

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

Decision notice

Date: 23 March 2016

Public Authority: Guildford Borough Council
Address: Millmead House
Guildford
Surrey
GU2 4BB

Decision (including any steps ordered)

1. The complainant requested details of all draft plans for intersections on the A3 in and around Burpham, specifically London Road Slip and Clay Lane Northbound off. The council said that it could disclose a note written by the complainant but the remaining information held was excepted under regulations 12(5)(e), 12(4)(d) and 12(5)(f) of the Environmental Information Regulations 2004 ("the EIR"). The Commissioner's decision is that regulation 12(4)(d) was correctly applied to some of the information and the public interest favoured maintaining the exception. The remaining information was excepted under regulation 12(5)(e) and the public interest also favoured maintaining the exception with the exception of one paragraph relating to noise emissions. It was not necessary to consider the application of regulation 12(5)(f).
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose paragraph 4.13 of document 4 entitled "Notes of Meeting: Gosden Hill – Highways Agency Meeting"
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant requested information from the council on 17 June 2015. It was for the following information:

"Details of all draft plans being discussed documented and Known about for intersections on the A3 in and around Burpham. Specifically London Road Slip and Clay Lane Northbound off".
5. The council responded on 8 July 2015. It confirmed that it held a note from the complainant which it considered could be published with his permission. It also confirmed that it held other information that was excepted under regulation 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR. The council said that the public interest did not favour disclosure.
6. The complainant requested an internal review on 8 July 2015. He said that the note he had written was already in the public domain.
7. The council completed its internal review on 6 August 2015. It said that it wished to maintain its position.

Scope of the case

8. The complainant contacted the Commissioner on 21 August 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had correctly relied upon the exceptions under regulation 12(4)(d), 12(5)(e) and 12(5)(f) in order to withhold information.
9. Given the complainant's comments about the note he wrote, which the council identified as falling within the scope of the request and referred to as Document 3, this information has not been included within the scope of the case. It was also not necessary to consider the application of regulation 12(5)(f).
10. For clarity, the council initially identified information relating to three proposals as falling within the scope of the request. It subsequently said that it had reassessed the information identified in relation to "Proposal 3" and had decided that it was not within the scope of this request.
11. The council explained that its Economic Development Service has a role as a promotor of a separate proposal known as the Clay Link Road Scheme for which the service is preparing a planning application. The council said that in considering the feasibility of this separate proposal,

Surrey County Council (on behalf of the council) assessed the impact of other projects being discussed that might affect the A3. The council identified the feasibility study by Surrey County Council as "document 12". The council said that scenarios 1 and 2 discussed in the study do not take into account any such plans. It said that scenario 3 refers to possible changes to the A3 slip road, but does not contain details of any such plans.

12. The Commissioner considered the feasibility study. He agrees with the council that information relating specifically to scenarios 1 and 2 discussed in the study does not fall within the scope of the request. However, the Commissioner does not accept the council's assessment that the information relating to scenario 3 was not within the scope of the request. The fact that the council is not proposing junction changes to the A3 trunk road in connection with this proposal does not change the fact that the impact of such a change was considered as part of this document. While the Commissioner can see that the focus of the document is on a separate proposal and therefore very limited information is provided about the possible change to the A3 itself, the information is still capable of being interpreted in the Commissioner's view as detail of a draft plan discussed relating to an intersection on the A3. The Commissioner notes that the document refers to a specific change, albeit not in any detail.
13. The council said that in the event that the Commissioner does not accept the information was not within the scope of the request, it would seek to rely on regulation 12(4)(d) to withhold the information. This has been considered by the Commissioner in the analysis below in relation to the relevant information within the feasibility study.

Background

14. The council explained to the Commissioner that the main context of this request is the preparation of the new local plan for Guildford Borough. The council is the Local Planning Authority responsible for preparing the local plan. The local plan is the plan for the future development of the local area. It sets out the strategic priorities for the development of an area and it guides decisions on whether or not to grant planning applications.
15. The Planning and Compulsory Purchase Act 2004 (and amendments in subsequent legislation) sets out the requirements and consultation processes to produce a local plan. The Town and Country Planning (Local Planning) (England) Regulations 2012 set out the processes the council must follow. Regulation 18 sets out the process for preparing

the local plan, taking into account representations from stakeholders and regulation 19 sets out the requirement for formal public consultation by making a "submission version" of the draft local plan available for inspection.

16. The council included a proposal for public consultation to modify the existing A3/London Road junction in its "Draft Guildford Borough Local Plan: Strategy and Sites (July 2014)". The proposal relates to a trunk road (part of the Strategic Road Network) and onward connections to the Local Road Network. Highways England and Surrey County Council are the responsible highway authorities for these networks and are therefore key stakeholders. The council said that the 2014 draft local plan represents an early stage in the plan preparation process. The council said that any proposals within it are subject to change as part of the process for preparing the next iteration of the local plan, which at the time of the request and of writing this decision notice, is the "submission version" of the draft local plan for formal public consultation. Other plans have also been discussed but details of these have not been published.
17. For clarity, the council numbered each of the proposals 1-3:
 - Proposal 1 is as set out in the draft Guildford local plan described in paragraph 16 above. It relates to a proposal for the relocation of the southbound off-slip at the existing A3/London Road junction, a new A3 southbound on-slip at this junction and onward connections to the Local Road Network (LRN).
 - Proposal 2 relates to another plan relating to the A3, the details of which are still under discussion and have not been published.
 - Proposal 3 concerns information where the impact of another possible plan relating to the A3 on a separate proposal known as the Clay Link Road Scheme was considered. This is a proposal for a new link road between Clay Lane and the Slyfield Industrial Estate in Guildford. Some details about the Clay Lane Link Road Scheme have been published on the council's website but the discussion connected to the A3 has not been published.
18. The complainant's particular interest in these matters is that his property is near to the A3 trunk road and he is concerned that the plans may impact his home.

Reasons for decision

Regulation 12(4)(d)

19. The Commissioner has published guidance on this exception, which for ease of reference may be accessed here:
- https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf
20. As discussed in the Commissioner's guidance, regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data. Material that is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete. Draft documents are unfinished even if the final version has been produced. Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later.
21. The exception is often engaged relatively easily since if the withheld information falls into one of the categories described above, then the exception is engaged. It is not necessary to show that the disclosure would have any adverse effect in order to engage the exception, however any adverse effects of disclosures may be relevant to the public interest test.
22. In this case, the council has identified 12 documents falling within the scope of the request in total (NB the Commissioner has excluded from the scope the complainant's note which was document 3 in the council's bundle), with the following information withheld using the exception under regulation 12(4)(d):
- Document 1: Covering Letter and Briefing note
 - Document 2: Local Plan Cumulative Assessment (Only sections 1, 2 and 4 are relevant)
 - Document 11: Hand drawn sketch
 - Document 12: Feasibility study conducted by Surrey County Council on behalf of Guildford Borough Council (As noted in the scoping section of this decision notice above, the council said that it would wish to rely on regulation 12(4)(d) if this information was deemed to be within the scope of the request. The Commissioner considered that some of the information was within scope and he has considered this in the analysis below).

23. Documents 1 and 2 relate to a proposal for the relocation of the southbound off-slip at the existing A3/London Road junction, a new A3 southbound on-slip at this junction and onward connections to the Local Road Network (LRN). The council explained that the junction proposal is described as item 6.1.2 (p. 131-2) in the Appendix B Infrastructure Schedule in the Draft Guildford Local Plan: Strategy and Sites (July 2014). The council referred to this as "Proposal 1".
24. Document 1 is a cover letter and briefing note written by a consultant to Martin Grant Homes (MGH). MGH control land to the northeast of Burpham and are promoting the land to the council as a potential site for an urban extension of Guildford and consequently, the council has had ongoing discussions with MGH who would like to have their site allocated in the new local plan and have advocated changes to the A3 trunk road and the LRN. The Draft Guildford Borough Local Plan: Strategy and Sites document (July 2014) included both the farm site as an allocated site in the proposed spatial strategy and the proposed changes.
25. The council explained that MGH's transport consultant had marked the briefing note as a "confidential draft", and this is displayed in a water mark across the document provided to the Commissioner. The council said that the document is likely to be revised and refined by MGH and its transport consultant for use by MGH as either part of a representation to a public consultation on the future regulation 19 submission version of the draft local plan or more likely as part of a planning application for the Gosden Hill Farm site. In the circumstances, the Commissioner accepts that the briefing note was a draft, which by definition is an unfinished document and the exception under regulation 12(4)(d) was therefore correctly engaged in relation to this information. The associated covering letter is not a draft but it does concern material still in the course of completion and is therefore excepted under regulation 12(4)(d) as well.
26. Document 2 is described as the Local Plan Cumulative Assessment. The document relates to high-level details about the various housing proposals set out in the draft local plan, one of which is the proposal to develop the MGH site, which in turn relate to the proposed junction forming part of "Proposal 1". The relevant parts of the report concern the assessment of traffic impacts. The author of the report is Surrey County Council. The council said that the report relates to the formulation of ideas for a project that is still in the course of completion. It said that a final version will be published as part of the Strategic Transport Assessment, part of the "Evidence Base" for a future consultation on the draft local plan.

27. The Commissioner's published guidance highlights that the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception. However, in this particular case, the Commissioner was satisfied that the intention of the assessment was to inform the consideration of future options. It relates to plans that have not yet been finalised and represents evidence to be used in the finalisation of any plans that are carried forward. The Commissioner therefore accepts that the information concerns material that is still in the course of completion and that regulation 12(4)(d) was engaged.
28. Document 11 is a hand drawn sketch. The council said that it is a draft provided to the council's consultant in order to instruct the consultant about a council proposal, which was not part of the 2014 draft local plan and which is still not in the public domain at the time of writing this decision notice. The council has referred to this as "Proposal 2". The council said that it is incomplete information relating to the early stages of the development of a proposal. It has been accorded no status by Highways England ("HE"), the highways authority for the A3 trunk road. The council said that its intention was to discuss the proposal with HE in due course. The council indicated that this may form part of the local plan in the future. Upon inspection of the document, the Commissioner accepts that it is a draft and that the exception under regulation 12(4)(d) was engaged. It is a hand drawn sketch, clearly part of a proposal in the earliest stages of development.
29. As noted, document 12 relates to a plan which was considered as part of an initial feasibility study conducted by Surrey County Council on behalf of the council. The council said that the report is part of information required for a project that is still in the course of completion, though the document itself is finished. It said that this would inform a forthcoming planning application and a transport assessment. The council has referred to this as "Proposal 3".
30. In this particular case, the Commissioner was satisfied that the intention of the feasibility study was in part to inform the early stages of considering the impact of a possible plan for the A3 on a separate proposal as part of the development of this proposal. As such, the Commissioner accepts that regulation 12(4)(d) was engaged because the information concerns material still in the course of completion.

Public interest in disclosing the information

31. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to

increase public understanding, trust and participation in the decisions taken by public authorities.

32. In this case, the complainant's particular interest is connected to the fact that his own property is near to the A3 and he is concerned about the impact of possible plans for the A3 on the property. While that is clearly a personal matter, it also points to a wider public interest in members of the public understanding plans being proposed by the council, particularly where they would have significant impacts on the environment and affect people's lives. The complainant has also highlighted that he is a member of the Burpham Neighbourhood Forum and he believes that the council is required to share information about its plans with the forum. He said that a neighbourhood plan must be in line with the strategic vision of the wider area so if the council refuse to share the information, it is failing to meet the requirements of the Localism Act.
33. The complainant also argued that there was a public interest in confirming further details about plans because Surrey County Council had already released some information about plans relating to the southbound carriage way. It said that the map supplied in January 2015 indicated multiple suggested modifications including junction widening adjacent to the complainant's property. He also alleged that the Northbound off slip area had been surveyed. He said that this plan was already partly public since a ground survey had been completed at the location and is clearly identifiable on the street surface. He said that house prices had already been affected so the council should not be relying on this as an argument for not disclosing the information.

Public interest in maintaining the exemption

34. Documents 1 and 2 relate to the proposals in the 2014 draft local plan or "Proposal 1". The council argued that it is in the public interest to maintain the exception because it is important that stakeholders are able to engage with and consult with the council in "a safe space" and that the council itself can consider ideas before the requirement to consult the public. The council said that the discussions are still "live" and that it was not in the public interest to disclose proposals that could change. The council highlighted that the local plan process and the planning approval process are statutory and require public consultation at the appropriate stages. It said that premature disclosure would be distracting, divert limited public resources and delay the progress of the local plan.
35. The council also said that stakeholders should be able to trust the council with the information. It said that it had concerns that the

- disclosure of a document marked “confidential draft” before a proposal is ready for public consultation would discourage stakeholders from engaging in frank discussions. It said that it believed that this would cause a “chilling effect” to its discussions with MGH and that it would also have the broader consequence of discouraging other stakeholders from engaging with the council in the future as part of the local plan process.
36. The council added that as the report from MGH was clearly labelled “confidential draft”, it could not be sure that it did not contain any misleading or inaccurate information, which the author would have corrected or amended before producing the final report.
 37. In relation to document 11 relating to an as yet unpublished council proposal known as “Proposal 2”, the council flagged the same concerns about distraction, diversion and delay connected to the need for a safe space to develop proposals. It also said that premature disclosure may have an unnecessary impact on property prices.
 38. In relation to document 12, the council again said that it was in the public interest for it to have a safe space in which to finalise its plans relating to the scheme, known as “Proposal 3”, since this project is still live and incomplete. It reiterated concerns about distraction, diversion and delay.

Balance of the public interest

39. The Commissioner does not consider that the public interest in preserving the confidentiality of other related information or information connected to other possible plans is not as significant as a result of information already disclosed or the allegation of survey work made by the complainant. The Commissioner’s understanding is that the information already disclosed relates to the southbound carriageway and concerns proposals which were put forward in the 2014 draft local plan, and which were subject to consultation. The information disclosed to the complainant was therefore in line with a level of disclosure that the council had deemed appropriate at that time. Moreover, the Commissioner is not aware of any appropriately independent evidence to support the allegation that survey work relating to the northbound carriageway had taken place. Highways England responded to this point in separate correspondence with the complainant as follows:

“I note your concerns about the recent surveys carried out immediately alongside your property and the markings on the road. This land falls under the jurisdiction of Surrey County Council and we believe the

surveys were carried out in connection with some public utilities works and the yellow marks were left as a marker for the gully cover.

Highways England do not have any works in this area and Surrey County Council have also confirmed they have no planned works at this location".

40. The Commissioner asked the council to confirm whether it has any knowledge of the allegation that survey work relating to the northbound carriageway had taken place and that property prices had already been affected as a result. The council responded as follows:
- Highways England, which manages the A3 trunk road, would be responsible for any survey work undertaken by its staff or contractors on the A3 trunk road.
 - Surrey County Council, which manages the Local Road Network including Clay Lane, would be responsible for any survey work undertaken by its staff or contractors on the Local Road Network.
 - Guildford Borough Council does own land adjacent to the complainant's house. This land is managed by Guildford Borough Council's Parks and Countryside team who may have undertaken management activities such as mowing the grass.
41. As regards the complainant's comments about the Localism Act, the council has said that it is confident that it has provided a high level of support to the Burpham Neighbourhood Forum. The relevant matter for the Commissioner to consider is the wider public interest under the EIR. The Commissioner can appreciate the complainant's personal concerns about the impact plans relating to this area could have on his property, and he has clearly found the ongoing uncertainty surrounding this difficult. This is a personal issue for him but it is true to say that there is a strong wider public interest in transparency and accountability. There is however always the question of degree and timing. It is not always necessary or appropriate to disclose every last piece of information at the time when a member of the public requests it in order to satisfy this wider objective. There are competing public interest arguments in favour of not disclosing information relating to these pre-planning matters as outlined by the council. The Commissioner has considered these below, focusing principally on the council's arguments about the need for a "safe space", and the related concern that not having this would cause a "chilling effect".
42. The terms "safe space" and "chilling effect" have become well-known in the context of certain exceptions under the EIR and exemptions under the FOIA. Safe space arguments are about the need for a safe space to

formulate policy, debate live issues, and reach decisions without being hindered by external comment and/or media involvement. Such arguments are related to, but not the same as chilling effect arguments, and care should be taken to differentiate between these two concepts. The Commissioner's view is that, whilst part of the reason for needing a safe space is to allow free and frank debate, the need for a safe space exists regardless of any impact of the candour of debate of the involved parties, which might result from a disclosure of information. Chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate or advice which it is said would result from disclosure of information under the EIR or the FOIA.

43. As noted specifically in this Commissioner's published guidance on regulation 12(4)(d),

"The need for public authorities to have a 'thinking space' for policy development was recognised in the original proposal for the Directive on public access to environmental information, which the EIR implement. The proposal explained the rationale for both this exception and the exception for internal communications:

'It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account. (COM(2000) 402 final p.13).'"

44. In relation to document 1 and 2, the Commissioner notes that the council has revealed some details about the possible plans in its 2014 draft local plan. However, the information revealed is of a limited nature and is, as the council says, subject to change. These documents form part of the council's and its stakeholders' considerations to inform the development of relevant proposals following the publication of the 2014 draft local plan, which sets out very early ideas about possible proposals in the life cycle of the local planning process. The Commissioner can appreciate that as part of this process of development, a safe space is required in order to avoid unnecessary distractions. Sometimes plans may change or not be taken forward at all. There appears to be no convincing reason to expect the council in this case to engage with the public at every stage in this process of development. The Commissioner agrees with the council that this would not be within the public interest because it would be likely to result in distraction and the unnecessary diversion of limited resources, and delay to the important work of finalising the council's local plan.

Given the scale of these proposals and the impact, the Commissioner was satisfied that the harm to the council's safe space by premature disclosure would be sufficiently severe.

45. The Commissioner also agrees with the council that there is a real risk of a chilling effect in relation to certain third party stakeholders like MGH in the future if documents 1 and 2 were disclosed. Such parties approach the council with the expectation of confidence as part of pre-planning discussions. This collaborative process depends on trust and confidence and is clearly an important tool in helping the parties arrive at mutually agreeable solutions to complex planning issues. The information provides detailed early considerations. The Commissioner can see how disclosure of this information would be likely to hinder the exchange of ideas in the future if there was a fear about premature disclosure to the public and is satisfied that the resulting chilling effect would be sufficiently severe in the circumstances.
46. In relation to the concerns expressed that MGH's draft report may contain misleading or inaccurate information, the council is only suggesting that there may be misleading or inaccurate information within the document. It does not know whether this is the case or not. The Commissioner is not willing to afford this argument significant additional weight as a result.
47. In relation to document 11, the Commissioner agrees with the council that it needs a safe space in order to think about possible plans. It is apparent that this sketch relates to the very early formulation of ideas. It may or may not be carried forward, and there seems to be no reason why the council should be expected to disclose such a provisional idea at the date of the complainant's request. This would not be within the public interest because it would be likely to result in distraction and the unnecessary diversion of limited resources, and delay to the important work of finalising the council's local plan. As the council says, disclosure of early plans that may or may not be taken forward risks an unnecessary impact on property prices and may cause undue public concern. Given the scale of these proposals and the impact, the Commissioner was satisfied that the harm to the council's safe space by premature disclosure would be sufficiently severe.
48. Finally, document 12 considered the impact of a possible plan for the A3 on another scheme. Not all of the information in this document is relevant to the request, but of the information that was, the Commissioner's view was that it was appropriate for the council to claim that a safe space was required to finalise its plans. The council has explained that the feasibility study completed by Surrey County Council is part of a wider evidence base and further assessments and

modelling work are needed before a firm proposal could be put forward in the form of a planning application. The Commissioner agrees that premature disclosure is unlikely to serve the public interest as much as preserving the safe space because of the likely distraction, diversion and delay, which the Commissioner was satisfied would be sufficiently severe in view of the nature of this scheme.

49. It is crucial to the balance of the public interest that the planning process is underpinned by a statutory framework, including requirements to consult with the public at appropriate points in the process. The council has added that Highways England is developing an A3 Guildford scheme for delivery in 2020/21-2024/25 and if proposal 1 is later advanced, it would be subject to additional public consultation in due course. The complainant has stressed to the Commissioner that he strongly believes that the public interest favours disclosure of all of the information now so that the public can be involved in the planning process. He has also alleged that the council is not complying with legislation by failing to provide information to a community forum, of which the complainant is a member.
50. However, the Commissioner was not persuaded that the complainant had presented persuasive rationale for the benefits of circumventing the usual planning processes in place in this particular case by disclosing the information to the general public under the EIR. In due course, the public will be consulted in line with the statutory requirements as the local plan develops, but it is important that the council be allowed the space and time in the meantime in order to carry out this work. The Commissioner's view is that the council correctly determined that the public interest favoured maintaining the exception under regulation 12(4)(d).

Regulation 12(5)(e)

51. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. The Commissioner has published guidance about this exception which for ease of reference is available here:

https://ico.org.uk/media/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

52. As the guidance notes, when assessing whether this exception is engaged, the Commissioner will consider the following questions:
- 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? This would happen if the information was disclosed.
53. The council applied this exception to documents 1, 11 and 12. As the Commissioner has found that this information was correctly withheld under regulation 12(4)(d), he has not gone on to consider whether this information was also excepted under regulation 12(5)(e). The council relied on regulation 12(5)(e) in relation to the following additional information, considered by the Commissioner in further detail below:
- Document 4: Notes of a Highways Agency Meeting (only section 4 is relevant)
 - Document 5: Meeting summary (only section 3 is relevant)
 - Document 6: Meeting minutes (only sections 4, 6 and 9 are relevant)
 - Document 7: Draft notes (only section 6 is relevant)
 - Document 8: Notes on workshops (only pages 4-5 are relevant)
 - Document 9: Meeting notes (only item 4 is relevant)
 - Document 10: Meeting notes (only section 2 is relevant)
54. It is firstly necessary to deal with one paragraph in document 4 which concerns discussion on the subject of noise. Regulation 12(9) of the EIR states the following:
- “To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g)”.*
55. The Commissioner considers that noise is an emission and that the information contained in this paragraph relates directly to the noise, touching upon effect and consequences. The Commissioner’s view is that regulation 12(5)(e) cannot be engaged in relation to this information. As no alternative exception was claimed, the Commissioner has ordered the disclosure of this paragraph in this decision notice.

Is the information commercial or industrial in nature?

56. 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 or services for profit.

57. Documents 4, 5, 7, 8, and 9 relate to MGH's proposals specifically. Their site has been identified in the emerging draft local plan as a potential site for residential development. The Commissioner accepts that this information relates to commercial activity.
58. Documents 6 and 10 relate to discussions with promoters of various sites identified in the draft local plan, including MGH. These promoters are competing to secure the allocation of land for development. The Commissioner accepts that this information relates to a commercial activity.

Is the information subject to confidentiality provided by law?

59. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
60. The council asserted that the information was confidential. It made no specific reference to this confidentiality being imposed by statute or contract and the Commissioner has therefore considered the common law of confidence. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
 - Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
61. Having considered the relevant information, the Commissioner is satisfied that the information is not trivial and the Commissioner is not aware of evidence to indicate that the information is in the public domain. He therefore concludes that the information has the necessary quality of confidence.
62. On the subject of whether the information was shared in circumstances importing an obligation of confidence, the council provided to the Commissioner a copy of its correspondence with MGH following consultation about this request. MGH made the following comments:

"These preliminary discussions were undertaken in the explicit and implicit expectation by Martin Grant Homes that such discussions and information provided would be treated as being confidential; which will

be no different from discussions held between our competitors and GBC in relation to other sites.

Had we been aware at the time that such discussions and information would be made publicly available, then that would have influenced the work undertaken and information provided.

At no time were we asked for our consent to disclose information and that remains our position”.

63. The Commissioner accepts that MGH provided information to the council about its proposals on the clear understanding that it would be kept confidential, with the caveat that information may be released if deemed appropriate under information access legislation. There is no evidence that would contradict the reasonableness of that assumption.
64. The Commissioner also notes that the discussions involved other stakeholders, in this case, the Highways Agency and Surrey County Council. Although not explicitly argued by the council, the Commissioner considers that the parties to these pre-planning discussions would owe each other a duty of confidence. The council has explained to the Commissioner that these discussions took place on a confidential basis, with the intention to publish relevant information as the draft local plan progressed. The Commissioner therefore considers that the information was shared in confidential circumstances and that the common law of confidence therefore applies.

Is the confidentiality required to protect a legitimate economic interest?

65. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal (now known as the First-Tier Tribunal (Information Rights)), the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) 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”.

66. The Commissioner will not accept speculation about prejudice to the interests of third parties. He expects public authorities to provide evidence that the arguments being presented genuinely reflect the concerns of the relevant third parties. This is in line with the decision of the Information Tribunal in the case of *Derry City Council v the Information Commissioner* (EA/2006/0014). In the latter case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air but as the arguments expressed only represented the council's own thoughts on the matter, the tribunal rejected the arguments.
67. By way of background, the Commissioner understands that the MGH site has been identified in the draft local plan for Guildford as a potential strategic scale residential site for up to 2,000 houses. The council explained that this is one of several large sites potentially able to help meet the anticipated housing need in Guildford. Preliminary discussions have taken place with council officers regarding the MGH site. This has included early discussions in connection with the primary point of access into the site.
68. In this case, the council argued that regulation 12(5)(e) was engaged in relation to all of the relevant documents because promoters of other identified strategic sites (with whom MGH are competing to secure the allocation of land for development) would gain a competitive advantage by the disclosure. The council argued that the disclosure would harm the safe space required for all the interested parties to formulate ideas and consult the council on matters that would affect their commercial interests before formal public consultation. It said that this would prejudice the ongoing pre-planning application discussions with MGH for their site and those concerning promoters of other sites.
69. The council provided no independent evidence to demonstrate that other promoters had concerns about the impact of disclosure on their own commercial interests and the Commissioner has therefore not been able to consider that argument further. He has focused instead on the evidence provided by MGH, which reflects the concerns put forward by the council. MGH made the following representations to the council:

Confidential information relating to the proposed access options to our site would be freely available in the public domain; open to be used by objectors and those promoting rival sites, possibly taken out of context from the significant amount of other technical work undertaken and yet to be undertaken. This could undermine our site and potentially

provide an unfair competitive advantage to our competitors, outside and in advance of the normal local plan and public consultation process ahead.

A position of trust and confidence in the discussions held to date with GBC would be undermined and further engagement would need to be significantly restricted. This, in turn, may undermine the normal level and type of engagement that would otherwise be held; a constraint which would not apply in equal measure to rival sites promoted by our competitors”.

70. The Commissioner considers that the argument proposed by MGH was limited. Nonetheless, the Commissioner accepts that these pre-planning documents collectively provide a great deal of specific information about MGH’s preliminary discussions with the council about their site, going significantly beyond the main issue of access to the site highlighted by MGH’s comments above. It is clear that those discussions took place in an open and frank manner, with MGH being encouraged to have those discussions on the understanding that the information would generally be kept confidential and not made available to the public or rival promoters prematurely.
71. The Commissioner was prepared to accept that the information contained within the documents would risk commercial prejudice to MGH because it involves detailed discussions about MGH’s specific proposals for its site at a point in time when plans have yet to be finalised and may change. In an environment where MGH is competing with the promoters of other sites, the risk is that this information would be used by competitors to exploit to their own advantage to make their own proposals seem more attractive. As MGH highlights, rival promoters of other sites would not necessarily be subject to the same level of disclosure at the same time causing a competitive imbalance, which would be unfair to MGH.
72. The Commissioner can also accept that revealing MGH’s early discussions with the council before it has had the opportunity to finalise plans as a part of a proper statutory public consultation and planning application in due course would expose MGH to an unfair commercial disadvantage compared to rival promoters because it would open them up to criticism and objections at an inappropriate point in the lifecycle of the planning negotiations, which would not necessarily be the case in relation to rival promoters of other sites. In other words, it would erode the safe space in which these discussions currently take place.
73. The Commissioner was also prepared to accept, given the nature of the information and the circumstances, that disclosure of the withheld information would impact MGH’s willingness to engage with the council

in the same way in the future, particularly because these matters were still ongoing at the time of the request and are still ongoing at the time of writing this decision notice. The discussions with MGH and other parties clearly involve complex plans on a large-scale requiring continued detailed consideration over a lengthy period of time. The Commissioner's impression is that the pre-planning discussions in general show cooperative relationships, with the current safe space available to the parties playing a significant role in securing that level of initial and valuable engagement. This is helping MGH to understand more about the council's requirements and to negotiate with it, increasing the likelihood of being commercially successful. A chilling effect resulting from disclosure would therefore risk commercial harm to MGH's interests.

74. In relation to documents 6 and 10, because the information also relates to rival promoters, rather than just MGH, the considerations are slightly different. The Commissioner cannot take into account commercial harm to the rival promoters' interests as the arguments provided by the council relate to MGH's interests. However, the council has confirmed that the argument is about the commercial harm to MGH's interests in view of the pre-planning safe space it would erode and the chilling effect it would cause which the Commissioner has accepted as described above.
75. In view of the above, the Commissioner considers that regulation 12(5)(e) was engaged.

Public interest in disclosing the information

76. The general scheme of the EIR itself envisages that there is always some public interest in the disclosure of information. This is because it promotes the general aims of transparency and accountability, and the understanding of decisions taken by public authorities.
77. In this particular case, the complainant made some specific arguments in favour of disclosure as already explained in paragraphs 31-33 of this notice. The Commissioner acknowledges that in relation to proposed large scale planning matters that would affect the environment and people's lives, there is a strong public interest in understanding the details of those plans. This information would enable the public to understand more about the options being considered relating to this development and the way the matter has progressed over a period of time.

Public interest in maintaining the exception

78. The EIR recognises that there is a public interest in ensuring that undue harm is not done to the commercial interests of public authorities through the disclosure of information. As described, the Commissioner has accepted that the disclosure of this information would prejudice the commercial interests of MGH. To reiterate briefly, he accepts that disclosure of the information would allow commercial rivals to exploit the information to their own advantage and erode the safe space that exists, increasing the risk of commercial prejudice via criticism and objections from rival promoters or members of the public at a point in time when plans are still being developed. This would cause a competitive imbalance.
79. The Commissioner also accepts that the disclosure would affect MGH's engagement with the council in the future, hampering its ability to understand the council's requirements and to negotiate as effectively as possible to try to ensure that it is commercially successful in the future.

Balance of the public interest

80. As mentioned, the complainant has made some specific points about why he believes the balance of the public interest favours disclosure. The Commissioner has not found his specific points persuasive for the reasons already outlined as part of the analysis relating to regulation 12(4)(d) (see paragraphs 39-41). On a general note, the Commissioner acknowledges that there is a strong public interest in accountability and transparency in relation to plans where the impact of those plans would be very significant. However, the fact that there is a strong public interest does not necessarily mean that the balance of the public interest was in favour of disclosure at the time of the request.
81. There are, as the council and MGH have argued, strong counter-acting public interest considerations that would warrant non-disclosure of the information outside of the usual statutory planning framework. The Commissioner considers that there is a persuasive case for withholding the information because of the risk that competitors could exploit the information. Some of the information concerns specific ideas discussed about the development that could provide a competitive advantage. Rivals or members of the public could also exploit the information by using it to level criticism or objections at MGH, particularly where possible problems are discussed. Other rivals would not necessarily be subject to the same treatment at the same time. The impact of this would be amplified because the plans are clearly in development and

may change. Dealing with criticism or objections would tie up resources unnecessarily. In the worst case scenario, the risk is that MGH would lose out to a competitor. The impact on MGH's business would be sufficiently severe.

82. Furthermore, there would be a related "chilling effect", hindering the open and frank dialogue that the parties benefit from in order to progress the plans free from external debate and comment. This may be counterbalanced to some extent by the benefits to MGH of continuing to engage with the pre-planning discussions. However, as the Commissioner has observed, it is clear that there are strong benefits to all parties in preserving open and cooperative negotiation in a long term and large scale development of this nature. This unhindered dialogue helps the parties to understand each other's requirements better and the feasibility of various options.
83. In the Commissioner's view, pre-planning discussions are often very valuable ways of progressing plans and are likely to save time and resources. In common with the rationale under regulation 12(4)(d) of the EIR, there is a strong public interest in supporting this commercial "thinking space" and allowing the time for ideas to be considered fully and accepted or rejected as a result of that due process. This is a productive way forward for all parties as the alternative might be that the council would receive a planning application that may not be suitable and would need to be rejected. Given the circumstances and the nature of the information, the Commissioner's view is that loss of this unhindered negotiating arena would have a sufficiently severe impact on MGH's interests.
84. As already mentioned in relation to the exception under 12(4)(d), a crucial factor in the public interest in this case is also the timing of the request and the existence of the relevant planning statutory background. As the council has explained, all of this information is connected to the ongoing process of developing the council's local plan. This will be subject to statutory public consultation in due course. As noted, the council has also drawn the Commissioner's attention to the fact that Highways England is developing an A3 Guildford scheme for delivery in 2020/21-2024/25 and if proposal 1 is later advanced, it would be subject to additional public consultation in due course.
85. The Commissioner can appreciate that waiting for the publication of more final plans is a source of frustration and concern for the complainant, however this is somewhat inevitable when there are plans needing discussion and development over a long period of time because of their significant impact and complexity. There does not seem to be any particular circumstances that would warrant

circumventing the usual planning process at the time of the complainant's request, and there was nothing about the nature of the information itself in the Commissioner's view that would warrant early disclosure of the plans discussed.

86. In view of the above, the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in disclosing the information in all the circumstances of the case.

Procedural issues

87. As the Commissioner found that one paragraph from document 4 was not exempt, the Commissioner considers that the council breached regulations 5(1) and 5(2). These regulations relate to the general duty to make environmental information available within 20 working days.

Right of appeal

88. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

89. 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.
90. 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
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