

**Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004**

Decision Notice

Date: 2 December 2009

Public Authority: Yorkshire Forward
Address: Victoria House
2 Victoria Place
Holbeck
Leeds
West Yorkshire
LS11 5AE

Summary

The complainant requested information about an agreement between Yorkshire Forward and a contractor to develop an area in Goole, Yorkshire. Yorkshire Forward provided some information however it exempted other information under sections 41 and 43 of the Freedom of Information Act. On review it considered that the information was exempt for the same reasons and stated that it had carried out work above the appropriate limit in responding to the complainants request and other requests he had made to Yorkshire Forward. The complainant then made a request for a decision to the Commissioner. The Commissioner wrote to Yorkshire Forward and stated that the information should properly have been considered under the Environmental Information Regulations 2004. Yorkshire Forward therefore reconsidered the request and applied the exception in regulation 12(5)(e) to it. The Commissioner's decision is that regulation 12(5)(e) was correctly applied to the information.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

2. Yorkshire Forward is a development agency for the county of Yorkshire. It tendered for developers to develop an industrial park in Goole, North Yorkshire which is now under construction. The successful contractor was Sterling St James (SSJ). The complainant's request relates to the tenders submitted to Yorkshire Forward and the subsequent Development Agreement entered into by the parties.

The Request

3. On the 11 February 2007 the complainant requested the following information:
 1. Details of the performance indicators SSJ are required to meet.
 2. Details of SSJ's relevant experience at floodplain development, etc.
 3. A copy of the Development Partnership Agreement.
 4. The tender documents submitted by SSJ.
 5. Tender documents submitted by rival companies.
 6. The criteria that will be used to decide what further applications are brought forward, particularly regarding the community cohesion issues associated with any possible use of employment agencies using migrant workers to force down labour costs by deducting accommodation, travel etc from wages.
 7. What plans are there to ensure the scheme contributes to work life balance in addition to the proposed country park - e.g. childcare facilities, sports facilities etc.
 8. Details of the Yorkshire Forward financial contribution to the scheme and any other sources of public funding being used.
 9. A record of the assessment of SSJ's proposals against the recently revised Strategic investment Priorities for the Humber Region.
 10. How proposed buildings rate on the BREEM system that Yorkshire Forward uses to assess its investments in buildings.
 11. The record of how proposals have been assessed against national and international commitments on climate change and biodiversity.
 12. The record of how proposals represent value for money against previous public investments in a rail link.

4. Yorkshire Forward responded on 15 March 2007. It provided some of the information of the above. It provided responses to the complainant, for some of the information in question and clarified that it did not hold other information. It subsequently disclosed further information in response to the intervention of the Commissioner.
5. The complainant requested an internal review of the decision; however the Commissioner does not hold a copy of that request. Yorkshire Forward responded on 11 July 2007. In that letter it stated that it has provided as much information as it was able to under the circumstances, and having considered this request along with other correspondence and requests made by the complainant it was satisfied that it had now worked up to, and over the appropriate limit when considering the complainants request. It therefore refused to provide any further work on this request.

The Investigation

Scope of the case

6. On 13 June 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he requested should have been disclosed to him.
7. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 5. Tender documents submitted by rival companies.
 6. The criteria that will be used to decide what further applications are brought forward, particularly regarding the community cohesion issues associated with any possible use of employment agencies using migrant workers to force down labour costs by deducting accommodation, travel etc from wages.
 7. What travel plans there are to ensure the scheme contributes to work life balance in addition to the proposed country park - e.g. childcare facilities, sports facilities etc.
 9. A record of the assessment of SSJ's proposals against the recently revised Strategic investment Priorities for the Humber Region.
 10. How proposed buildings rate on the BREAM system that Yorkshire Forward uses to assess its investments in buildings.
 11. The record of how proposals have been assessed against national and international commitments on climate change and biodiversity

8. On 9 February 2009 the complainant wrote to the Commissioner outlining the requests which he still wished the Commissioner to consider and the reasons for doing so. These included:
 1. The complainant stated that he did not believe that Yorkshire Forward could withhold the milestone information as doing so makes it impossible to establish what Yorkshire Forward is trying to achieve and how value for money is being secured.
 2. The complainant wished to see any other information used to determine the competence of SSJ. The Commissioner notes however that the request was for, and therefore limited to SSJ's relevant floodplain experience.
 3. The complainant clarified that he believed that the refusal to reveal full details of the partnership agreement was not justified because of the large amounts of public money being used.
 4. The complainant also clarified that he believed that the refusal to reveal the full details of the tender submitted by SSJ was not justified because of the large amounts of public money being used.
 8. The complainant requested further details held by Yorkshire Forward relating to the figure of £24.4 million which was provided to him.
 12. The complainant requested further information on value for money assessment regarding shift to road-focussed warehouses when a rail link has previously been catered for.
9. The Commissioner wrote to the council outlining these remaining requests and in response Yorkshire Forward confirmed that:
 2. It does not hold information as regards SSJ's relevant experience at floodplain development. It states that all available reports are already available through the planning applications.
 8. Yorkshire Forward states that the information it holds in relation to this includes information which Yorkshire Forward provided to the project for land assembly and infrastructure costs.
 12. Yorkshire Forward does not hold any value for money assessments on the provision of rail infrastructure or the change to road based transport.
10. Therefore the Commissioner considers that the information which he needs to consider further relates to the redacted information from the development agreements and the redacted information from the tender submitted by SSJ. He also needs to consider whether further details caught by request 8 should be disclosed.

Chronology

11. The Commissioner wrote to Yorkshire Forward on 13 August 2008 clarifying that in his view the information should have been considered under the regulations. There then followed a series of correspondence chasing a response to that letter before Yorkshire Forward finally responded providing further argument on 29 October 2009.
12. On that date Yorkshire Forward provided the Commissioner with arguments that the information was exempt under regulation 12(5)(e), however it also stated that some information could be disclosed to the complainant.
13. On 8 January 2009 the Commissioner telephoned Yorkshire Forward to discuss the case. He asked if the information had been disclosed but Yorkshire Forward clarified that it had been awaiting comments from the Commissioner prior to doing so. It agreed to disclose further information to the complainant and confirmed that it still wished to exempt some information under regulation 12(5)(e). Yorkshire Forward wrote to the complainant on the same day disclosing the information to him.
14. On 12 January 2009 Yorkshire Forward sent the Commissioner an email confirming that it had disclosed further information to the complainant. The Commissioner therefore wrote to the Complainant on 13 January 2009 and asked him if he was now happy with the response to his request and whether he wished to withdraw his complaint.
15. On 9 February 2009 the complainant wrote to the Commissioner outlining concerns he had with the information which remained exempt and asked the Commissioner to continue with his investigation. The Commissioner therefore confirmed with Yorkshire Forward that the case was to be investigated further and asked Yorkshire Forward to provide further arguments in support of its position.
16. On 20 February 2009 Yorkshire Forward wrote to the Commissioner providing further arguments in support of the view that the information should be exempt under regulation 12(5)(e).
17. On 10 June 2009 the Commissioner wrote to Yorkshire Forward asking it to clarify further points in relation to its arguments. Yorkshire Forward responded on 10 July 2009.
18. On 21 July the Commissioner asked for further clarification of the arguments put forward by Yorkshire Forward. It responded on 28 July 2009.

Findings of fact

19. Therefore the Commissioner considers that the information which he needs to consider further relates to the redacted information from the development agreements and the redacted information from the tender submitted by SSJ.

20. The Commissioner is satisfied that after the disclosure of some of the withheld information the following information has been withheld by Yorkshire Forward:
- a) milestone information
 - b) information on the costs and profits held in the development agreement
 - c) information on costs, profits and valuations and prospective milestone information held in the tender documents
 - d) details relating a breakdown of funds provided by Yorkshire Forward into the project for land assembly and infrastructure costs as per question 8 above. .

Analysis

Substantive Procedural Matters

Procedural matters

21. The Commissioner notes that the council initially refused the request for the information because it considered it exempt under sections 43 and 41 of the Act. However the Commissioner considered that the information was environmental information which falls under the scope of the Regulations.
22. The Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR.
23. Regulation 2(1)(c) provides that –
- “environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -
- (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) and (b) as well as measures or activities designed to protect those elements’
24. The factors referred to in (a) include -
- ‘ 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’
25. The Commissioner is satisfied that the information falls within the definition of environmental information as provided in Regulation 2(1)(c). The information is figures and details from a development agreement and a tender which relate to the development of section of Land in Goole, Yorkshire. The development is an

activity or plan that falls within the definition of a measure in Regulation 2(1)(c), which would be likely to affect the elements in Regulation 2(1)(a), in particular the land and landscape.

26. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

Exemptions

Regulation 12(5)(e)

27. Regulation 12(5)(e) states:

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

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

28. The criteria for section 12(5)(e) to be engaged are:

- i) Is the information commercial or industrial in nature?
- ii) Is the information subject to a duty of confidence which is provided by law?
- iii) Is confidentiality required to protect a legitimate economic interest?
- iv) Would that confidentiality be adversely affected by disclosure?

The Commissioner has therefore applied the criteria to the information falling within the scope of the request. At the time of drafting this notice the Information Tribunal promulgated its decision in the case of *South Gloucestershire Council v Information Commissioner and Bovis Homes* (EA/2009/0032). The Commissioner has noted the approach taken by the Tribunal in that case and has accepted the approach of the Tribunal to the term “confidentiality is provided by law”.

- i) Is the information commercial or industrial in nature?

29. The Commissioner is satisfied that the information is commercial in nature. It is information held by Yorkshire Forward relating to its agreement with SSJ to develop a business park in Goole, North Yorkshire. The exempted information relates to milestones for the development of the site together with financial information relating to that development.

- ii) Is the information subject to a duty of confidence which is provided by law?

30. The Commissioner does not accept that all information is held in confidence merely because the parties decide together that that will be the case. Allowing

this would essentially allow parties to contract their way out of their obligations under the Act. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.

31. In order for the exemption to be engaged it must be shown that the information was:
- imparted in circumstances creating an obligation of confidence,
 - that it has the necessary quality of confidence,

The necessary obligation of confidence

32. The Commissioner has considered whether the information was imparted in circumstances creating an obligation of confidence. He asked Yorkshire Forward to confirm why it considered that the information was subject to a duty of confidence which is provided by law.
33. Yorkshire Forward confirmed that there is no formal confidentiality agreement between the parties however their conduct has been consistent with the existence of a common law duty of confidence from the outset of the competitive procurement process, and both Yorkshire Forward and the developer believe such a duty exists. In addition, Yorkshire Forward stated that some of the information was provided as part of a tendering process and there is an accepted principle in law that information provided in tenders is held in confidence.
34. The Commissioner has considered this argument. He is satisfied that information provided as part of a tender should be considered to be held in confidence by the parties, at least until such time as the tender is concluded. After that point the parties would understand however that some details of the successful tender are likely to be disclosed, particularly in the case of public authorities with a duty to be accountable to the public for their actions and to act transparently.
35. The Commissioner is satisfied that there was an ongoing expectation that financial details relating to costs and specific details regarding the milestones would be considered to be held in confidence, at least until the park is completed and is occupied.
36. The Commissioner is therefore satisfied that the withheld information is subject to an obligation of confidence; this obligation applies to both parties.

The necessary quality of confidence

37. The Commissioner has considered whether the information has the necessary quality of confidence in order for a duty of confidence to apply. This question takes into account such factors as whether the information is trivial or whether it is already in the public domain. The Commissioner is satisfied that the information is not already in the public domain and that it is not generally known.
38. As regards the milestones the Commissioner understands that these are target dates for specific buildings or specific square footage to be completed. The

Commissioner asked Yorkshire Forward to confirm whether this information might be available or might be determined from the planning permissions which exist for the site, however Yorkshire Forward confirmed that that was not the case. Although the outline planning applications which exist for the site outline that an area is to be developed and give a time range wherein planning approval is valid this information does not divulge the detail which the parties are seeking to protect through confidence in this case.

39. The Commissioner is also satisfied that the information as a whole is not trivial. It includes financial information and milestones which are relevant to the final price which the developer and Yorkshire Forward might obtain when the development is completed. The Commissioner is therefore satisfied that there is a duty of confidence which is provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

40. The Commissioner has considered whether a disclosure of the confidential information would be detrimental to the legitimate economic interests of any party. In order for the exception to be in place to protect a legitimate economic interest there must be some harm or detriment which would occur should the information be disclosed.
41. The Information Tribunal has previously provided a 3 step test for prejudice which is transferable as a relevant test for harm or detriment in this instance:

Step 1 - Identify the applicable interests within the relevant exemption

42. Regulation 12(5)(e) seeks to protect the confidentiality of information which would otherwise cause a detriment to the economic interests of the confider of that information; for instance the disclosure would cause a harm to the commercial interests of the confider. Yorkshire Forward put forward the following arguments for the application of regulation 12(5)(e).

Milestone information. The milestone information in this case is dates by which a certain building or a certain square footage of building will be completed. Yorkshire Forward stated that a disclosure of the milestone information would change the balance of power in negotiations to prospective tenants or purchasers of properties and that this would result in a reduced level of profit on a deal and consequently a reduction in Yorkshire Forward's receipts for the sale of the land.

Costs. As regards the financial information, redacted parts of the development partnership agreement relate to sums set aside to contribute towards the provision of infrastructure, lease premiums on land sales, additional land valuation figures and cost estimates for road and infrastructure. Costs are also provided in the details of the 24.4 million pounds provided by Yorkshire Forward.

43. If the information about cost estimates for the development of the infrastructure were to be disclosed then this would put the partners in the development in a

worse position in negotiating and tendering contracts for the provision of this infrastructure. Yorkshire Forward therefore argues that this information should not be disclosed prior to any tender for the individual contracts. Similarly, if details of lease premiums on land sales, and/or land valuations were to be made public knowledge then this would have a detrimental affect on the partners' ability to negotiate favourable terms on subsequent sales or lettings.

44. Tender. Yorkshire Forward states that all of the redacted parts of the SSJ tender submission relate either to budget costs, financial appraisal and outline development costs, or to a commitment to build sizes and types of building and infrastructure. It further states that disclosure would cause financial loss to the developer and Yorkshire Forward for the same reasons provided above in respect of the redacted parts of the development Partnership Agreement. These arguments are not therefore separated further in the considerations provided below.

Step 2 – the nature of the adverse effect which would occur

Milestone information

45. The Commissioner understands that Yorkshire Forward's argument provides the following scenarios:
46. Yorkshire Forward states that if a potential purchaser is aware that SSJ will not meet its milestone criteria if a deal it is negotiating with SSJ does not go ahead within a certain timescale then it may use this as leverage to complete a deal on more preferable terms within that period. It states that SSJ is under a contractual duty to develop to specific criteria within the agreed milestones, and a failure to do this could lead to action being taken against it for a breach of those conditions by Yorkshire Forward. If a party negotiating with SSJ for a particular size of building were aware of this they would use this to their advantage, agreeing to bring forward their contractual agreement for the building to allow SSJ to meet a milestone only if SSJ agreed advantageous terms with it for that development. The Commissioner recognises that negotiators could in fact purposely delay agreeing terms until such time as agreement could be best used in its favour in this way.

Costs

47. A party negotiating to construct infrastructure which knows the value set aside by the developer for that project is unlikely to tender at a price significantly lower unless the market is competitive enough to drive tender prices down. Contractors would know the money which has been budgeted for development which would give them an advantage when setting tender prices.
48. Similarly a potential buyer who is aware of the property valuations which the parties have worked to would be unlikely to offer significantly more than that amount. This could significantly reduce the profits which would be gained by the developer and, in turn, the public money which could be recouped by Yorkshire Forward.

Step 3 – the likelihood that the adverse effect would occur

49. The Commissioner has therefore considered the likelihood of the perceived adverse effect occurring for the information identified above.

Milestone information.

50. It is clear that prospective purchasers or tenants of the properties being developed will have knowledge of the larger development in progress at the site. Yorkshire Forward and SSJ have a website advertising the development to those with an interest in it. Those interested are also able to access planning applications (which will have limited approval dates for development on the site). The applications will therefore provide an overview of the dates involved in the development but may not be aware of the likely timeline for a particular development to be completed. The planning applications will provide a degree of clarity as to the types and overall footage of developments which are to be developed on the site.
51. The Commissioner asked Yorkshire Forward whether larger organisations might have the necessary “purchasing power” to enable them to require SSJ to provide it with the information through threats to withdraw completely from negotiations if the information is not provided. Yorkshire Forward has stated that the partners would not accede to such a request. It clarified that it may do so if the request was for speculative developments under construction but that it would not do so for information on developments under construction as a result of the development agreement.
52. The Commissioner therefore accepts that there is likelihood that the disclosure of the milestone information would provide a commercial advantage to the prospective tenant or purchaser. It would therefore have a detrimental affect on SSJ’s commercial interests, however that detrimental affect would be likely to be small.

Costs

53. Yorkshire Forward split the costs further into valuations which are held for the development of infrastructure and information on lease premiums and land valuations. In either case the argument holds significant weight that if prospective contractors, purchasers or tenants are aware of the financial evaluations of Yorkshire Forward and SSJ then they can seek to take advantage of this during the negotiations.
54. The Commissioner therefore accepts that there is a likelihood that a disclosure of this financial information would provide a commercial advantage to a prospective tenant or purchaser.

Conclusion to the question of detriment

55. The Commissioner is therefore satisfied that there would be a detriment to the legitimate economic interests of both SSJ and Yorkshire Forward if the redacted

information were to be disclosed. The confidentiality is in place to protect the legitimate economic interests of the parties because a disclosure of the information would impact upon the balance of power in negotiations and on the price which can be obtained from prospective purchasers.

56. The Commissioner has therefore gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. If it does not then the information should be disclosed.

Public interest arguments in favour of disclosing the information

57. The public interest arguments in favour of disclosing the information revolve around the fact that public land or money is being provided to aid a private developer to develop an area with a view to regenerating the area, creating opportunities for new businesses and jobs. The complainant has publicly questioned the effectiveness of that project and there has been a degree of public concern expressed about the development. There is a strong public interest in the public being allowed to scrutinise the decisions made by Yorkshire Forward on its behalf in order that this can inform public debate therefore. Factors which are relevant to this balance are therefore;
- the public interest in public authorities being transparent about their use of public resources (i.e. public money and/or land)
 - the public interest in creating confidence in the decisions (including financial decisions) taken by authorities.
 - the public interest in allowing the scrutiny of agreements entered into by public authorities which will have a marked effect on the community and the economy of the area local to the development.
 - noting that this request is for environmental information, the public interest in environmental information being disclosed, particularly where the milestones are concerned. Milestones affect the rate of development on the site, which is situated close to a county park. There is a strong public interest in the public knowing the milestones plus the plans proposed in the tender in order that they may have a better understanding of the overall intentions of Yorkshire Forward and SSJ and how that might affect the environment surrounding the site.
 - The public interest in allowing greater public participation in decisions affecting the environment. This is a strong public interest argument in favour of disclosure, particularly taking into account the aims of EU Directive the EIR are derived from and the Aarhus Convention that the Directive stems from. Both stress the importance of access to information to support public participation in environmental decision making.

Public interest arguments in favour of maintaining the exception

58. The Information Tribunal has stated that the public interest arguments in favour of maintaining an exemption must specifically relate to the exemption rather than a wider discussion of any public interest arguments in favour of withholding the information. In this case they revolve mainly around the public interest in specific confidences being maintained in order to protect the legitimate economic interests of the parties. Additionally the Commissioner has recognised the following factors also have weight:

- the repercussions of financial and commercial detriment to the developer and how that may affect the likelihood of development projects such as this in the future, and
- the resultant effect on the Yorkshire Forward and therefore the public purse and

Balance of the public interest arguments

59. The Commissioner has balanced the public interest factors in this case. The EIR contains a presumption in favour of disclosure in Regulation 12(2)

60. There will always be some inherent public interest in preserving confidentiality, but the Commissioner will be cautious about placing significant weight on this generic argument. Arguments about undermining confidentiality will have more weight when they relate to the specific circumstances of the case. The Commissioner has taken note of article 4(2) of the Directive from which the EIR are derived, this states that grounds for refusal must be interpreted in a restrictive way.

61. The Commissioner notes the inherent public interest in public authorities acting transparently and allowing the general public to scrutinise actions taken by authorities, in their name, which might have a marked affect on the environment and the community surrounding it.

62. There is also a strong public interest in information about such a development being disclosed, particularly given the aims of the Aarhus convention and of the regulations themselves. Yorkshire Forward has stated that it is to input £24.4 Million to this project, a significant amount of public money, and yet it has failed to provide all of the relevant details of how that money is to be spent, how it intends some of that money to be recouped and the standards it expects from the developer for the input of those funds. There is therefore a strong public interest in this being explained to taxpayers.

63. It is noted in this case that some members of the community in Goole have expressed concerns about this development. Individuals have criticised the type of development which was agreed in this tender. They have highlighted concerns about the level of jobs and skills which will be produced as a result of the decision to choose this particular development proposal, and on the environmental impact

of the site on the community, both as regards the demographics of the community as a whole and also because of the damage caused to the natural environment.

64. It is further noted the local press reported that SSJ sought planning permission to cut down trees near the site in order to better facilitate the development of the area. Permission was denied, however it is clear that the development of the area will have a major impact on the environment around the site. The site also borders a county park that harbours rare species, such as voles. The developer has taken active steps to protect these species; however it is understandable that such a major development at such close proximity to the park will raise concerns amongst the community.
65. As it stands the community are unable to assess the full impact of the development as they are not aware of the rate at which development is intended (i.e. the milestone information), nor the full plans for development as submitted by the developer in the tender agreement. These details were redacted from the information provided to the complainant in response to his complaint. There are therefore strong public interest arguments in favour of disclosure.
66. *In Derry City v Information Commissioner (EA/2006/0014)* the Tribunal provided a degree of guidance as to how competing interests such as this should be balanced:
- “Clearly, considerable weight should be attributed to an issue on which the public is justifiably exercised at the time, regardless of whether it falls within a category [i.e. of defence to a breach of confidentiality] that has previously been approved by the courts. Conversely, less weight should be attributed if, for example, the public interest extends only as far as a half hearted wish to be more fully informed in the context of a desultory public debate on a matter of relatively low significance.”
67. The development is of relative importance to the people of Goole, which is a relatively small area in Yorkshire. The growth of Capitol Goole has brought employment to the area but also attracted those seeking employment to move into the area. The stated plan is that the development will eventually create 5000 new jobs. There are suggestions in letters to the local press however that the infrastructure in and around Goole has not been developed to the necessary degree to cope with the influx of people such a large development will create and that housing and school provision may become an issue for local people due to this. Such a development will therefore have a major impact on the fabric of society in Goole itself.
68. The Commissioner has considered this in the context of the information to be disclosed. Milestone information would highlight to an extent the speed over which development is to continue, and this might shed light on the infrastructure development which will be needed to accommodate new people moving into the area. The developers have already stated however that they hope 5000 jobs would be created through the development. They have not however provided square footage to the complainant and have redacted information on this from the sections of the tender which was disclosed. The public are not therefore able to

- tell from the information in the public domain what types of facility are planned or the size of the intended facilities to any accurate degree.
69. In considering the public interest in withholding the information the Commissioner can also take into account the degree of harm which would be likely should he order the disclosure of the information. Yorkshire Forward has stated that the developer would suffer an adverse effect if milestone figures were disclosed because prospective tenants or purchasers would use the information in order to obtain more favourable terms. However these arguments are based on the suggestion that Yorkshire Forward itself would take action against SSJ for a breach of the milestone agreements should they fail to be met. Yorkshire Forward is therefore arguing that the information should not be disclosed because if it was it could result in pressure being put on the developer through using its own ability to take action should the agreed milestones not be met. If Yorkshire Forward were to agree with the developer that that action would not be taken forward in such circumstances then pressure to reduce the terms would have a lesser affect on the developer. The Commissioner recognises however that a disclosure under the regulations should not require the parties to have to reconsider the terms under which they have agreed to operate. He also recognises that making such an agreement would in fact weaken Yorkshire Forward's power to enforce the terms of the overall agreement.
70. The Commissioner accepts that a disclosure of the information would damage the commercial interests of the developer and hence through this the public purse. A loss of profit by SSJ would also be borne by taxpayers because Yorkshire Forward's would be unable to recoup some of the money it has already provided to the project.
71. The Commissioner has balanced this against the specific public interest in the milestone figures being disclosed. His view is that there are fairly strong arguments for disclosure based around transparency which add weight to the arguments for the information to be disclosed, not least because of the effect on Goole itself, but also because of the proximity of the country park.
72. However the Commissioner notes that Yorkshire Forward has provided a copy of the development agreement in full other than the specific financial figures involved and the milestone figures.
73. The Commissioner decision is that a disclosure of the financial figures involved would not be in the public interest. Although there are large amounts of public money involved in the project a disclosure of the proposed infrastructure costs or budgeted valuations for particular developments would potentially undermine the profitability of the project and as a result the returns able to be recouped by the public purse. The Commissioner decision is therefore that the public interest in maintaining the exception outweighs the public interest in disclosing the information in this instance.
74. As regards the milestone information the Commissioner considers that this is less clear an argument, however on balance he does not believe that a disclosure of the figures would significantly enhance the public's understanding of the project.

Yorkshire Forward has provided significant details about the project through the disclosure of the other information and the other information it has published previously. The arguments for milestone information to be disclosed in order to better understand the project have therefore been significantly reduced.

75. The Commissioner has considered this. There is already a relative degree of transparency because of the disclosure of the remainder of the development agreement and the tender together with other information already in the public domain to allow a significant degree of understanding of the aims and the approximate final size and shape of the project. The speed at which key factors are met would not significantly increase an understanding of the overall project because much of the information on the final aims of the project has already been disclosed. Because of this, balanced against the adverse effects which would occur to the parties negotiating positions, the benefit to the public of disclosing the milestone agreements would not override the benefit to the public of maintaining the exception in this instance.
76. The Commissioner considers that the following factors are therefore of stronger importance to the public interest in maintaining the exception than that in disclosing the information in this instance:
- the damage to the project which the disclosure of the commercially sensitive information in this case would be likely to cause to both parties in this project, and
 - the damage which could be caused to the parties abilities to negotiate favourable terms in future negotiations,
 - the damage which would be caused to Yorkshire Forward's ability to recoup public money it has assigned to this project through the factors considered above.

His view is therefore that the public interest in maintaining the exception outweighs that of disclosing the information in this instance.

77. The Commissioner is therefore satisfied that in this case the public interest in withholding both the financial information which has been redacted and the milestone information outweighs that of maintaining the exception.
78. Yorkshire Forward was therefore correct to apply regulation 12 (5)(e) in this instance.

The Decision

79. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the regulations:
- However Yorkshire Forward correctly applied regulation 12(5)(e) once it had reconsidered the information under the regulations after the Commissioner's intervention.

80. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the regulations:

- Yorkshire Forward incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
- In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations Yorkshire Forward breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.

Steps Required

81. The Commissioner requires no steps to be taken.

Right of Appeal

82. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 2nd day of December 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 12(5)(e)

9. Regulation 12(5)(e) states:

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

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