

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

**Decision notice**

**Date:** 8 August 2016

**Public Authority:** East Devon District Council

**Address:** Knowle  
Sidmouth  
Devon  
EX10 8HL

**Decision (including any steps ordered)**

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1. The complainant has requested recorded information from East Devon District Council which concerns the development of the Queen's Drive site on Exmouth Seafront. The Council has provided the complainant with information which relates to parts of his request. It has withheld other information – redacted sections from a report presented to the Council's Cabinet a report commissioned from Jones Lang LaSalle, in reliance on Regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that East Devon District Council has properly applied Regulation 12(5)(e) to the information it is withholding and it is therefore entitled to withhold that information from the complainant. The Commissioner has also decided that the Council has contravened Regulation 5(2) of the EIR for its failure to respond to the complainant's request within the required time for compliance.
3. No further steps are required in this matter.

**Request and response**

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4. On 7 December 2015, the complainant wrote to East Devon Council and requested information in the following terms:

"I would like to make a formal request under the Freedom of Information Act 2000. I am also making this Request under the Environmental Impact Regulations 2004.

In 'The Splash' consultation document, East Devon District Council, gave a thoroughly unambiguous undertaking that there would be 'no residential accommodation' (holiday or hotel aside) on any part of the Queen's Drive site on Exmouth Seafront.

The planning application form also confirmed that there would be no house losses or gains.

A local developer has expressed grave doubts as to the financial viability of the latest (Moirai) proposals which include 'residential'. Further he expressed the view that without residential, as in the case of the original published proposals, the proposal would have been a complete non-starter from a financial perspective and should have readily been recognised as such.

Question 1: Please advise me as to what information East Devon District Council holds with regard to the financial viability of all versions of proposed developments for Queen's Drive.

Question 2: Specifically, what expert advice/evidence did East Devon District Council have to support and promote the initial proposal, in which there was 'no residential', as an accurate, sound and viable financial proposition? What evidence is there that the council's promise of 'no residential' was both a sincere and financially sound statement to make?

Question 3: Does East Devon District Council propose to offer any form of financial assistance towards any part of the Queens Drive development? Please supply full details of any such proposals.

Question 4: What was the reasoning behind East Devon District Council's acceptance and support for the Moirai proposals, which include residential when they (EDDC) had specified 'no residential'? Did the brief to potential developers specify 'no residential'? If not then why not? Why was Moirai's proposal embraced by council and not rejected as exceeding the brief in relation the council's promise, to Exmouth residents, of 'no residential' ?

Question 5: Has East Devon District Council given any thought as to what S106 (or equivalent) contributions it will expect from the developers? Please provide fullest details. If not, then why not?"

5. The Council failed to respond to the complainant's request within the statutory 20 working days provided by Regulation 5(2) of the EIR and

therefore the complainant wrote to the Council again on 9 January 2016, to ask it to review the Council's handling of his request.

6. Following the Information Commissioner's intervention, on 9 March 2016, the Council provided the complainant with the following response to his request:

Question 1: "The Council holds a report produced by Jones Lang LaSalle which outlines development and viability appraisals. The report considers detailed site valuations and, at this point in time, is considered to be commercially confidential and exempt from disclosure under regulation 12(5)(e) of the Environmental Information Regulations."

Question 2: "We hold expert advice in the form of a report produced by Jones Lang LaSalle. The report considers site valuations and, at this point in time, is considered to be commercially confidential and exempt from disclosure under regulation 12(5)(e) of the Environmental Information Regulations."

Question 3: "The Council has agreed that it would fund the costs of the road and car park upfront in order to enable the first proposals for the southern area of the site to make progress. This is in the expectation that the income received from the developer for the remainder of the site ought to cover these costs. Detail of Cabinet's decision can be read here

<http://eastdevon.gov.uk/media/1465844/070115-cabinet-mins.pdf>.

Parts of the report have been redacted on the grounds of commercial confidentiality and are exempt from disclosure under regulation 12(5)(e) of the Environmental Information Regulations."

Question 4: "The brief to developers has been posted to you separately. The attached Cabinet report also outlines the reasons. You may also like to read some information which has recently been published on our website which deals specifically with the question of residential land-use in the context of this development <http://eastdevon.gov.uk/regeneration-projects/regeneration-projects-in-exmouth/exmouth-regeneration-frequently-asked-questions-and-answers-february-2016/>. Otherwise you are asking for explanation which we are not required to answer in the context of this request."

Question 5: "No information held.

## Scope of the case

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant told the Commissioner that he considers the Council's use of Regulation 12(5)(e) is open to challenge where it is applied to those parts of his request.
8. The complainant has complained that the 'downloadable/view as HTML' information which the Council directed him to, is illegible' and he has asserted that the redevelopment issue is of great concern to the people of Exmouth and the Council continues 'to take steps to try to withhold, mislead, or delay releasing' information relevant to the public debate.
9. The Commissioner has investigated the Council's application of Regulation 12(5)(e) of the EIR to parts 1, 2 and 3 of the complainant's request. This notice sets out the Commissioner's decision.

## Reasons for decision

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### **Regulation 12(5)(e) – prejudice to the confidentiality of commercial information**

10. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
11. When assessing whether this exception is engaged the Commissioner will consider the following points:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

*Is the information commercial or industrial in nature?*

12. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally

involve the sale or purchase of goods and/or the provision of services for a profit.

*The Council's representations*

13. The Council has provided the Commissioner with background information. This information explains the manner in which the Council has addressed the complainant's request.
14. The Council initially provided the complainant with a copy of a report which had been presented to its Cabinet in June 2015. The report was considered under part B of that meeting, which was closed to the public. When the Council considered the complainant's request, the Council reviewed the contents of the report to assess whether some parts could be disclosed to the public.
15. The Council's review resulted in the disclosure of the majority of the report. Redactions were made in respect of a small number of sections due to their commercial confidentiality.
16. The actions taken by the Council are in line with its policy of reviewing part B reports and publishing them when it is considered appropriate to do so.
17. The Council has assured the Commissioner that the redacted report will be published in full once the commercial sensitivity attached to the redacted sections is reduced or has passed.
18. In addition to the "Part B" report, the Council has withheld a report which was prepared by Jones Lang LaSalle. This report was withheld in its entirety.
19. The Council informed the Commissioner that it carefully considered whether it could disclose this report. Ultimately the Council determined that the Jones Lang LaSalle report consists of a commercial evaluation of a live development project. It details such matters as likely profit margins, agreed fees, likely rental figures and premiums as well as the assessment and its associated comments and conclusions.
20. It is the Council's position that the disclosure of the Jones Lang LaSalle report would be used to the advantage of the current preferred bidder – currently not yet under contract, who might seek to renegotiate their position. Likewise, the information could be similarly used by any future developer or agent who may be tendering for the development. Disclosure of the report would, in the Council's opinion, seriously weaken the council's negotiating position in a competitive environment.

21. The Council informs the Commissioner that it is likely that the Council will be going back to the market in the future and the release of this confidential information would prejudice the outcome of future tenders and negotiations. It points out that the Council is under a legal obligation to secure 'best value' in any land disposal and the publication of this information is likely to impact on the Council's ability to meet its legal obligations.

*The Commissioner's considerations*

22. The Commissioner has examined the information which the Council redacted from the "Part B report", together with the withheld Jones Lang LaSalle report. She is satisfied that both of the reports contain information which is commercially confidential.
23. The commercially confidential information is comprised of figures and Jones Lang LaSalle's assessment and conclusions on the viability of the scheme.
24. The Commissioner is satisfied that the redacted information from the "Part B report" and the Jones Lang LaSalle report in its entirety, engages the exception to disclosure which is provided by Regulation 12(5)(e).
25. The Commissioner is content with the approach taken by the Council in considering that the Jones Lang LaSalle report should be withheld in its entirety. She accepts the Council's position that the disclosure of a heavily redacted report would have the potential to lead future bidders to make incorrect or unfounded assumptions and that disclosure could potentially affect the number of tenders the Council receives and also the level of those tenders.

*The public interest*

*Factors favouring the disclosure of the withheld information*

26. 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. This assists the public in their understanding of how public authorities make their decisions and in turn fosters trust in public authorities.
27. In many circumstances the disclosure of recorded information may allow greater public participation in the decision making process.
28. In this case, the Commissioner recognises that disclosure of the withheld information would promote transparency concerning the approach of East Devon District Council to the development of the Queen's Drive site on Exmouth Seafront.

29. The Commissioner is mindful of the overarching objectives of the Aarhus Convention of June 1998, from which the EIR derive. She accepts that, in order to participate in decision-making, citizens must have access to information in order to exercise their rights. Access to environmental information provides the public the opportunity to express its concerns and enables the Council to consider those concerns. By allowing informed accountability and transparency in the Council's decision-making process, disclosure of the withheld information would help strengthen public understanding for decisions in matters concerning the environment and which are of significant economic impact.
30. The Council accepts that there is a justified public interest in regeneration of Exmouth Seafront. It assures the Commissioner that it is making every effort to ensure that the local community is informed and engaged at all stages of the project.

*Factors favouring the continued withholding of the withheld information*

31. The Council argues that disclosure of the withheld information would weaken its commercial position and lead to its inability to achieve the best value from the organisations we work with. This, in the Commissioner's opinion, would not be in the interests of the Council's council tax payers.
32. The Council asserts that withholding the requested detailed information is particularly important at a point in time where the information relates to a live development project which is not subject to a settled contract. Disclosure would significantly weaken the Council's negotiating position in today's competitive commercial environment and the information could be used to the Council's disadvantage by developers who might engage in the tendering process in the future.

*The Commissioner's decision*

33. When weighing the need for transparency and accountability against the requirement for the Council to secure the most advantageous outcome for this project, the Commissioner has decided that greater weight must be given to those factors which favour the Council's continue withholding of the information contained in the two reports.
34. The Commissioner must acknowledge the timing of the complainant's request. The request was submitted at a point where the project is yet to be formalised by way of a settled contract. Therefore, the Commissioner's decision is that the Council is entitled to rely on Regulation 12(5)(e). She finds that the public interest, at this juncture, favours maintaining the exception and that the information should not be disclosed.

35. In view of the Commissioner's conclusion above, it is not necessary for him to consider the Council's additional reliance on Regulation 12(5)(f).
36. The Commissioner acknowledges the Council's intention to publish some of the withheld information in the future.
37. In view of the Council's late compliance with the complainant's request, the Commissioner finds that the Council has contravened Regulation 5(2) of the EIR.

### **Other matters**

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38. The Commissioner acknowledges that the Council has provided the complainant with two URLs<sup>1</sup> where he might find information relevant to his request. She has accessed the information available on the Council's website and has found them to be satisfactorily legible. She accepts the Council's assurance that the information shown on its website is the best copies of that information available and that the second URL provides information which is only available in web form.
39. The Commissioner has put the complainant's allegation to the Council that it is taking steps to withhold, mislead or delay the release of information relating to this project. The Council has strongly refuted the complainant's allegation that it is seeking to mislead the public. It regards this allegation as extremely serious and completely unfounded and rebuts it by drawing the Commissioner's attention to the information which it has proactively published on its website. It is the Council's belief that the published information demonstrates the process the Council has followed in terms of this project and it outlines how the Council has consulted with the public.
40. The Commissioner has considered the complainant's allegations: She is unable to support the complainant's allegations due to the absence of any corroborating evidence.

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<sup>1</sup> <http://eastdevon.gov.uk/media/1465844/070115-cabinet-mins.pdf>  
<http://eastdevon.gov.uk/regeneration-projects/regeneration-projects-in-exmouth/exmouth-regeneration-frequently-asked-questions-and-answers-february-2016/> .



## Right of appeal

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41. 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)
42. 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.
43. 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**  
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