

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

**Date:** 11 February 2015

**Public Authority:** Denbighshire County Council  
**Address:** Council Offices  
County Hall  
Wynnstay Road  
Ruthin  
Denbighshire  
LL15 1YN

**Decision (including any steps ordered)**

---

1. The complainant requested information relating to the former North Wales Hospital, Denbigh. Denbighshire County Council ('the Council') provided some information but withheld other information under regulations 12(5)(b), 12(5)(e) and 12(5)(g). During the course of the Commissioner's investigation, the Council disclosed some additional information relevant to the request. The Commissioner's decision is that the Council has correctly applied regulations 12(5)(b) and 12(5)(e) to the remaining withheld information. He has also determined that, on the balance of probabilities, the Council does not hold any additional information other than that which it has disclosed and the remaining information that it has withheld under regulations 12(5)(b) and 12(5)(e). He does not require any steps to be taken.

**Request and response**

---

2. The request in this case was submitted by solicitors acting on behalf of the owners of the former North Wales Hospital site.
3. On 1 October 2013 the complainant wrote a lengthy letter to the Council, which included a number of requests for information in the following terms:

- “1. We once again make this request for disclosure of the Agreement signed in respect of the £1.9m and all the communication to and from yourselves in respect thereof and also any advices and also any Reports to Committees in respect thereof and all the additional information, reports and documents contained in the letter dated 26/9/13.
2. Please arrange to provide to us disclosure of the Strutt & Parker report together also with any further or previous reports that have been secured.
3. We make this Freedom of Information Act request for disclosure of documentation between DCC, PRT, engaged Contractors and Lloyds TSB between January 2009 to June 2013 together with copies of all relevant agreements and copies of all correspondence, email or otherwise. We also request copies of all communication with the contractors and all consultants in relation to the carrying out of Urgent Works and Repair Notices”.
4. The Council responded on 18 December 2013 and disclosed some information, stated other information (Committee Reports and Agendas) was available on its website and withheld other information under regulations 12(5)(e), 12(5)(b) and 12(5)(g) of the EIR.
5. On 13 January 2014 the complainant requested an internal review of the Council’s handling of the request.
6. The Council provided the outcome of its internal review on 31 March 2014 and upheld its decision that the remaining information held relevant to the request was exempt from disclosure under the EIR.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 4 April 2014 to complain about the way their request for information had been handled.
8. During the course of the Commissioner’s investigation, the Council disclosed some additional information relevant to the request. The remaining withheld information comprises the deed of release agreed between the Council and Lloyds Bank Plc and communications relating to the deed of release. The Council considers the withheld information to be exempt under regulations 12(5)(b) and/or 12(5)(e). In addition, the complainant raised concerns that the Council had not identified all information it held relevant to the request.
9. In light of the above, the Commissioner considers this complaint to be:

- whether the Council held any additional information relevant to the request at the time of the request (other than that which has been disclosed and that which it has continued to withhold); and
- whether the Council should disclose the remaining information held relevant to the request of 1 October 2013.

## Reasons for decision

---

### Background

10. The request in this case relates to the former North Wales Hospital, a Grade II listed building in Denbigh. The psychiatric hospital closed in 1995 as part of a reorganisation of health services and since then the buildings have been looted, vandalised and damaged by fire.
11. In 2001/2002, the property was purchased at auction by Acebench Investments Ltd. A feasibility study was commissioned in 2003 to identify a financially viable way forward for the site. The outcome was that enabling development was needed in the form of new build housing to fund the repair of the more important parts of the listed building, and substantial demolition was also needed to make the scheme viable. In November 2004 a hybrid planning application was submitted on behalf of Acebench Investments Ltd for, amongst other things, 17 acres of new build housing.
12. In early 2005 ownership of the site was transferred to Freemont (Denbigh) Ltd., a company registered in the British Virgin Islands. The Council discovered the sale when checking ownership with the Land Registry, and the planning application was amended accordingly.
13. In May 2005, the Council granted outline planning permission for the enabling development on 17 acres of land for new build housing located behind the main hospital building. This permission was subject to a section 106 agreement tying proceeds from the housing development to the repair of the listed building. Following lengthy negotiations, a section 106 agreement was signed in September 2006. The section 106 agreement included provision for a payment of £4.8 million into a restoration fund, controlled by the Council. The Council insisted that the payment of £4.8 million was underwritten by a bond from a British Bank, Lloyds TSB. A payment of £240,000 as a deposit for the restoration fund was paid by the owner to the Council, as required by the section 106 agreement and the balance was to be paid before the end of September 2009.

14. In April 2008 listed building consent was granted for demolition of approximately 60% of the main building in accordance with the outline planning approval. Demolition started at the end of October but was stopped shortly after because the owner had failed to get a licence to disturb the habitat of a protected species of bats.
15. At the end of September 2009, the balance of the restoration fund was not paid and the planning permission lapsed. The Council subsequently entered into discussions with Lloyds TSB about the bonds. The dispute with Lloyds TSB was settled by deed of release in October 2009, and the Council received a payment of £1.9 million from the bank.
16. In October 2010 the Council authorised the service of an Urgent Works Notice on the owner of the site. Following several months of preparation dealing with matters relating to listed building legislation, protected species legislation, health and safety matters associated with the structural condition of the building and the presence of asbestos, on 6 June 2011 an Urgent Works Notice was served on the owner of the building under section 54 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the 1990 Act'). As the owner did not respond, the Council's contractors entered the site to carry out the urgent works in default, costing approximately £900k. This was paid for out of the £1.9 million. Five demands for payments in relation to the costs of carrying out the urgent works in default were served on the owner by the Council under section 55 of the 1990 Act. The owner appealed against the five notices and the Planning Inspectorate accepted three of the appeals as valid. The appeals were the subject of an inquiry in 2014.
17. In May 2013 a repairs notice was served on the owner under section 48 of the 1990 Act outlining the repairs necessary to the most important part of the main listed building. As the Council did not receive any response, in September 2013 it resolved to proceed to Compulsory Purchase of the site.
18. In June 2014 the Compulsory Purchase Order (CPO) was made and served on the owners. The CPO requires the owners, Freemont (Denbigh) Limited, to sell the building to the Council, who will in turn pass ownership of the site onto the North Wales Building Preservation Trust, a non-profit organization which has been established to take over the site and who will receive support from the Prince's Regeneration Trust. The Trust will manage the restoration of the main buildings by progressing enabling development on the associated land, the profit from which will fund the restoration of the most important listed buildings and the demolition of a number of less important buildings. The CPO process could take 18 months and will include a public inquiry, which has yet to be timetabled.

**Regulation 5 – Duty to make available environmental information on request**

19. Regulation 5(1) provides a general right of access to environmental information held by public authorities. Regulation 12(4) states that:

“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.”

20. Irrespective of the legislative regime, the task for the Commissioner is to determine whether, on the balance of probabilities, the Council holds any information relevant to the request further to that which it has already identified. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases. For clarity, the Commissioner is not expected to prove categorically whether the information was held; he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

21. The Commissioner asked the Council to explain the extent of the searches undertaken in relation to the request. The Council confirmed that it holds a central manual record of information comprising approximately 17 lever arch files relating to the subject matter of the request, ie the former North Wales Hospital. These files, which were retained and managed by the legal advisor at the time, constitute the only centrally retrievable record of communications and documentation created in relation to the site in question. The Council confirmed that extensive searches were undertaken of the manual files at the time the request was received to identify information falling within the scope of the request.

22. The Council advised the Commissioner that, in light of the volume of information held and the fact that the manual files are not scheduled or listed in any structured way other than date order, it did consider applying the provisions of regulation 12(4)(b) – manifestly unreasonable requests – at the time the request was received. However, the Council advised that the searches that were undertaken did not exceed the 18 hours’ cost ceiling.

23. The Council explained that two of its officers were privy to communications relating to the former North Wales Hospital site – its legal advisor at the time and its conservation architect. The Council advised that it was not possible to conduct searches of the laptop of its former legal advisor as she had passed away prior to the request being made, and her laptop was returned to the Council’s IT department for

cleansing and re-use. In addition, the Council stated that when an officer leaves, their email account is deleted from the central address book and unless a request is made to retain the mailbox it is physically deleted 90 days after the date that user is removed from the directory.

24. However, the Council advised that its former legal advisor's preferred method of record keeping was manual filing. The Council is of the view that most (if not all) communications received electronically by the officer were printed and placed on the manual files held. The Council's view is, therefore, that the central manual record was the most logical place to search as it was likely to be entirely accurate and complete. In addition, the Council confirmed that searches of electronic records held by its conservation architect were undertaken and the information which was located was disclosed to the complainant in December 2014.
25. In reaching a decision in this case, the Commissioner has principally considered the steps the Council has undertaken to retrieve relevant information. He also notes that the Council was unable to conduct electronic searches in respect of one of the key officers involved in the issue as their laptop and email records had been deleted in line with normal policies and procedures prior to the request being received. Having considered these aspects, and in the absence of any clear evidence that further information is held beyond that which the Council has disclosed and that which the Council has continued to withhold, the Commissioner has reached the conclusion that, on the balance of probabilities, it is unlikely that further information is held by the Council.

### **Regulation 12(5)(b) – legal professional privilege**

26. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect "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". The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
27. The success of an application of regulation 12(5)(b) in terms of LPP will turn on three principal questions –
  - (i) Is the information covered by LPP?
  - (ii) Would a disclosure of the information adversely affect the course of justice?
  - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

### **Is the information covered by LPP?**

28. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Legal advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
29. In order to attract LPP, the information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
30. The withheld information in this case comprises legal advice requests and responses between the Council and its in-house legal advisers, and legal advice from Counsel. It also includes correspondence between the Council and Lloyds Bank plc as part of 'without prejudice' confidential negotiations relating to the dispute between the two parties. This is further considered at paragraphs 37 to 40 below. The Council is relying on legal advice privilege for some information and litigation privilege in relation to other information.
31. In terms of its application of litigation privilege, the Council provided the Commissioner with evidence to demonstrate that there was a real prospect of litigation at the time the information was created. The legal advice connects to potential litigation and the ongoing issue in relation to the provisions contained within the Section 106 Agreement.
32. The Council also provided the Commissioner with further arguments in support of its application of regulation 12(5)(b), and its public interest arguments. These are not included in this notice due to their confidential nature and the fact that they would reveal the content of the withheld information.
33. The Council confirmed that the legal advice and litigation information came into existence for the sole or dominant purpose of collecting evidence to use in agreeing a lawful strategy for development of the

site, seeking to negotiate a sale with the owner and funding the development strategy, obtaining a CPO, and carrying out urgent works at the property.

34. From the content of the withheld information, it is clear to the Commissioner that there was a real prospect of litigation between the Council and Lloyds Bank plc at the time the documents were created.
35. The Commissioner is satisfied that the withheld information which is subject to LPP consists of communications that, at the time they were made, were confidential, were made between a client and professional legal advisers acting in their professional capacity, and were made for the sole or dominant purpose of obtaining legal advice. Therefore, the Commissioner is satisfied that the information is subject to either legal advice privilege or litigation privilege.
36. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request, and there is therefore no suggestion that privilege has been lost.

#### **'Without prejudice' correspondence**

37. As stated earlier, some of the withheld information comprises correspondence between the Council and Lloyds Bank plc as part of 'without prejudice' negotiations.
38. In correspondence relating to litigation, the term 'without prejudice' is often marked on correspondence as part of negotiations on settlement. Rules about 'without prejudice' exist as a matter of public policy to encourage attempts at informal resolution of legal disputes, without fear of any offers or admissions being used against the parties in a subsequent court case and with the aim of streamlining the legal process while ensuring that fair trials are not undermined. 'Without prejudice' protection for information on negotiations continues even after a settlement is agreed, but obviously will no longer apply to the actual terms of the agreement once they have been finalised.
39. Under the EIR, public authorities may be able to exempt information that is marked 'without prejudice' in negotiations under regulation 12(5)(b), by virtue of the broad term "course of justice" in the exception, rather than specifically by means of LPP. In order for regulation 12(5)(b) to apply to such information, a public authority must demonstrate that the negotiations were genuine 'without prejudice' negotiations in an attempt to settle a legal dispute and that disclosure would adversely affect the course of justice.



40. The Commissioner notes that not all of the communications between the Council and Lloyds Bank plc are marked "without prejudice". However, it is clear that the correspondence was created during a period of confidential mediation where the parties involved were trying to resolve the matter without recourse to formal litigation.

**Would disclosure have an adverse effect on the course of justice?**

41. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
42. In consideration of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information subject to LPP would adversely affect the course of justice. In relation to the 'without prejudice' correspondence, the Commissioner is also satisfied that disclosure would undermine confidence in the general principle of 'without prejudice' negotiations, which would in turn adversely affect the course of justice. The Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information. Consequently, he has gone on to consider the public interest test.

**Public interest arguments in favour of disclosing the information**

43. The Council accepts that there is a general public interest in transparency and accountability in relation to its decision making process. The site and building to which the request relates are well known and prominent within the County and there is a public interest relating to its deteriorating and vulnerable condition, together with future use and plans for the site.
44. The Council acknowledges that disclosure would allow the public to understand the source of monies used to carry out the remedial works to the property and the reason why the Council had to carry out such works. This would enable the public to be more involved in the debate on the future of the site.
45. The Council also recognises "the public interest in seeing that a public authority is enforcing the law, its confidence in the Council's regulatory enforcement processes and the effect that any non-observance over building control/planning and regulatory issues by the owner are not being ignored but acted upon".

46. The complainant considers there is a strong public interest in disclosure of the information requested as the Council has

“acted in flagrant disregard for the terms of the Section 106 Agreement by refusing to acknowledge for a period of almost two years that they were holding these sums [the £1.9m received under the terms of the deed of release] and that such information only came to light after DCC had granted a contract for urgent works at the property.....They [the Council] kept the sum of £1.9m totally hidden.....It is now of paramount importance that [redacted] receives full information as to the terms under which payment was made, the Settlement Agreement reached by DCC with Lloyds TSB and the reasons why receipt of these sums was never disclosed”.

47. The complainant also advised that the Council stated on a number of occasions in 2009 that the owner of the site had no liability to pay the balance of the restoration fund. However, in 2011 the Council subsequently stated that it wanted to “recover from the Bank under the Bonds the £5.1m owed under the Section 106 Agreement as at 26 September 2009”. The complainant alleges that the Council has not accepted that it has ever made any request for payment under the terms of the Bond that they held with Lloyds Bank Plc. The complainant considers that this is evidence that the Council “clearly misled & misrepresented the truth”.

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

48. In this case, in relation to the public interest in favour of maintaining the exception, the Council put forward the following arguments:
- The contractual and common law duty of confidentiality owed to the Bank.
  - The matter is still live in as much as at the time of the request there was ongoing litigation. The legal advice is actively being used by the Council in the ongoing litigation.
  - The importance of maintaining the principle behind LPP in safeguarding the confidential relationship between a client and his legal adviser. Decisions made by public authorities must be taken in a fully informed context.
  - Disclosure has the potential to prejudice the Council’s position to defend its legal position in the ongoing and any future litigation.
  - The overwhelming public interest in preventing the site and historic buildings from deteriorating further, and to bring the land back into

use for the community. Disclosure has the real prospect of damaging the plans and the strategy developed for the site to date.

### **Balance of the public interest arguments**

49. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, he has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.
50. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP; namely safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
51. The Commissioner believes there is a public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. A disclosure of the withheld information would provide a degree of transparency and reassurance in relation to the Council's decisions regarding the building and site in question and may assist the public in understanding the legal basis for such. The Commissioner notes that there is also a general public interest in matters associated with the site as a result of its historical significance for the area.
52. The Commissioner notes that the complainant has a private interest in the withheld information due to involvement in the ongoing appeals and litigation against the Council. However, the Commissioner does not accept that this equates to a wider public interest in disclosure of information relating to the deed of release agreed between the Council and Lloyds Bank plc.
53. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner believes it is important that the Council should be able to

consult freely and frankly with its legal advisors and that its ability to defend itself fairly in the future is not compromised. The Commissioner considers that disclosure of the information would be unfair since parties seeking to challenge the Council's legal position would not be obliged to disclose any equivalent advice they had received in relation to the issue. Disclosure would, therefore, adversely affect the Council's ability to defend its position in current and future legal appeals/challenges. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.

54. The Commissioner also considers that the timing of the request in this case weighs heavily in favour of maintaining the exception, given the fact that the Council was involved in ongoing litigation at the time of the request.
55. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of good quality legal advice.
56. The Commissioner notes that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the Council had misrepresented any legal advice it had received or evidence of a significant lack of transparency.
57. On balance, the Commissioner is satisfied that, in this case, the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

### **Regulation 12(5)(e) - confidentiality of commercial or industrial information**

58. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where disclosure would adversely affect "the confidentiality of commercial or industrial information where such

confidentiality is provided by law to protect a legitimate economic interest”.

59. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

60. The Commissioner has considered how each of the conditions apply to the withheld information.

61. The Council also provided the Commissioner with further arguments in support of its application of regulation 12(5)(e) and its public interest arguments. These are not included in this notice due to their confidential nature and the fact that they would reveal the content of the withheld information.

*Is the information commercial or industrial in nature?*

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

63. The withheld information relates to a payment of monies to the Council in relation to two bonds agreed within a Section 106 agreement in relation to the development of the site in question. As such, the Commissioner is satisfied that the information is commercial in nature.

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

64. In relation to this element of the exception, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligations or statute.

65. The Council advised that the withheld information is subject to a duty of confidence provided by law. This is outlined within the deed of release which contains a confidentiality clause relating to the deed itself and negotiations in connection with it.

66. The Commissioner has seen a copy of the deed of release, which contains a confidentiality clause which demonstrates the intention for

the information to be held in confidence. The Commissioner is satisfied that the information is subject to a duty of confidence provided by law. He is also satisfied that the information is not trivial in nature and it has not been disseminated into the public domain.

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

67. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
68. The Council has argued that disclosure of the withheld information would adversely affect its own legitimate economic interests. The Commissioner accepts that the Council has spent around £900,000 in carrying out emergency repairs on the site in question. This money has, to date, been deducted from the £1.9 million payment received as a result of the deed of release agreed with Lloyds Bank plc (the mortgagee of the land in question). The Council has attempted to reclaim the monies spent on emergency repairs from the owner and issued a number of demands of payment under section 55 of the 1990 Act. In light of the ongoing litigation between the Council and the owner of the site the Commissioner is satisfied that disclosure of the withheld information would harm the Council's own economic interests.

*Would confidentiality be adversely affected by disclosure?*

69. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. He acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified. The Commissioner has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosing the information**

70. The Council submitted the same arguments in favour of disclosure as that for regulation 12(5)(b). As such, the Commissioner has not repeated them here. In addition, the complainant's arguments in favour of disclosure are the same as those detailed previously in respect of regulation 12(5)(b).

### **Public interest arguments in maintaining the exception**

71. The Council put forward the following arguments in favour of maintaining the exception at regulation 12(5)(e):
72. The Council has argued that disclosure at the time of the request, (and even at this stage), would undermine the principle of confidentiality. The Council pointed out that the information was exchanged between the parties during confidential negotiations and discussions, as demonstrated by the confidentiality clause contained within the deed of release. The Council does not consider it to be in the public interest for it to breach an obligation of confidence which may render it liable to litigation and compensation. This would impact negatively on public funds, particular during a time of austerity, as in the current economic climate.
73. The Council also does not consider it to be in the public interest for information to be disclosed which is likely to prejudice its commercial interests. In addition, the impact of such disclosure could lead to a loss of confidence of third parties entering into commercial negotiations with the Council if they believed such information would not remain confidential.
74. The Council stated that the site already had planning permission for development, which had lapsed. The public will have the opportunity to contribute to any decisions relating to the site, if and when any planning application is submitted in the future.
75. The Council also confirmed that the subject matter was very much a live issue in that at the time of the request there was ongoing litigation and appeals relating to the site. At the time of the request, the Council had made a decision to apply for a Compulsory Purchase Order for the site, and there were ongoing appeals in relation to the demands for payment issued by the Council to the owner under section 55 of the 1990 Act.
76. The Council also contends that there is an overwhelming public interest in preventing the site and historic buildings from deteriorating further, and to bring the land back into use for the community. Disclosure has the real prospect of damaging the plans and the strategy developed for the site to date.

### **Balance of the public interest**

77. The Commissioner has considered the above arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial

detriment and the public interest in protecting the principle of confidentiality.

78. There is a particular public interest in the subject matter of the request which relates to an important historical listed building. There is a strong public interest in preventing the site and historic buildings from deteriorating further. The Commissioner notes that there has been significant media attention in relation to matters relating to the building and site in question.
79. It is therefore clear that there will be considerable weight attached to the argument that disclosure of the disputed information will help the public engage with the Council about plans that could ultimately affect them. The Commissioner notes, however, that planning permission for the site has lapsed and the public will have the opportunity to comment on any plans for the site if and when any new planning application is submitted. The Commissioner considers that the public will have an opportunity to consult with the Council about any proposals for the site and air any concerns about any potential development itself following submission of a planning application. It is the opinion of the Commissioner that this consultation period would be the appropriate forum in which the public could participate in and potentially shape any decision made by the Council about the site.
80. Again, the Commissioner notes that the complainant has a private interest in the withheld information as they are involved in the ongoing appeals and litigation against the Council. However, the Commissioner does not accept that this equates to a wider public interest in disclosure of information relating to the deed of release agreed between the Council and Lloyds Bank plc.
81. The Commissioner considers that there is a strong public interest in maintaining the confidentiality of information which reveals a party's bargaining position during ongoing negotiations. In this case the deed of release and information relating to it is subject to a specific confidentiality clause. It is also clear to the Commissioner that negotiations and exchanges between the Council and Lloyds Bank plc were conducted on a confidential, without prejudice basis. The Commissioner therefore accepts that disclosure has the potential to dissuade third parties in legal dispute with the Council from negotiating on a confidential basis which could result in protracted and expensive litigation.
82. The Commissioner considers that the timing of the request in this case is an important factor in determining where the balance of the public interest lies. He notes that there were ongoing legal appeals relating to



the site at the time of the request, which he understands are still ongoing.

83. In light of the above, and the nature of the withheld information, the Commissioner is of the view that the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. Therefore the Commissioner is satisfied that the Council correctly withheld the information under regulation 12(5)(e) of the EIR.

## Right of appeal

---

84. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

85. 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.
86. 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 .....**

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