

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

**Decision notice**

**Date:** 9 July 2014

**Public Authority:** North West Leicestershire District Council  
**Address:** Council Offices  
Whitwick Road  
Coalville  
Leicestershire  
LE67 3FJ

**Decision (including any steps ordered)**

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1. The complainant has requested a viability assessment relating to a proposed housing development. North West Leicestershire District Council refused the request citing the exception for adverse affect to the confidentiality of commercial information (regulation 12(5)(e) of the EIR).
2. The Commissioner's decision is that North West Leicestershire District Council has correctly applied regulation 12(5)(e) to the requested information and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 30 January 2014, the complainant wrote to North West Leicestershire District Council (the "council") and requested information in the following terms:

*"I would like to make a request for a copy of the viability study for planning application 11/01054/FULM which shows affordable housing is not viable."*

5. The council responded on 3 February 2014. It stated that it was refusing the request, citing the exemption for prejudice to commercial interests (section 43 of the FOIA).
6. Following an internal review the council wrote to the complainant on 26 February 2014. It stated that it had reconsidered the request under the EIR and that it was now withhold the information under exception for adverse affect to the confidentiality of commercial information (regulation 12(5)(e)).

## Scope of the case

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7. On 27 February 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the council disclosed an redacted version of the requested information to the complainant, withholding the remaining information under regulation 12(5)(e). The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the outstanding information.

## Reasons for decision

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9. In this case the council disclosed a redacted version of the information which was originally withheld in its entirety. The remaining withheld information consists of valuations, costings and other sums which were provided to the council by the developer as part of the viability assessment.
10. 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”.

11. 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?
12. The Commissioner has considered how each of the conditions apply to the withheld information.

*Is the information commercial or industrial in nature?*

13. 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.
14. Having viewed the withheld information which relates to a proposed housing development the Commissioner is satisfied that the information is commercial in nature.

*Is the information subject to confidentiality provided by law?*

15. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
16. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
17. In this case the council has confirmed that the information was provided by the developer on the basis that it was confidential and the council has agreed to maintain this confidentiality. The Commissioner notes that the information, which relates to a relatively large housing development, is not trivial in nature and that it has not been placed in the public domain.

18. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*<sup>1</sup>, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."*

19. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012) 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, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.

20. In applying the 'reasonable person' test the Tribunal stated:

*"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence ) apparently without regard to the particular purpose for which they were being approved)... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realised that that was what the developer was doing."*<sup>2</sup>

21. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and its very limited distribution and access leaves the Commissioner to conclude that the withheld information has the necessary quality of confidence and therefore this element of the exception is satisfied.

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<sup>1</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

<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)

*Is the confidentiality provided to protect a legitimate economic interest?*

22. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
23. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
24. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

*"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".*

25. In this case the council has argued that disclosure of the information would affect the legitimate economic interests of the developer.
26. Generally the Commissioner will not accept speculation from a public authority about the harm it identifies concerning a third party's interests unless there is evidence that the arguments genuinely reflect the concerns of the third party involved. In this case the council stated in its internal review response that it sought the views of the developer in considering the request. The Commissioner has decided to accept the submissions of the council which it made in respect of the developer.

*The developer's economic interests*

27. The council has stated that the developer has an ongoing interest in the site in question and, should the calculations, analyses and assessments be released, it is very likely to prejudice any future negotiations (such as disposals and sub-lettings) relating to the development. The council considers that disclosure would, in these respects, be detrimental to the competitive negotiating position of the developer and could prejudice the viability of the development as a whole.
28. The council has argued that disclosure of the commercial assumptions and calculations applied by the developer would adversely affect its economic interests as well as placing it at a competitive disadvantage in any future development opportunity.

29. The Commissioner considers that disclosure of the withheld information would provide third parties with knowledge that would not otherwise be available in a competitive market. The information in question is the result of detailed research conducted by the developer which would provide insights into its strategies; insights which would not, otherwise than via disclosure under the EIR, be available to competitors. Disclosure of this information would be of detriment to the commercial interests of the developer.
30. The Commissioner considers that the withheld is exactly the type of information which regulation 12(5)(e) seeks to protect. This, together with the confidential nature of the information leads the Commissioner to conclude that the disclosure of the financial model in its entirety would adversely affect the Council's and Grant Thornton's legitimate economic interests and therefore finds that the exception provides by regulation 12(5)(e) is engaged.

### **The public interest test**

31. Having determined that regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest test.
32. Regulations 12(1) and 12(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."*
33. In considering the public interest in this case the Commissioner has had regard to the submissions made by the complainant and the council.

### *Public interest in disclosure*

34. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
35. Disclosure can assist the public in understanding the basis of how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.

36. The council has acknowledged that the development is a significant one within a village setting and it has prompted considerable interest and comment from residents during the ongoing planning process.
37. The complainant has argued that the outcome of the development in question is already having significant local implications and asserts that this development is being used by other developers as a standard to refuse any affordable housing content on highly viable green field sites.
38. The complainant has asserted that that the local district is in need of 350 affordable homes each year but that very few are actually being provided, whilst private housing provision is soaring.
39. The complainant has stated that their understanding of the agreement on low viability sites is that if the developer's site is not viable with affordable homes then some contribution can be made to local infrastructure. The complainant asserts that the council appears to be asking for huge infrastructure contributions before affordable housing and not the other way round.
40. The complainant has argued that, in view of their concerns about the council's practice in relation to developments which involve viability assessments in general and this case in particular, all the relevant figures should be disclosed to ensure that everything is above board.
41. In relation to any resulting commercial detriment, the complainant has argued that numbers would hardly be any surprise from developer to developer as there is much employee movement between them so there is little if anything to lose.

*Public interest in maintaining the exception*

42. The Commissioner considers that the council and the developer must have been aware that a project of this scale, with the attendant repercussions for the local community, would attract public interest.
43. In the Commissioner's view a housing development of this size, allied with local concerns about a shortfall in affordable housing is a factor which increases the need for public scrutiny.
44. In that respect he recognises that disclosure of the information would promote openness and transparency and inform public debate on what is clearly a significant local project. However, he also understands that the proposed development is subject to the planning process, a process which goes some way to meeting the public interest.
45. The Commissioner notes the complainant's concerns about the local need for affordable housing and the council's role in relation to viability

assessments, however, he has not been provided with any evidence of specific wrongdoing on the council's part in this case. In relation to the complainant's suggestion that the withheld information, the result of bespoke research conducted by the developer, would not be of value to competitors because of the movement of employees between different developers, the Commissioner considers this is hearsay and not supported by any evidence.

46. The Commissioner is also not convinced that disclosure of the information would assist either the public interest in engagement in decision-making or reassuring that the council has followed proper procedures. The planning process provides mechanisms for engagement and scrutiny and, whilst knowing how a developer supports and progresses its business model might be of interest to the public it is not clear how this would serve the wider public interest, which includes the public interest in allowing commercial endeavours to proceed on a level playing field.
47. In relation to any policy obligations the council might have in relation to the provision of affordable homes, this is publically available information, as is its performance in this regard via the planning application process. The Commissioner considers that the public interest in facilitating scrutiny of the council's record in this regard is met by existing, publically available information.
48. The Commissioner accepts that while the withheld information relates to plans for the physical development of the land, it comprises financial models which illustrate how the developer structures a development of this nature.
49. The Commissioner has noted the council's arguments that disclosure would have an effect on the scheme and on the developer's ability to conduct negotiations in a way which would optimise its economic and commercial interests. He is mindful that the purpose of the exception is to protect legitimate economic interests, and the severity and frequency of the harm is a relevant public interest factor.
50. Having considered the relevant arguments the Commissioner, in reaching a decision in this case, is mindful of the general presumption in favour of disclosure. However, in this case, given the nature and content of the withheld information which is intended to assist a private developer in delivering a commercial housing scheme, he considers that the public interest in maintaining the exception outweighs the public interest in disclosure.

## Right of appeal

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51. 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: 0116 249 4253

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)

52. 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.
53. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**