

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

**Decision notice**

**Date:** 23 March 2016

**Public Authority:** Selby District Council  
**Address:** Civic Centre  
Doncaster Road  
Selby  
North Yorkshire  
YO8 9FT

**Decision (including any steps ordered)**

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1. The complainant has made three requests for different items of advice received by Selby District Council (the Council) in connection with the Burn airfield site. The Council has withheld, either in full or in part, information covered by each of the requests. For request 1, the Commissioner has decided that the Council incorrectly relied on regulations 12(5)(e) (confidentiality of commercial or industrial information) and 12(4)(d) (material in the course of completion) of the EIR to withhold the disputed information and therefore the information should be disclosed. For requests 2 and 3, the Commissioner considers the Council correctly applied regulation 12(5)(b) (course of justice) of the EIR and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exception.
2. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - In relation to request 1, disclose a copy of the remaining contents of the specified report with the exception of the information that the complainant has confirmed is not required, specifically any personal data of an individual and the references to tenants and details of the tenancy agreements.
3. The public authority must take this step 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**

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4. On 13 April 2015, the complainant wrote to the Council and requested information in the following terms:
  1. *Could we have a copy of the professional advice received by SDC from Smith Gore last year for the sum of £8255.05 (Transaction Ref 43103 September 2014) in connection with Burn airfield?*
  2. *Could we have a copy of the advice received from Freeth Cartwright last year in connection with Burn airfield (TR 41429 June for £4352.55, TR 40392 May for £5461.10)?*
  3. *Could we have a copy of the 3 hours of advice received from Mr Jonathan Easton for Burn airfield traveller site (TR 37021 January 2014 for £600)?*
5. The Council responded on 26 June 2015. The Council informed the complainant that it was not obliged to comply with the requests, citing regulation 12(5)(e) (request 1) and regulation 12(5)(b) (requests 2 and 3) of the EIR. Both of the exceptions are qualified by the public interest test and the Council found that on balance the public interest favoured withholding the requested information.
6. On 30 June 2015 the complainant contacted the Council to ask it to reconsider the decision to withhold the requested information. With regard to request 1, the complainant advised that he had no interest in the actual valuation figure from Smiths Gore. The Council therefore carried out an internal review, the outcome of which was provided to the complainant on 21 September 2015. The reviewer upheld the Council's original position.

## **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the Council's refusal to comply with each of the requests, 1 – 3.
8. The Commissioner's analysis of the Council's position with regard to each of the requests is set out in the body of this notice.

## Reasons for decision

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### Background

9. All of the requests relate to information concerning Burn airfield, which is situated in the vicinity of Burn village and near Selby, in North Yorkshire. This site had previously been used as military base. A 12-pitch traveller site is currently positioned on part of the airfield.
10. On 9 January 2014 the Council's Executive body considered whether the Council should inform the Homes and Communities Agency (HCA) that it was interested in purchasing the Burn Airfield site. The Report to the Executive<sup>1</sup> set out the context in which the recommendation was made.

#### **1. Introduction and background**

*1.1 The HCA own a 195 hectare (482 acres) site which is currently used for agricultural (Grade 2) and recreational purposes including Burn Gliding Club and dog walking.*

*1.2 The HCA had discussed with the Council the possibility of selling the site to the Council, however, on 9<sup>th</sup> December 2013 HCA wrote to the Council to say that they propose placing the site on the open market.*

*1.3 Purchasing the land will safeguard the land for future use as a strategic site. It may for example protect the majority of the route of the proposed bypass and could enable the delivery of the bypass by facilitating future development.*

#### **2. The Report**

*2.1 The site is 3.5 km (2 miles) south of Selby town centre; it is 195 Ha (482 acres) in size, in two parcels split by Burn Lane. Both parcels are irregular in shape with no frontage or direct access on to the A19. The larger site is bound by a railway line to the east, Common Lane to the North, Brick Kiln Lane and the village of Burn to the west and Burn Lane to the South. The smaller plot is bound by Burn Lane to the North, agricultural fields to the east and west and a drain to the south.*

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<sup>1</sup>[http://www.selby.gov.uk/sites/default/files/Documents/Committees/Agendas/Executive\\_Public\\_9.1.14.pdf](http://www.selby.gov.uk/sites/default/files/Documents/Committees/Agendas/Executive_Public_9.1.14.pdf)

[...]

*2.7 The HCA following the receipt of their desk study issued a letter to their tenants stating that it is safe to farm the land but if they find any suspect objects it set out the procedures they are expected to take.*

*2.8 The site is partially in Flood Zones 1, 2 and 3 and any application for development will require a sequential test. As part of the Core Strategy the sequential test will be in the order Principal Town, Local Service Centre, Designated Village, Secondary Village.*

*2.9 Part of the site has been designated by North Yorkshire County Council as a SINC (Sites of Importance for Nature Conservation), and this was last surveyed in 2000. Any development will need to take this designation into account.*

[...]

### **3.3 Financial Issues**

*3.4 The site was purchased by Yorkshire Forward (transferred to HCA) in 2003 for £2,694,000.*

*3.5 The Council does not have sufficient cash resources to purchase the site and therefore will need to take out prudential borrowing in full or part depending on the ultimate value negotiated. There is the potential for some funding from the Programme for Growth which could reduce the amount of borrowing needed. The cost of serving the interest payments and the required Minimum Revenue Provision associated with borrowing can not be fully funded by income generation from the site and therefore will require additional finance allocated to this project on an annual basis.*

*3.6 The ultimate funding package will be brought forward as part of the report should Council approval be sought to purchase the site.*

11. The Executive resolved the recommendations and the minutes recorded that: the Executive was interested in purchasing the Burn airfield site; a budget from the Programme for Growth Strategic Sites should be approved; and, authorisation should be given to the Chief Executive to appoint a land agent and procure legal advice to negotiate a price and agree heads of terms.

## **Request 1 – Smiths Gore valuation report**

12. The Council has explained that the request relates to a report that was prepared to aid it in negotiations connected to the purchase of the Burn airfield site. The valuation includes details of all the agricultural tenancies and other leases and licences affecting the land, including the names of the tenants and the rental payments.
13. During the course of the Commissioner's investigation, the Council disclosed a redacted version of the report. In the Council's letter to the complainant, it explained that the redactions had been made under regulations 12(5)(e) (confidentiality of commercial or industrial information) and 13 (third party personal data) of the EIR. The Council also informed the Commissioner that the redacted material would also be covered by regulation 12(4)(d) (material in the course of completion) of the EIR.
14. The complainant has confirmed that he does not object to the decision to withhold the personal data of any individual and details of the tenants and the tenancy agreements. The complainant though continues to dispute the Council's refusal to disclose the remaining items of information. In light of this clarification, the Commissioner has only considered the withheld information not excluded by the complainant. The Commissioner's analysis begins by looking at regulation 12(5)(e) of the EIR.

- **Regulation 12(5)(e) – confidentiality of commercial or industrial information**

15. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
16. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010)<sup>2</sup>, the Information Tribunal considered that the construction of the exception could be read as imposing a four-stage test. All four of the following conditions must be satisfied for the exception to be engaged:

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<sup>2</sup>[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)

- (i) The information is commercial or industrial in nature.
  - (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
  - (iii) The confidentiality is protecting a legitimate economic interest. Where the arguments refer to the economic interests of a third party, it will not be sufficient for a public authority to speculate on the potential harm attached to disclosure. Instead, a public authority must have evidence that demonstrates the arguments genuinely reflect the concerns of the third party.
  - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, the Information Tribunal in the *Bristol City Council* case considered that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. Consequently, it follows that this stage of the test will be met where the preceding stages are found to be satisfied.
17. Where regulation 12(5)(e) of the EIR is found to be engaged on the basis that each of the tests is fulfilled, a public authority must go on to assess the public interest test.
18. The Council has addressed in turn each of the stages of the test in the exception.
- *(i) Is the information commercial or industrial in nature?*
19. The Council considers that the information is commercial in nature, relating to the valuation of land. It explains that valuation "is not an exact science and requires a consideration of relevant characteristics of a site against prevailing local and national market conditions. It includes information on the licenses and leases affecting the land and rental values. It also appraises the likely future development value of the land."
20. The Commissioner accepts that the information is commercial in nature.
- *(ii) Is the confidentiality of the information provided by law?*
21. For the purposes of this test, the Council considers important the inclusion of a confidentiality clause in the report. In this regard, it has highlighted the approach adopted by the Commissioner to the test in his

decision notice served on Peterborough City Council (FS50566023, 10 September 2015)<sup>3</sup>. The decision notice states:

*29. The Commissioner considers "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.*

*30. PCC explained that clause 15 of Baker Storey Matthews' terms and conditions creates an expectation that the information contained in the report would remain confidential and cannot be disclosed without the valuer's written approval of the form and context in which the information would appear.*

*31. The Commissioner considers that this is sufficient to satisfy the requirement for the information to be protected by confidentiality. It may appear that accepting such a clause as evidence that the information is confidential allows public authorities to contract out of their obligations under the EIR. However, to engage the exception a public authority must satisfy the third test provided by regulation 12(5)(e), ie a public authority must be able to demonstrate that the confidentiality is protecting a legitimate economic interest.*

22. This approach to contractual obligations of confidence follows the Commissioner's guidance<sup>4</sup> on the exception. At paragraph 25, he states his acceptance that confidentiality will be provided by law where a public authority can establish that there is a binding confidentiality clause covering the requested information. The Commissioner has therefore found that this stage of the test is met.
23. In making this finding, however, the Commissioner would reiterate his statement in the *Peterborough* decision that said the existence of a broadly drafted confidentiality clause does not allow a public authority to circumvent its EIR responsibilities. Instead, confidentiality is just one element of the tests attached to the exception and a confidentiality clause will only protect genuinely sensitive information from disclosure.

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<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432500/fs\\_50566023.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432500/fs_50566023.pdf)

<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)



- *Is confidentiality protecting a legitimate economic interest?*

24. Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. However, they will not include personal privacy concerns.
25. A public authority applying the exception is required not only to identify the legitimate economic interest of a party but also demonstrate that the disclosure of the confidential information would adversely affect this interest. It is not enough that disclosure *might* cause some harm. Rather, the likelihood of the harm occurring must be more probable than not. With regard to the risk of harm arising through the release of the requested information, the Commissioner's guidance states:

*33. Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of the harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interest at the time it was imposed will not be supported if disclosure would not actually impart on those interests at the time of the request.*

26. The Council considers that both its own economic interests and the economic interests of the author of the report, Smiths Gore, would be adversely affected by the release of the complete report.
27. With regard to its own economic interests, the Council has put its position in context by explaining that the reasons behind the proposed purchase of the land was as an investment looking to the long term development of the site. In the Council's view, it follows that the confidentiality protects a legitimate economic interest. The Council considers that this link was established in the *Peterborough* decision:

*32. The Commissioner is satisfied that the redevelopment of a site is a legitimate economic activity. In this case, it is the legitimate economic interest of Baker Storey Matthews, as PCC explained that the withheld information contained valuation criteria, assumptions Baker Storey Matthews have made on the application of the criteria and other projects with which it had been involved.*



28. The Council also asserts that Smiths Gore would have an economic interest in protecting the confidential information. The Council considers this is borne out by an examination of the confidentiality clause, which signposts that one of the areas of concern is that any disclosure places the information in the context of the whole report such that no party is misled. The Council has confirmed that Smiths Gore refused their consent to disclosure when approached by the Council for their views on the possibility of releasing the report.
29. In terms of the nature and likelihood of an adverse effect occurring through disclosure, the Council commented as follows:

*At the time of the request, negotiations were on going between the parties and the timing and nature of the requested information would disclose commercial information that would put the Council at a disadvantage in relation to its negotiations with the then landowner and commercial negotiations with tenants and licence holders. The intended offer price was in the public domain on 29 April 2014 however negotiations were on going until exchange and completion on 15 July 2015 which was subsequent to the complainant's request made on 13 April 2015. The Council maintains the public interest arguments previously put forward in correspondence.*

*Disclosure of the redacted information would subsequently impact on the Council's ability to ensure that a fair and competitive process was followed, in relation to its proposed purchase. The disclosure of the information would disadvantage the Council in that other interested parties could obtain the information and thwart the Council's acquisition and it has the potential to affect the Council's negotiations with the tenants in relation to their occupation.*

*When the Council contacted the valuers to ask for their consent to release the information requested, they referred to the existence of the confidentiality clause and commented that they viewed disclosure of private treaty particulars in relation to land sales different to disclosure of residential property particulars on the open market and therefore the confidentiality is relevant to this.*

*It is clear from the above and points made in previous correspondence that when considering matters as they stood at the time of the request and the time for response to the request discussions were on-going regarding the site in question. The seller had indicated that the site might be placed on the open market. If the information were to be released it would diminish*

*the Council's ability to achieve best value for money as any third party wishing to enter into a transaction with the Council may base their negotiations on the information contained in the document.*

30. From the point of view of Smiths Gore, the Commissioner has not been provided with any arguments that identify their specific economic interests. Instead, the explanation refers to the rather nebulous explanation that disclosure should not result in a party being misled. How the confusion could arise and how it would affect Smiths Gore is not detailed. In any event, a link between disclosure and the harm to Smiths Gore's own economic interests has not been made out and evidenced. The Commissioner has therefore gone on to consider whether this stage of the test is met on the basis that confidentiality is protecting the legitimate economic interests of the Council.
31. On the face of it, the arguments submitted in support of the Council's position are more persuasive. They speak of the sensitivity of negotiations relating to the purchase of the site at the time the request was made and refer to the likelihood that disclosure would weaken the Council's position in these negotiations. It is precisely the unfair disadvantaging of a party in a commercial sphere that the exception is designed to protect against.
32. The arguments will ultimately only carry weight, however, if they correspond with the information that has actually been withheld. Testing the Council's submissions against the redactions, the Commissioner has found a disconnect between the nature of the prejudice cited and the information itself. This is because in some cases the items of information do not refer to matters that would feature in the negotiations (for example, the sentence withheld in the 'Description' section) or, in others, were already in the public domain. With regard to the remaining items of withheld information, the Commissioner considers that the Council has failed to evidence a link between disclosure of the items of information that are actually in dispute and the disadvantaging of the Council in negotiations relating to the purchase of the site or with the tenants regarding their occupation.
33. For this reason, the Commissioner has decided that the third stage of the test built into the exception is not met and therefore regulation 12(5)(e) of the EIR is not engaged. This means the Commissioner has not been required to consider the public interest test.

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

34. At a late stage of the process, the Council introduced the possibility that regulation 12(4)(d) of the EIR would apply to the withheld information in the report. It stated the following:

*You will note that the valuation report dated 7 March 2014 is not signed and was not finalised. Smiths Gore is no longer in existence and therefore further comments cannot be obtained. Regulation 12(4)(d) applies to the information requested as the request relates to material which is still in the course of completion. The Council submits that the public interest points raised previously are applicable in relation to considering this exception.*

35. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
36. A document may be unfinished because the authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it. Furthermore, draft documents will engage the exception because a draft of a document is by its very nature an unfinished form of that document. The draft version of a document is still an unfinished document, even if the final version of the document has been published. Where the exception is engaged, however, a public authority must assess as part of the exercise of the public interest test whether the sensitivity of the incomplete material dictates that the information should be withheld.
37. There is nothing in the report itself that indicates the document is not the final version but was instead potentially subject to change. Nevertheless, based on the Council's assurance the report was not finalised, the Commissioner has accepted that regulation 12(4)(d) of the EIR does cover the withheld information. He has therefore considered the balance of the public interest.
38. As stated, the Council considers that the same public interest arguments advanced in connection with 12(5)(e) of the EIR equally apply to regulation 12(4)(d). The Council submitted there that the following factors applied:
- Disclosure would put into the public domain tenancy details and rental paid by individuals in breach of the Data Protection Act, which is a strong factor in favour of maintaining the exception.
  - Disclosure would also prejudice on-going negotiations and discussions on the use of the site and on occupancy agreements.

This would affect the Council's ability to deliver best value and meet its statutory duties under section 123 of the Local Government Act 1972. In the Council's view, this factor should be given substantial weight.

39. The complainant does not dispute the Council's decision to withhold tenancy details and any personal data contained in the report. The first public interest argument would not therefore have any application in the circumstances. In effect, therefore, the basis of the Council's position rests on the prejudicial effect that disclosure would have on the Council's continuing negotiations.
40. In the Commissioner's view, it is significant that the Council has sought to rely on the same arguments presented in relation to regulation 12(5)(e) of the EIR. For the reasons explained previously, the Commissioner has found that the arguments referring to the likelihood of the cited prejudice occurring has not been substantiated. By extension, therefore, the Commissioner considers that the corresponding public interest argument carries little weight.
41. Against this is the EIR's emphasis on disclosure and the principles underpinning the legislation which means that the disclosure of environmental information should be the default position. In this case there is a clear public interest in knowing more about the factors that guided the Council on whether it should purchase the Burn airfield site; a purchase that the report to the Council's Executive Committee acknowledged could not come out of the Council's cash resources but would require it to 'take out prudential borrowing in full or in part.'
42. A public authority has a fiduciary duty to the population it serves. Accordingly, the public will want to be assured that any financial decision taken by the authority was based on a robust analysis of the available evidence. In the Commissioner's view, the Council's public interest arguments when considered in context suffer against the arguments for the release of the disputed information. He has therefore concluded that in all the circumstances the public interest in maintaining the exception is outweighed by the public interest in disclosure.

## **Request 2 – legal advice relating to the purchase of the Burn airfield site**

43. The withheld information relates to the Council's employment of an external firm of solicitors, Freeth Cartwright, to act for it in connection with the purchase of the Burn airfield site and specifically the work undertaken over a two month period (February and March 2014). The solicitors were involved in negotiating the terms and conditions of the

sale. The Council considers that this material is covered by the exception to disclosure set out at regulation 12(5)(b) of the EIR.

- **Regulation 12(5)(b) – course of justice**

44. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its 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.
45. For the exception to be applied correctly, a public authority must be able to demonstrate that each of the following three conditions are met: (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on the factor(s) cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.
46. The Council considers that the exception applies to the requested information by virtue of the fact that it attracts legal professional privilege (LPP). It is accepted that the 'course of justice' component of regulation 12(5)(b) may cover information protected by LPP. In contrast though with section 42(1) of FOIA, which exempts LPP information from disclosure in that piece of legislation, a public seeking to rely on regulation 12(5)(b) of the EIR is required to take the additional step of demonstrating that disclosure would adversely affect the course of justice.
47. With regard to the 'course of justice' component of the exception, the Commissioner's guidance<sup>5</sup> on regulation 12(5)(b) explains that LPP protects advice given by a lawyer to a client and confidential communications between them about that advice. It exists to ensure complete fairness in legal proceedings. There are two types of privilege within the concept of LPP; litigation privilege and advice privilege. In this case the Council considers that advice privilege applies.
48. Advice privilege will apply where there was no litigation in progress or contemplated at the time or where the advice does not directly refer to the litigation. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving

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<sup>5</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

legal advice. The client in this case is the Council and Freeth Cartwright LLP, the legal advisor.

49. The relationship between the parties, and the nature of the issues being discussed, would tend to support the position that LPP applied. Information may no longer be protected by LPP, however, where its quality of confidence is lost owing to an unrestricted disclosure. This will occur where a disclosure is made to the world at large or without any restriction on the future use of the information. Whether the public authority intended to relinquish its right to claim LPP is irrelevant.
50. The Council has confirmed that the requested information has not been placed in the public domain. It is noted, however, that elements of the correspondence were copied in to Smiths Gore, one of the Council's professional advisors. This potentially opens the door to an unrestricted disclosure. The Council rejects this possibility, however:

*The sharing of communications with Smiths Gore, one of the Council's professional advisers was necessary to obtain comprehensive professional advice from its legal advisers. The dominant purpose of the communications between the Council and both professional advisers was to provide financial and legal advice in connection with the then proposed acquisition. The information was created or brought together for that transaction and the information was passed to or emanated from the professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. Privilege has not been lost as it has not been shared without restriction to external third parties or with the world at large.*

51. The Commissioner is content that the relationship between the Council, Freeth Cartwright and Smiths Gore, and the circumstances in which the information was shared between the partners, connotes that the sharing of the information was on a restricted basis. The Commissioner is also not aware of any evidence that an unrestricted disclosure may have occurred in another context. He has therefore found that the withheld information does attract LPP and is covered by the 'course of justice' element of the exception. The exception will only be engaged, however, where disclosure would adversely affect the course of justice.
52. 'Adversely affect' means that there must be an identifiable harm and the likelihood of the harm occurring is more likely than not. It may be the case that disclosure will have an adverse effect on the course of justice



simply through the weakening of the vital concept of LPP. The Upper Tribunal in *GW v Information Commissioner & Local Government Ombudsman & Sandwell MBC* ([2014] UKUT 0130 (AAC), 11 March 2014)<sup>6</sup> also clarified, however, that this should not be an automatic assumption. Instead, Judge Turnbull confirmed that testing whether there would be an adverse effect “requires attention to be focused on all the circumstances of the particular case, and there is no room for an absolute rule that disclosure of legal privilege information will necessarily affect the course of justice” (paragraph 43).

53. For guidance, the Council has found important the decision of the Upper Tribunal in *DCLG v Information Commissioner & WR* ([2012] UKUT 103 (AAC), 28 March 2012)<sup>7</sup>. The Upper Tribunal said it was relevant to take into account any adverse effect upon LPP and the administration of justice generally. The Upper Tribunal proceeded though on the acceptance that “the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (eg that the legal advice is very stale), such there would be no undermining of public confidence in the efficacy of LPP generally [...] whether regulation 12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis” (paragraph 53).
54. The Council advises that the legal advice cannot be described as stale, in that the negotiations relating to the terms and conditions of the purchase were continuing at the time of the request. The effect of disclosure would therefore be to disadvantage the Council by exposing its legal discussions. On this basis, the Commissioner accepts that there would be an adverse effect and regulation 12(5)(b) of the EIR is therefore engaged. Accordingly, the Commissioner has gone on to assess the public interest test.

### **The balance of the public interest**

55. The complainant has expressed a number of concerns about the purchase of the site and the Council's intentions with regard to the use of the land. He considers that these concerns arrange themselves into a strong public interest case for disclosure. To support his position, the complainant has provided detailed arguments that cogently illustrate why further transparency of the Council's decision-making is required.

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<sup>6</sup> <http://www.osspsc.gov.uk/judgmentfiles/j4159/GIA%204279%202012-01.doc>

<sup>7</sup> [http://www.osspsc.gov.uk/judgmentfiles/j3477/\[2012\]%20AACR%2043bv.doc](http://www.osspsc.gov.uk/judgmentfiles/j3477/[2012]%20AACR%2043bv.doc)



56. The Commissioner has considered all of the arguments advanced by the complainant. For the purposes of this notice, however, he has found it appropriate to provide a summary of what he considers are the key submissions:

- The Council has not clearly explained the reasons for purchasing the site in the information that has been published.
- The land has been purchased before any policy has been developed and consulted on and this is not the proper order.
- There is a strong public interest in knowing more about the proposed decision to spend a significant amount of public funds.
- It is not evident that the Council has properly analysed the risks of purchasing the site.

57. The Commissioner accepts that these may provide a weighty case for disclosure.

58. Against this, the Council has stressed the importance of the concept of LPP and considers this is reflected in a number of decisions of the Commissioner and the Information Tribunal. For example, the Council has cited the Commissioner's comments made in a decision notice served on South Downs National Park (FS50586791, 16 September 2015)<sup>8</sup> on the exercising of the public interest test in relation to information covered by LPP:

*30. Previous decisions of the Commissioner and both the First-tier and Upper Information Tribunals have emphasised the importance of LPP. A theme linking each of these decisions is that LPP is fundamental to the administration of the course of justice and therefore any decision that could weaken the confidence in the protection that LPP provides should not be taken lightly. Instead, following the approach of the First-tier Tribunal in Calland v The Information Commissioner and the Financial Services (EA/2007/0136, 8 August 2008)<sup>9</sup>, it must be shown that there is a clear, compelling and specific justification for breaching the confidentiality. (paragraph 37)*

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<sup>8</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432839/fs\\_50586791.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432839/fs_50586791.pdf)

<sup>9</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>

59. The decision notice goes on to say in the following paragraph that additional weight may be added to the argument for maintaining the course of justice exception where the legal advice is recent and, or live. In that particular case, the Commissioner considered that in no sense could the legal advice be described as 'stale', which he suggested might have strengthened the position for disclosure.
60. To decide where the balance of the public interest lies, it has been necessary to assess to what extent the contents of the information would enrich the public debate on the purchase of the site before comparing and testing this against the importance of preserving LPP. In carrying out this exercise, the Commissioner must take into account regulation 12(2), which states that a public authority shall apply a presumption in favour of disclosure. This reflects the purpose behind the enactment of the EIR, which was designed to facilitate and encourage greater public participation in environmental decisions that affect them.
61. The complainant has, as acknowledged, put forward a number of powerful arguments for greater transparency of the Council's decision-making. In the view of the Commissioner, the weight of the public interest will be at its strongest where the information reveals the Council's reasons for wanting to purchase the site and how it planned to manage and mitigate any risks associated with the purchase. The Commissioner considers that while there is a public interest in the disclosure of the information, the issues discussed do not go to the heart of the essential public debate. This is because it concerns more technical details relating to the purchase.
62. The Commissioner considers that the strength of the public interest in maintaining LPP means that, to echo the Tribunal in *Calland*, there must be clear, compelling and specific justification for breaching the confidentiality. This returns to the fundamental right of a person to seek and receive legal advice on a confidential basis. On this test, the Commissioner has ultimately decided that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exception.

### **Request 3 – legal advice relating to the Burn airfield travellers' site**

63. The Council has also applied regulation 12(5)(b) to the information captured by the third of the complainant's requests on the basis that the information attracts LPP. The way in which regulation 12(5)(b) operates has already been set out and are not therefore rehearsed again here.
64. The withheld information in this case constitutes specific advice given by a legal adviser, in his professional capacity, to the Council on 17 October 2013. This concerned the accommodation of travellers at the site. There

is an existing 12 pitch council-run traveller site next to the airfield but the Council's application to create 15 additional pitches on an adjacent part of the airfield – to assist with its obligation under the Department for Communities and Local Government's 'Planning policy for traveller sites' to arrange a deliverable five year supply of gipsy and traveller sites - was rejected by the Council's own planning committee earlier in the month that the legal advice was received. The media reported that the Local Government Ombudsman had found 'evidence of fault' and a lack of transparency in the way the Council had selected the site<sup>10</sup>.

65. The Council has conceded that the material circumstances have changed since the legal advice was obtained. Nevertheless, it has resisted disclosure on the basis that the advice is still relevant and to reveal the substance of that advice could significantly disadvantage the Council in terms of assessing its future options.
66. The Commissioner accepts that not only does the information constitute legal advice protected by advice privilege but that furthermore the disclosure of that advice would adversely affect the course of justice referred to in the exception. In making this finding, the Commissioner has taken into account the developments that had occurred between the giving of the legal advice and the date of the request – particularly with respect to the proposal put forward by the Council to purchase the Burn airfield site. He has though nevertheless concluded that the legal advice could still have relevance at the time of the request and therefore to disclose the information would weaken public confidence in the efficacy of the protection afforded by LPP.
67. For this reason, the Commissioner has decided that regulation 12(5)(b) of the EIR does apply and he has therefore gone on to consider the public interest test.

### **The balance of the public interest**

68. The complainant's arguments for disclosure that were set out in relation to request 2 similarly apply here. As previously stated, the Commissioner considers that the reasons given by the complainant for needing greater transparency in respect of the Council's intentions regarding the site do have considerable merit.

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<sup>10</sup> <http://www.yorkshirepost.co.uk/news/watchdog-brands-selby-travellers-site-scheme-arbitrary-and-unfair-1-6251794>

69. The withheld information captured by this request would arguably attract a greater degree of public interest than the information discussed in connection with request 2. This is because it demonstrates the options potentially available to the Council in respect of the delivery of the targets set out in the 'Planning policy for traveller sites'. Whether or not the Council chose to act on any of the options, or even whether all of the options remained viable by the date of the request, there remained some value in the public knowing more about the Council's thinking in respect of meeting the traveller site targets. This is because of the potentially profound impact that the Council's decisions would have on both the traveller and settled communities. Again then, the Commissioner must assess whether the undeniably strong arguments for transparency, when factored in with the EIR's express presumption in favour of disclosure, ultimately outweighed the strength of the public interest in upholding an essential principle pertaining to the course of justice.
70. On the basis of his analysis, the Commissioner has found that the public interest arguments are finely balanced. The Commissioner recognises that the complainant has entirely reasonable reasons for wanting the requested information to be placed in the public domain. There is also a wider argument which points towards the importance of transparency in respects of decisions that will directly affect the local community.
71. Yet, the Commissioner also acknowledges that there are equally entirely legitimate reasons for ensuring that a public authority has space to seek advice about the extent of its powers and obligations. To impinge on this space may weaken or undermine the public authority's decision-making. The Commissioner has also had regard to the age and relevance of the advice. As already remarked upon, the harm to the privilege holder is likely to diminish with the passage of time, or where the advice has effectively served its purpose. This is not the case here, however, with the Council insisting that the substance of the advice may still influence future decision-making.
72. The Commissioner has in the end been guided by the weight invested in LPP and particularly the ramifications of breaching the trust between a legal adviser and their client that exists to ensure the possibility of a frank discussion between the parties. Taking this into account, the Commissioner has decided that the public interest in maintaining the confidence, and therefore the exception, outweighs the public interest in disclosure.

## Right of appeal

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73. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

74. 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.
75. 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 .....**

**Alun Johnson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**