

## Environmental Information Regulations 2004

### Decision Notice

**Date:** 26 January 2010

**Public Authority:** Bath and North East Somerset Council  
**Address:** The Guildhall  
High Street  
Bath  
BA1 5AW

### Summary

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On 23 October 2007 the complainant made a request for information relating to the Bath Western Riverside Scheme. Bath and North East Somerset Council refused the request citing regulation 12(4)(b) of the Environmental Information Regulations 2004 (the 'EIR'). On 27 December 2007 the complainant refined his request and asked for to the latest financial model and viability assessments for the scheme. The Council refused this refined request on the basis of regulation 12(5)(e) and (f) of the EIR. The Commissioner determined that the Council was correct to refuse the original request by virtue of regulation 12(4)(b) of the EIR. In relation to the refined request, the Commissioner considered that regulation 12(5)(e) is engaged for the withheld information, but that the public interest favours disclosure. Further, the Commissioner found that the exception provided by regulation 12(5)(f) was not engaged. The Commissioner's decision is that the Council must disclose the information requested on 27 December 2007.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.
2. The Environmental Information Regulations 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

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3. The Bath Western Riverside scheme ('the BWR scheme') concerns the development of an area of land that has historically proven problematic to develop, due to issues such as contaminated land and the lack of major infrastructure.
4. Crest Nicholson PLC ('Crest Nicholson') owns a large proportion of the land included in the intended development area. The Council gave its official approval in 2005 to work with Crest Nicholson as a development partner in relation to the BWR scheme. A Co-operation agreement was signed between the Council and Crest Nicholson in January 2007.

## The Request

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5. On 23 October 2007 the complainant requested via email:

“...any material in the possession of BNES [Bath and North East Somerset Council], including emails and MS notes, that is not already in the domain public [sic] that falls within one or more of the following categories

  1. Financial information about the cost of the relevant land
  2. Budgets prepared by Crest Nicholson and any material relating thereto
  3. Any communication between BNES officials with responsibility for heritage or conservation and the BNES planning department
  4. Any reports by BNES conservation officers
  5. Any material dealing with regional housing policy or targets and its relevance to the project
  6. Any material generated by Crest Nicholson or BNES relating to dealing with objections or objectors or the possibility of a call-in
  7. Any material generated by any Councillor dealing with the political implications of the proposed development
  8. Any communication sent to or received from Creatix Public Relations, Davis Langdon and Everest and ESD
  9. Any development agreement by whatever name called
  10. Any material sent to or received from UNESCO.”
6. On 5 November 2007 the Council informed the complainant that it considered his request may have included requests for both environmental and non-environmental information. The Council concluded that the request for the environmental information was manifestly unreasonable by virtue of regulation 12(4)(b) of the EIR, and, that the request for the non-environmental information was excluded by virtue of section 12(1) of the Act. The Council invited the complainant to refine his request.

### **First refined request**

7. On 5 November 2007 the complainant contacted the Council disputing the Council's decision that his request was manifestly unreasonable. He did however refine his request to "EIR material generated within the past 2 years which fall within categories 2,3,4,5,6,8,9 and 10" of his original request.
8. On 6 November 2007 the Council responded to the complainant's refined request. The Council explained that the request fell within the manifestly unreasonable exception provided in the EIR and that its reasoning was the same as outlined in its initial refusal notice of 5 November 2007.

### **Second refined request**

9. On 6 November 2007 the complainant requested an internal review of the decision that his first refined request was manifestly unreasonable and further refined his request to questions 2, 4 and 6 of his original request of 23 October 2007. On 14 November 2007 the complainant clarified to the Council that this second refined request related to information generated over the course of the previous 18 months.
10. On 20 November 2007 the Council contacted the complainant to advise him that under regulation 7(1) of the EIR it was extending the time limit for response from 20 to 40 working days.
11. On 13 December 2007 the Council wrote to the complainant providing information in relation to questions 6 and 4 but stated that it still considered his further refined request in relation to question 2 to be manifestly unreasonable.

### **Third refined request**

12. On 27 December 2007 and again on 6 February 2008, the complainant requested an internal review of the Council's decision in relation to his second refined request. In his letter of 27 December 2007 the complainant also further refined his request to the latest financial model and viability assessments relating to the Bath Western Riverside project.
13. On 21 February 2008 the Council undertook an internal review of its decision to consider the complainant's requests as manifestly unreasonable. The Council upheld its original decision that the request of 23 October 2007 was manifestly unreasonable, as were the first and second refined requests.
14. The internal review acknowledged the third refined request dated 27 December 2007 for the latest financial model and viability assessments. The Council determined that whilst this request was not manifestly unreasonable under regulation 12(4)(b), the information held was exempt from disclosure by virtue of regulations 12(5)(e) and 12(5)(f) of the EIR.
15. On 17 March 2008 the complainant contacted the Information Commissioner's Office to complain about the way in which the Council had handled his requests.

## The Investigation

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### Scope of the case

16. The Commissioner contacted the complainant on 2 February 2009 to clarify the scope of his complaint. The complainant asked the Commissioner to investigate whether the Council had correctly applied regulation 12(4)(b) to his original request of 23 October 2007 and whether it had correctly applied the exceptions under regulation 12(5)(e) and 12(5)(f) to his third refined request of 27 December 2007, referred to throughout the remainder of this Decision Notice as the 'refined request'. On the same day the Commissioner informed the Council of the scope of his investigation.

### Chronology

17. On 17 February 2009 the Commissioner contacted the Council to request clarification of its application of the exceptions under regulations 12(4)(b), 12(5)(e) and 12(5)(f) of the EIR. The Commissioner also requested that the Council provide him with the withheld information in relation to the complainant's refined request of 27 December 2007.
18. On 9 March 2009 the Council provided the Commissioner with what it considered to be relevant arguments and documentation. The Commissioner's view was that the Council had provided insufficient arguments to support its position in this matter.
19. On 11 March 2009 the Commissioner wrote to the Council and explained that failure to make substantive arguments in support of its application of the exceptions could result in his decision being that the withheld information should be disclosed.
20. On 20 March 2009 the Council confirmed to the Commissioner that it would not be making any further submissions in relation to its application of the exceptions and requested that the Commissioner consider the arguments previously provided to the complainant.
21. On 2 April 2009 the Commissioner wrote to the Council advising that, in light of the lack of evidence put forward by the Council in support of its application of the exceptions under regulations 12(4)(b), 12(5)(e) and 12(5)(f) any formal decision he made would be likely to conclude that the exceptions were not engaged.
22. On 30 April 2009 the Council made further representations to the Commissioner in support of its application of the exceptions available at 12(4)(b) and 12(5)(e).
23. On 20 May 2009 the Commissioner requested further clarification on the representations made by the Council and asked that the Council confirm the scope of the complainant's revised request dated 27 December 2007. The Commissioner also asked the Council to verify that it had provided him with copies of all of the information that fell within the scope of this request.

24. On 5 June 2009 the Council provided further arguments in support of its application of the exceptions. It explained that it had provided a sample of the information requested to the Commissioner as it considered that the request was manifestly unreasonable and had therefore not collated the information.
25. On 3 July 2009 the Commissioner wrote to the Council to remind it of the scope of his investigation and to clarify that in order for him to make an informed decision on this matter he required the information and arguments he had requested from the Council on 17 February 2009.
26. On 31 July 2009 the Council provided the Commissioner with the withheld information and further arguments in support of its application of the exceptions.
27. On 26 August 2009 the complainant contacted the Commissioner with information relating to his complaint to the Commissioner and on 28 August 2009 the Commissioner contacted the council to discuss the possibility of informally resolving the complaint.
28. On 4 September 2009 the Council provided further representations in support of its application of the exceptions and declined to informally resolving the complaint. Therefore the Commissioner has proceeded to make a decision on the basis of the arguments provided by the Council.

## Analysis

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29. Full extracts of the relevant legislation considered in this case can be found in the Legal Annex to this Notice.

## Substantive Procedural matters

### Regulation 2(1) – Defining environmental information

30. The Commissioner considered whether the complainant's refined request of 27 December 2007 should have been interpreted to be environmental information under regulation 2(1) of the EIR.
31. The Commissioner considers that the withheld information falls within the definition of environmental information as set out in regulation 2(1)(c) of the EIR. In his view, information relating to the BWR scheme is information on an activity or a plan which is likely to affect the elements of the environment referred to in Regulation 2(1)(a), in particular the land and the landscape. Redeveloping an area inevitably changes the landscape and land use.
32. Accordingly, the Commissioner considers that the information requested constitutes environmental information and should have been dealt with under the EIR, rather than some parts being considered initially under the Act.

## Exceptions

### The request of 23 October 2007

#### Regulation 12(4)(b) – the request is manifestly unreasonable

33. Regulation 12(4)(b) of the EIR is a broad provision for public authorities to refuse to comply with requests that are manifestly unreasonable. The EIR contain no definition of the phrase “manifestly unreasonable” but the Commissioner considers that the word “manifestly” means that a request should be obviously or clearly unreasonable. The exception can cover requests that are unreasonably costly for a public authority to answer, as well as requests that are vexatious or repeated.

#### Council's Submissions

34. The Council's position was that the cost of complying with the complainant's request of 23 October 2007 was manifestly unreasonable.
35. The Council provided an estimate of the time taken to locate, retrieve and extract information relevant to the request that had been generated over the course of the period of 18 months prior to the request. The Council explained that;
- “.... our estimates are based on [the complainant's] refined request [of 27 December 2007], which covered a period of 18 months. [The complainant's] original request did not specify a time frame and we would need to undertake further calculations to estimate the time that it would take to comply with this broader request”.
36. The Council confirmed that it held relevant information in the form of electronic documents, emails and paper files and described the actions which would be required in order to extract the information requested.
37. In its estimates of the time it would take to comply with the request, the Council included the time it would take to print and label files and the time it would take to obtain authorisation to access closed accounts. The Commissioner has disregarded the part of the estimates for printing and labelling files and the time it would take to obtain authorisation and has provided an explanation of his reasoning in paragraph 57 below.

#### Electronic documents

38. The Council explained that the electronic storage systems for the BWR are held in two areas on the shared file server: Major Projects/Western Riverside Development and Major Projects Finance/[an Officer]/Regeneration & Development/BWR. The Council provided details of the high level file structures for these directories to the Commissioner for his consideration. The high level file structure showed that there were 112 folders that would need to be searched for relevant information.

39. The Council further explained that during the 18 months prior to the request (24 April 2006 – 23 October 2007) the project filing structure was not controlled centrally and there was no standard protocol for naming files. The Council stated that in order to conduct a thorough search, it would be required to open each folder and undertake a search for 3 key words, namely 'budget', 'financial' and 'viability'.
40. The Council stated that in order to estimate how long a search of the 112 folders would take, it had performed a sample search on 1 folder. The sample search for the 3 key words took 1 minute and produced 5 results for 'viability', 6 for 'financial' and 12 for 'budget'. The Council stated that to open each of the documents highlighted by the search took a further 3 minutes for the results for 'budget', 2 minutes for 'financial' and 2 minutes for 'viability'. The Council informed the Commissioner that to print and collate the relevant documents took 3 minutes. The sample search of 1 folder therefore took 11 minutes and the Council used this as the basis of its estimate of the time it would take to search all 112 folders.
41. The Council's estimate was that it would therefore take 1232 minutes (11 minutes x 112 folders) to search all relevant folders, which equates to 20.53 hours.

#### Emails

42. The Council advised that during the 18 months prior to the request (24 April 2006 – 23 October 2007) emails were not stored in a central filing system. The Council explained that each officer on the project was at liberty to store their emails how they preferred on the personal drive of their individual computer. The Council stated that 14 officers had worked on the BWR project during the relevant time period.
43. The Council stated that in order to determine whether relevant information was held in emails, it would be necessary to access individual email accounts and folders of archived emails on personal drives.
44. The Council explained that it had undertaken a search of a sample folder of archived emails based on the key words set out in paragraph 40. The Council advised that it took 75 seconds to search the key words 'budget', 'financial' and 'viability'; 20 seconds to search for 'budget' with 14 emails identified; 30 seconds to search for 'financial' with 34 emails identified and 25 seconds to search for 'viability' with 21 emails identified. The Council stated that that a review of the actual emails identified by the search took 12 minutes (720 seconds). The sample search of emails for a folder was therefore 795 seconds (720 plus 75 seconds), which equates to 13.25 minutes.
45. The Council provided the Commissioner with a screen shot of an archived email folder. It advised that from the file structure it could be seen that 74 email folders would require searching. The Commissioner is satisfied that this screenshot is an accurate representation of the number of email folders which would need to be searched.
46. The formula used by the Council was therefore:

795 seconds x 74 = 58830 seconds (16.34 hours) per Officer's outlook account.

14 Officers x 16.34 hours = 228.76 hours

47. The Council also explained that because 8 of the Officers who had worked on the BWR project during the 18 month period prior to the request were no longer employed by the Council, their email accounts had been closed and additional time would be required to access their email accounts. The Council informed the Commissioner that its IT department had advised that recovery of each email account would take, on average 7.5 hours. The Council therefore calculated that the recovery of these emails would take up to 60 hours. The Council did not however provide any further details or evidence outlining the process which would need to be undertaken. Therefore the Commissioner has not considered this further.

#### Paper files

48. The Council advised the Commissioner that it held over 150 paper files (in both current and archive storage) regarding the BWR scheme. The Council explained that it had undertaken a search of a sample paper file in order to determine a reasonable estimate for searching all of the paper documents for information relevant to the request.
49. The Council stated that it had selected a file at random which was considered to be of average size, in terms of the volume of information held. The file contained an index detailing 56 documents. The Council reviewed the file index and the documents generated within the period relevant to the request were reviewed to determine whether they contained relevant information. This sample review took 4 minutes and 40 seconds.
50. The Council's estimate of the time it would take to search all the paper files it held on the BWR project was based on the sample review detailed above and the details of its estimate are as follows:
- Number of 'current' files held = 147 x 4 minutes 40 seconds = 11.43 hours.
  - Number of archived files held = 6 x 4 minutes 40 seconds = 0.46 hours.
51. Based on the above estimate the Council's view was that it would take 11.89 hours to review all of the relevant paper files it held on the BWR scheme.
52. During his investigation the Commissioner was provided with copies of a representative sample of the paper files held, by the Council and he is satisfied that the basis of the Council's estimate is reasonable.

#### Commissioner's position

53. The Commissioner has considered whether the amount of time and costs associated with responding to the request of 23 October 2007 could be considered to be manifestly unreasonable.

54. The Commissioner notes that the representations from the Council have focused on the application of the costs limit under section 12 of the Act, which provides that the appropriate costs limit for responding to requests under the Act is £450 which equates to 18 hours of work at £25 per hour.<sup>1</sup>
55. The Commissioner acknowledges that the amount of time required to respond to a request can make it manifestly unreasonable. However, he considers that regulation 12(4) (b) does not operate as an equivalent to section 12. This is because section 12 involves a straight calculation of the time required to respond to a request. Such an approach allows a public authority to consider the request in isolation from other factors including the ability of a public authority to meet the request or the extent to which the time required to meet the request would detract from other functions.
56. The Commissioner considers that regulation 12(4) (b) operates quite differently, in that there is no appropriate limit to act as a cut off point when responding to requests. The Commissioner requires that the *request* be manifestly unreasonable, and not just the time required for complying with it. In practice, regulation 12(4) (b) requires public authorities to consider a request for environmental information more broadly, taking into account the time to respond to the request as one factor to be considered along with others, such as the interference with the normal conduct of the public authority's activities, or whether compliance entails a significant diversion of resources from other functions.
57. In order to determine whether the Council was correct in this instance to determine the request as manifestly unreasonable, the Commissioner has considered the following:
- Time for compliance
  - The cost of compliance
  - Whether compliance would equate to a significant diversion of resources
  - Whether compliance would interfere with the normal conduct of the authority's activities

### **Time for compliance & unreasonable cost of compliance**

58. Whilst there is no cost limit under the EIR, the Commissioner has considered the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') as a starting point when considering the time for compliance. The appropriate cost limit for local authorities, such as the Council, set out in the Fees Regulations is £450, which equates to 18 hours of work at £25 per hour. The Commissioner's view is that it is appropriate to consider the Fees Regulations when considering arguments regarding unreasonable cost of compliance and the time taken to comply with a request.
59. The Commissioner has referred to the Fees Regulations for guidance as to the activities that the Council may include in its estimate of the cost of dealing with

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<sup>1</sup> Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations').

the request. Under the Fees Regulations, a local authority may only legitimately refuse requests for information on fees grounds under the Act if it would take more than 18 hours to:

- a) determine whether it holds the information requested
  - b) locate the information requested
  - c) retrieve the information from a document containing it, and
  - d) extract the information from a document containing it
60. While these guidelines do not constitute a strict test to be used under the EIR, they are a helpful group of guiding principles for identifying actions which can be considered when determining whether a request is manifestly unreasonable. It is for these reasons that the Commissioner disregarded the Council's estimates for the time it would take to print and label files and the time it would take to obtain authorisation to access closed email accounts, as detailed in paragraph 47, above. Further the Commissioner expects public authorities to adopt the most efficient search strategy available.
61. The Commissioner has summarised the Council's estimate of the time it would take to search all relevant sources for information relevant to the request of 23 October 2007 that was generated over the 18 month period 24 April 2006 – 23 October as follows:

Source	Estimated time	Total
Electronic documents	20.53 hours	
Email	228.76 hours	
Paper documents	11.89 hours	
		<b>261.02 hours</b>

62. The Commissioner noted that the complainant's original request of 23 October 2007 did not specify a time frame and considers that this request relates to the life of the BWR scheme, rather than the 18 month period assumed by the Council.
63. However, having viewed samples of information held by the Council the Commissioner is satisfied that the estimates the Council has provided have a reasonable basis. The Commissioner is unaware of the precise length of time that the Council has been involved in the BWR scheme but it would appear to date back significantly further than 24 April 2006. It therefore follows that if it would take over 263 hours to provide for information covering the period 24 April 2006 to 23 October 2007, it would take longer (perhaps considerably longer) to provide information covering a wider time period.
64. The Commissioner's view is that in order to answer the request of the 23 October 2007, the Council would need to review a substantial amount of information and that the cost of determining whether relevant information was held, locating, retrieving and extracting that information would (using the Fees Regulations as a benchmark), cost approximately £6525.50 (261.03 x £25 per hours). The Commissioner considers that this is unreasonably costly and compliance would take an unreasonable amount of time.

## Significant diversion of resources

65. The Council advised the Commissioner that it considered the request would require a significant diversion of resources for the following reasons:
- Information relevant to the request is held in 3 separate Council departments
  - Information relevant to the request is held by numerous Council Officers (past and present)
  - Extensive searches would be required to locate and retrieve the information requested
  - Information relevant to the request is likely to be held in both archived and current/semi-current records, requiring a variety of search and retrieval methods.
66. The Council informed the Commissioner that it had considered the nature of the request and the importance of the information which the complainant was seeking. However, it had determined that requiring officers to spend 261 hours responding to the request would constitute an unreasonable diversion of resources.
67. The complainant has argued that the nature of the request (a request concerning a large development in Bath) means that the request can not be considered to be manifestly unreasonable on the basis that responding to the request is a significant diversion of resources. He considers that the Council should be prepared to divert the available resources to respond to the request.
68. The Commissioner notes that under the EIR, public authorities may be required to accept a greater burden in providing environmental information than other information. However, as outlined above, the Commissioner considers that he must have regard to diversion of resources as a factor which can make a request manifestly unreasonable.
69. The Commissioner notes that the role of the Council in relation to major planning developments is to deliver its regeneration agenda providing robust project management systems, the overall promotion, co-ordination and direction of physical regeneration, development and economic development activity<sup>2</sup>. It has a number of projects including:
- Bath Transportation Package
  - Southgate project
  - Public Realm
  - Schools Capital Projects
  - Writhlington School
  - Play Pathfinder
  - Beat the Crunch - Advice and Support for Businesses during the Recession
  - The Future - for Bath, Keynsham, Midsomer Norton and Radstock
  - Business Support

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<sup>2</sup> <http://www.bathnes.gov.uk/BathNES/environmentandplanning/majordevelopments/>

70. The Commissioner notes that the estimated time for complying with the request is more than 261 hours. As such, the Commissioner is minded to accept that responding to the request would clearly require the Council to divert a disproportionate amount of its resources from its everyday core functions.

### **Interference with the normal conduct of the authority's activities**

71. The commissioner considers that such a significant diversion of resources, as outlined in paragraphs 65-70 above will inevitably interfere with the normal conduct of the authority's activities. Further devoting a minimum of 261 hours to complying with the request would also impact severely on the normal conduct of the Council's activities.
72. The Commissioner has therefore concluded that responding to the request could prevent the Council from carrying out their wider obligations fully and effectively, so that the needs of the communities they serve are not met.

### **Conclusion**

73. The commissioner considers that the Council has demonstrated that responding to the request would require of the Council an unreasonable amount of time, expense and would significantly divert resources and interfere with normal activities. On this basis, in this particular case, he finds that the Council appropriately applied the exception provided by regulation 12(4)(b). The Commissioner therefore went on to consider the public interest test as required by regulation 12(1)(b).

### **Public interest test**

74. Regulation 12(1)(b) states that a public authority can refuse to disclose environmental information if a relevant exception applies and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure. This is commonly known as 'the public interest test'.
75. When considering the public interest test public authorities should be mindful of the specific presumption in favour of disclosure provided by regulation 12(2) of the EIR. In effect this means that if the factors on both sides of the test are balanced evenly, the public authority should disclose the information.

### **Public interest in favour of disclosure**

76. The Commissioner's view is that the general purpose of the EIR is to enable public access to information which affects, or is likely to affect, the environment. This has the clear benefits of promoting accountability and transparency, as well as enabling individuals to access information which may help them to challenge a decision made, or action taken, by the public authority. This in turn promotes a sense of democracy and public participation.

## **Public interest in favour of maintaining the exception**

77. Whilst disclosure of environmental information promotes transparency and accountability of public authorities, the Commissioner notes that the estimated cost of complying with this request would be significant. In fact it would probably exceed the appropriate cost limit that applies to the Act by more than 14 times. The Commissioner accepts that responding to the request would clearly require the Council to divert a disproportionate amount of its resources from its everyday core functions. The Commissioner is of the view that there is a very strong public interest in public authorities being able to carry out their wider obligations fully and effectively, so that the needs of the communities they serve are met.

## **Balance of public interest**

78. The Commissioner considered whether responding to the request would require the Council to undertake an unreasonable amount of work which would divert it from its core business. In view of the Commissioner's observations about the 'appropriate limit' of 18 hours for dealing with requests under the Act, he considers that the total estimated requirement to respond to the request represents an unreasonable amount of work. The exception serves to protect public authorities from being distracted from the various important public functions and duties they are charged with, and therefore to ensure that compliance costs are kept to a reasonable amount.
79. In view of the above the Commissioner has concluded that the public interest in maintaining the exception under 12(4) (b) outweighs the public interest in disclosing the information.

## **The refined request of 27 December 2007**

### **Regulation 12(5)(e)**

80. Regulation 12(5)(e) allows commercial or industrial information which is held by a public authority under either a statutory or a common law duty of confidentiality to remain confidential if that duty is required in order to protect the legitimate economic interest of any party.
81. The Commissioner considers that this exception can be broken down into four elements, all of which are required in order for the exception to be engaged:
- 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 interest?
  - Would confidentiality be adversely affected by disclosure?

### **Is the information commercial or industrial in nature?**

82. The Commissioner considers that for information to be commercial or industrial in nature it is required to relate to a commercial activity, either of the public authority concerned or a third party.

83. The Commissioner considers that the withheld information constitutes industrial information as it refers to a business activity for commercial gain. He therefore considers that this element of the exception is satisfied.

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

84. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law duty of confidence, contractual obligation or statute.
85. The Council has provided the Commissioner with evidence that a confidentiality clause was included within the Co-operation Agreement between the Council and Crest Nicholson at the time the withheld information was received by the Council.
86. The Commissioner has had regard to the confidentiality clause referred to by the Council. He notes that the purpose of the contractual obligation is to protect information provided to the Council by Crest Nicholson (as the preferred developer in the BWR Scheme). As the clause is not designed to protect the commercial interests of the Council, the Commissioner has not considered these interests. This is because the exception will only prevent a disclosure that would adversely affect the interests of the party the confidence was designed to protect.
87. As the information was subject to a contractual obligation (the confidentiality clause) the Commissioner considers that the information is subject to confidentiality provided by law.
88. Having established that the requested information is subject to confidentiality provided by law, the Commissioner considered whether that confidence was necessary to protect a legitimate economic interest.

**Is confidence necessary to protect a legitimate economic interest?**

89. The Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner has therefore considered the submissions made by the Council in relation to the sensitivity of the information and nature of any harm which would be caused by disclosure.
90. In its submissions to the Commissioner the Council advised that disclosure of the withheld information would have a severely detrimental impact on Crest Nicholson's interests. The Council explained that to disclose the withheld information would allow Crest Nicholson's competitors to make use of Crest Nicholson's experience and expertise in terms of other sites opening up in Bath.
91. The Council further outlined that release of the withheld information would prejudice Crest Nicholson's ongoing negotiations with other landowners in the area. The Council explained that it considered that disclosure of the withheld information would result in Crest Nicholson's inability to continue their cooperation with the Council in the BWR scheme.

92. The Council also highlighted to the Commissioner that in very challenging market conditions, the “disclosure of financial tools to the public could be destructive to the scheme and seriously harm Crest’s market position further”.
93. Having been informed by the Commissioner that he gave little or no weight to speculative views about prejudice, the Council provided the Commissioner with a letter from Crest Nicholson which stated:

“The way in which national developers each go about appraising the value of land differs from company to company particularly as regards to large strategic regeneration sites such as the Bath Scheme. There is a tremendous amount of skill, knowledge and experience which goes into the design of bespoke financial models to cater for all the cost and revenue streams which need to be catered for over the considerable life of such projects. Indeed it would not be overstating things to say that each model and the underlying assumptions behind them amount to trade secrets within the industry. If the way Crest approaches modelling such sites were to become public knowledge then it would mean that on future sites Crest’s competitors would know how Crest would approach the financial modelling of the site, and whilst it may not mean that a competitor would know how much Crest would be prepared to bid for a site, it would nevertheless place Crest at a significant disadvantage in any negotiations, not only vis a vis its competitors but also regards the seller of the site who would also potentially be able to acquire the same information.....With the amount of land trading that takes place between developers themselves, it could well be a direct competitor looking to sell land to Crest; again confidential information would severely prejudice Crest in such a position.”
94. The Commissioner considers that the withheld information contains financial modelling information which is of significant commercial value and which would give a competitive advantage to any party negotiating commercial transactions with the Council and Crest Nicholson.
95. The Commissioner further considers that the detail of the withheld information would provide information to third parties which would not otherwise be available to them in a competitive market.
96. The Commissioner notes that effective financial modelling is at the heart of the information which regulation 12(5)(e) seeks to protect. The Commissioner considers that it is Crest Nicholson’s skill and experience which allows it to produce competitive pricing whilst providing a profitable return. The Commissioner is therefore satisfied that disclosure of the information could weaken Crest Nicholson’s edge by allowing competitors to copy the most innovative or successful parts of the model.
97. It is therefore the Commissioner’s view that the Council’s arguments are persuasive and the release of the information would adversely affect the economic interests of the contractor.

### **Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?**

98. The Commissioner considers that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available. In turn this will also inevitably harm the legitimate economic interests that have already been identified in paragraphs 75-83 above.
99. The Commissioner therefore concludes that this element of the exception is engaged, and as a result finds that the exception is engaged.

### **Public interest test**

100. Having determined that the exception available at regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest test. The test specifies that a public authority may only withhold information to which an exception applies where, in the circumstances, the public interest in maintaining the exception outweighs the public interest in disclosure.
101. The Commissioner has considered fully all of the submissions on the public interest made by both the complainant and the Council, taking into consideration the specific content and wider context of the withheld information.

### **Public interest in favour of disclosure**

102. The complainant has suggested that the public interest favours disclosure for the following reasons:
- The development has a capital cost of £500 million
  - The development did not go out to tender
  - The development includes grants of up to £40 million from English Partnership and further grants from the Housing Corporation
  - The development is of immense significance in a housing and architectural context
  - The development could impact on Bath as a World Heritage site
103. The complainant also drew the Commissioner's attention to formal complaint procedures which had been initiated by the European Commission in respect of the BWR scheme. The Commissioner understands that the European Commission has begun the first stage of the procedure by providing the UK Government with a Letter of Formal Notice indicating that the BWR scheme was in breach of the EU Procurement Rules<sup>3</sup> as it did not go out to tender. A Letter of Formal Notice gives the Government an opportunity to respond to an allegation of a breach of Community Law.
104. The Council has suggested that the public interest factors in favour of disclosure are:

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<sup>3</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm)

- Further understanding of and participation in the public debate of issues of the day. Disclosure would allow a more informed debate of the issues under consideration by the Council.
  - Promote the accountability and transparency by the Council for the decisions it takes. Placing an obligation on the Council to provide reasoned explanations for decisions and administrations.
  - Allow individuals and companies to understand the decisions made by the Council affecting their lives, and assisting individuals in challenging those decisions.
105. The Council also acknowledges that the BWR scheme represents a major development opportunity for Bath, the effects of which will be felt and seen by Bath's citizens for many years to come. It is therefore important that as much information is made publicly available as possible.
106. The Commissioner recognises that the withheld information relates to a planning matter of great public interest and he is aware that this has occasioned controversy in the local area.
107. The Commissioner acknowledges that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve the improve accountability and participation.
108. The public interest in disclosing the information in this case surrounds the creation of transparency and accountability of public bodies in their decisions and actions in investing public money. There is a need for openness, transparency and public consultancy particularly in respect of large transactions concerning public assets.

### **Public Interest in favour of maintaining the exemption**

109. The Council has suggested that the public interest factors in favour of maintaining the exception:
- Disclosure of the information would result in the potential withdrawal of Crest Nicholson from the scheme, which would impact negatively in terms of transport links and the development of sustainable economy.
  - It would be likely that other private organisations with the commercial expertise required by the Council in relation to projects such as BWR would refuse to be involved in development planning. As a result there would be a negative impact on the Council's development of plans in other areas, due to a lack of commercial input and expertise.
110. The Commissioner also acknowledges that there is public interest in maintaining trust and preserving free flow of information to the public authority where this is necessary for the public authority to perform its functions serving the public.
111. In respect of the public interest in disclosure as a result of the European Commission's infringement proceedings concerning the BWR scheme, the

Council advised that it considers that the public interest will be satisfied on release of the Commission's decision.

### **Balance of public interest**

112. The Commissioner recognises that there is some inherent public interest in preserving confidentiality. He considered that such public interest should be given more weight where, for example a public authority can demonstrate that the disclosure would undermine its relationship with a particular company
113. The Commissioner considers that the Council's position that Crest will withdraw from the scheme is undermined by the fact that the Council has acknowledged that Crest owns a substantial proportion of the land and has contractual options to acquire further land, within the development area, from the existing private sector owners. As a result of this acknowledgement the Commissioner considers that the public interest in preserving confidentiality carries inherently less weight.
114. Such an approach is supported by paragraphs 46 to 53 of the Code of Practice issued under the EIR<sup>4</sup> which makes it clear that public authorities should not contract out of their obligations under the EIR and should not accept information in confidence unless it is necessary to do so.
115. The Commissioner does not agree with the Council's argument that disclosure could mean that developers might not become involved in future development projects. Developments of this nature can be highly lucrative and it is therefore unlikely that developers would willingly exclude themselves from such work.
116. The Commissioner also considers that businesses will understand that a decision to disclose the withheld information in this situation does not set a precedent for disclosure of this sort of information in all cases. There are particular circumstances (for example the involvement of the European Commission) in this case which are unlikely to be duplicated in the vast majority of other situations. The Council's arguments are therefore weakened by the fact that a decision to disclose in this instance does not give a precedent for all future requests for this kind of information.
117. For these reasons the Commissioner considers that the greater weight of the public interest rests in allowing more scrutiny of the financial aspects of the arrangements under which BWR is to be developed, particularly in light of the significant cost to tax payers.
118. The Commissioner has therefore determined that the public interest in disclosing the requested information outweighs the public interest in maintaining the exception.

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<sup>4</sup> Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391)

### **Regulation 12(5)(f) – Adverse effect on the interests of the supplier of the information**

119. The Council has also sought to apply the exception available at regulation 12(5)(f) to the requested information.
120. Regulation 12(5)(f) only applies where:
- the information was provided voluntarily, that is the supplier was not under, and could not have been put under, any legal obligation to supply it to the public authority, and
  - there are no other circumstances that entitle the public authority to disclose it, and
  - the supplier has not consented to its disclosure

### **Council's submissions**

121. The Council explained to the complainant that the Co-operation Agreement contained a clause which required an open book principle. This clause required Crest Nicholson to provide the Council with information which it reasonably required.
122. The Council suggested that the exception was engaged because Crest Nicholson voluntarily entered into this agreement with the Council, and would not otherwise have been obliged to provide the information to the Council.
123. The Council also considered that some of the information requested was not covered by the Co-operation Agreement, (although it did not identify which information to the Commissioner), and that this information was provided voluntarily.

### **Commissioner's view**

124. The Commissioner considered the withheld information and his view is that the information falls, in its entirety, within the scope of the information the Council could reasonably expect Crest Nicholson to make available to it, under the terms of the Co-operation Agreement.
125. As the Co-operation Agreement is contractual, and as a result may be enforceable through the courts, the Commissioner considers that a contractual obligation was in place requiring Crest Nicholson to provide the information. As a result Crest Nicholson was under an obligation to provide the information, and it cannot be said that the supplier (Crest Nicholson) was not under an obligation to supply the information to the Council.
126. The Commissioner therefore considers that the exception is not engaged as the first limb of the test at regulation 12(5) (f) is not satisfied, as the information was not provided voluntarily.

## **Procedural requirements**

127. The full text of the regulations referred to can be found in the Legal Annex at the end of this Notice.

### **Regulation 5(1)**

128. Regulation 5(1) provides that environmental information shall be made available upon request.
129. In relation to the refined request of 27 December 2007, the Commissioner determined that the exception under 12(5)(e) was engaged but that the public interest in disclosure outweighed the public interest in maintaining the exception and that the exception under 12(5)(f) was not engaged. The Council therefore breached the requirements of regulation 5(1) as it failed to make the requested information available on request.

### **Regulation 5(2)**

130. Regulation 5(2) requires a public authority to provide information as soon as possible and no later than 20 working days of receipt of the request.
131. In relation to the refined request of 27 December 2007, the Commissioner determined that the exception under 12(5)(e) was engaged but that the public interest in disclosure outweighed the public interest in maintaining the exception and that the exception under 12(5)(f) was not engaged. In failing to disclose the information requested within 20 working days of receipt of the request the Council breached regulation 5(2).

### **Regulation 11(4)**

132. Regulation 11(4) provides that on receipt of representations from an applicant a public authority should consider whether it complied with the requirements of the EIR. Such 'internal reviews' should be completed as soon as possible and no later than 40 working days after the date of receipt of representations.
133. The complainant expressed his dissatisfaction with the Council's handling of his request on a number of occasions, the first being on 6 November 2007. The Commissioner notes that this expression of dissatisfaction pre-dated the Council's 'full refusal' of 12 December 2007. He further notes that at least two other expressions of dissatisfaction were sent on 27 December 2007 and 6 February 2008 and it is these expressions that appear to have triggered the review process.
134. The Commissioner considers that the first expression of dissatisfaction is taken as the date on which a review was requested (6 November 2007). Therefore, the Commissioner considers that the Council breached regulation 11(4) as it took 70 working days, from the complainant's first request for a review, to complete the review process.

## Regulation 14(2)

135. Regulation 14(2) states that if a request for environmental information is refused, this refusal should be made in writing in no later than 20 working days after the date of the request.
136. In delivering an internal review of the earlier requests made by the complainant, the Council advised the complainant that the refined request was being withheld under regulations 12(5)(e) and 12(5)(f) of the EIR. The Commissioner considers that the internal review communicated to the complainant on 21 February 2008 constitutes a refusal of a request for environmental information. The Commissioner considers that the refusal contained in the internal review does not accord with the requirements of regulation 14(2) in that it was not provided within 20 working days.
137. As such the Commissioner considers that the Council breached regulation 14(2).

## The Decision

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138. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The information requested by the complainant on 23 October 2007 is exempt from disclosure by virtue of the exception contained at regulation 12(4)(b) of the EIR and, in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
139. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Commissioner finds that the exception at regulation 12(5)(e) is engaged but the public interest in maintaining the exception does not outweigh the public interest in disclosure.
  - The Commissioner has determined that the exception at regulation 12(5)(f) is not engaged.
  - In failing to provide the information requested on 27 December 2007 on request the Commissioner finds that the Council have breached regulation 5(1) of the EIR.
  - In failing to provide the information requested on 27 December 2007 within 20 working days the Commissioner finds that the Council breached regulation 5(2) of the EIR.
  - In failing to undertake an internal review within 40 working days of receipt of a request for an internal review, the Commissioner finds that the Council breached regulation 11(4)
  - In failing to provide a refusal to the refined request within 20 working days of receipt, the Commissioner finds that the Council breached regulation 14(2) of the EIR.

## Steps Required

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140. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose the withheld information in respect of the complainant's refined request dated 27 December 2007.

141. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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142. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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

First-tier Tribunal (Information Rights)  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 26th day of January 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### Regulation 2(1) In these Regulations –

“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 –

- (a) 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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 11(4)** A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;

- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) 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;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.