision 24-05-2010 \(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

workforce and any future residents. The Commissioner notes that a pressure group which reflects the level of local concern about these matters has been set up⁴.

81. The complainant has also pointed to the indirect effect of the potential costs of decontaminating the site, and making it safe. The complainant has identified that these costs have to be incorporated into the financial viability calculation - an essential part of the planning process. The complainant has argued that access to the information will provide reassurance that the potential costs of addressing any contamination have been incorporated into the assessment of viability.
82. The complainant has stated that, until his request was made, the council had not made information relating to viability and contamination available via the planning application on its website. He has argued that the council made attempts to obtain final democratic approval for the application in December 2013, with none of this information in the public domain. As confirmed by the council, the application will now be determined by the council's City Plans Panel (its decision making body for large scale development proposals) which will consider the relevant viability and contamination factors.
83. In support of their argument for the need for enhanced transparency in this case, the complainant has directed the Commissioner to other information disclosed by the council in response to their request. The information in question consists of a number of "contaminated land consultation" responses, issued to the planning officer dealing with the application. These documents form the basis of internal advice from the Contaminated Land Team (CL).
84. The Commissioner notes that a number of these documents suggest that the developer was refusing to carry out preliminary site-wide investigation and that, on this basis, the recommendation to the planning officer was that the application should not be granted⁵. The Commissioner notes that subsequent consultation responses acknowledge that concerns raised by CL have been, to an extent, addressed by the developer. However, the Commissioner acknowledges that the perception that environmental factors which might have an

⁴ <http://www.thorparch.org.uk/tate-proposals-information-log>

⁵ See: "(Application reference: P/13/03061/OT) Leeds City Council, Contaminated Land Consultation Response: Information for Planning Officer", dated 12 February 2014.

impact on public health and safety might not be being properly addressed carries some weight.

Public interest in maintaining the exception

85. In support of maintaining the exception the council has directed the Commissioner to take into account the fact that valuable commercially confidential information is a form of “possessions” for the purposes of Article 1, First Protocol of the European Convention on Human Rights (ECHR).
86. The council has also argued that there is a strong public interest in the maintenance of commercially confidential information and in not commercially prejudicing developers by releasing information which could influence negotiations with contractors, or reveal their methodology to competitors. The council has also stated that it considers that the planning process is already open and transparent and any effects on proposals as a result of the information in the assessment will enter the public domain.
87. The council has argued that it has engaged the services of a consultant to analyse and advise upon the soundness of the methodology and the findings of the developer’s appraisal. It maintains that this, combined with the fact that the City Plans Panel will scrutinise and determine the application should satisfy the need for accountability in its decision making in this case.
88. The council has also argued that there is little public interest in disclosing the information as the assessment has been withdrawn and the information can no longer be used in the determination of the planning application.

Balance of the public interest

89. The Commissioner acknowledges that the exception is designed to protect economic interests and that disclosing the withheld information in this case would provide insights into the developer’s commercial strategy which would be of benefit to contractors it might engage in furthering the development. He has, therefore, accorded this appropriate weight in considering where the balance of the public interest lies. He has also noted the council’s reference to the ECHR in its submissions.
90. The Commissioner notes that, at the time of the request (and currently) a decision has not been made in relation to the planning application. It is well established that the timing of a request can have a bearing on the relative sensitivity of information and, where information identifies a

commercial strategy, the release of information ahead of a decision being reached can inhibit negotiating space.

91. However, the Commissioner notes that, by the council's own acknowledgement, the assessment had been withdrawn by the developer at the time of the request. So, whilst elements of the assessment might form the basis of a future assessment submitted by the developer, the withheld document as a whole is not a factor which will influence the planning decision.
92. The Commissioner further notes that the council has attempted to argue that the assessment is both of significant value to the developer, whilst simultaneously maintaining that there is little public interest in it being disclosed, since it is largely a redundant document.
93. The Commissioner considers that the focus of the public interest in maintaining the exception should be on the harm that disclosure would cause to economic interests. Whilst the council has provided arguments in this regard which were sufficient to engage the exception he does not consider that the council has provided adequate detail about the nature and extent of the harm that disclosure would cause to the developer.
94. The Commissioner considers that the arguments submitted by the council are not sufficiently detailed to link specific harm to specific elements of the withheld information. Whilst he would not expect authorities to engage in a word-by-word analysis of withheld information he does consider that, as a minimum, authorities should be able to identify specific harm and link it to the disclosure of a discrete element of withheld information.
95. In this case, the harmful effects described by the council can be summarised thus: Prospective contractors, buyers or builders will use the information in negotiations to the detriment of the developer. The Commissioner understands the general principle that the availability of information about a business' commercial strategy will be of use to competitors and that the availability of such information, without reciprocal access being provided, can result in harm to the business in question. Clearly, knowledge of (for example) a business' projected profits will allow organisations engaging in negotiations to identify profit margins and potentially skew negotiations to the detriment of the business.
96. However, the Commissioner considers that these general concepts are, in themselves, too high-level or generic in nature to constitute public interest weightings in favour of maintaining exceptions. In the Commissioner's view, the arguments presented by the council do not transcend the status of these high-level, conceptual arguments. He

does not consider that the council has taken sufficient care in this case to demonstrate the causal relationship between specific harm and the disclosure of specific information. Whilst the council might be convinced that disclosure would result in the harm it has indicated, the Commissioner does not consider that the council has shown or explained how this is the case.

97. In relation to the council's argument that there is little public interest in the information being disclosed, the Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.
98. Regulation 12(5)(e) often arises in relation to planning matters. The Commissioner considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases.
99. In relation to the factors which are specific to this matter, the Commissioner notes the complainant's concerns about the contamination issue and the relationship between this factor and the assessment. Clearly, if the proposed site is to any degree contaminated the cost of addressing this will need to be incorporated into any assessment. Access to the withheld information, therefore, would allow scrutiny of the extent to which this has been considered. Whilst the assessment has been withdrawn, the Commissioner notes that there is a clear public interest in scrutinising the development of the application and the extent to which environmental factors have been addressed.
100. The Commissioner acknowledges the council's point that the planning process provides a regulatory structure for reaching decisions, however, in cases where there are significant concerns relating to public health and safety, the need for transparency and public reassurance are intensified.
101. In this case, the complainant has argued that there is a perception that the developer's application and assessment might not be sufficiently addressing the issue of contamination. The Commissioner accepts that it might well be part of the normal planning procedure for differences and concerns to be addressed within the planning approval mechanism and for planning authorities to engage with applicants without interference. However, the Commissioner has weighed this against the importance of the public perception that health and safety concerns are

being robustly addressed and the public interest in promoting public participation in planning matters.

102. The Commissioner considers that the inbuilt public interest in disclosure, the general public interest in promoting public engagement in planning matters and the specific environmental concerns regarding the potential contamination of the proposed development site combine to produce significant weight in this case. In the absence of arguments from the council which clarify the severity or extent of any harm which disclosure would cause the Commissioner has concluded that, in this case, the balance of the public interest weighs in favour of disclosure.

Right of appeal

103. 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

104. 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.

105. 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

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – Request as defined at the internal review stage

- a) The planning draft decision notice for the application.
- b) All correspondence/documents sent from the planning service regarding Contaminated Land.
- c) Any correspondence/documents from/to Public Health regarding Contaminated Land.
- d) Any correspondence/documents from/to Ecology regarding Contaminated Land
- e) Any correspondence/documents from/to the Landscape team regarding Contaminated Land
- f) Any correspondence/documents from/to the Environment Agency regarding Contaminated Land.
- g) Any correspondence/documents regarding economic analysis and contaminated land, ecology or sustainable development.
- h) Any correspondence/documents regarding decontamination proposals and human health.
- i) Any correspondence/documents regarding public funded subsidy for required works.
- j) Any responses from Rockspring or their representatives with respect to site contamination