



**Merseyside
FIRE & RESCUE
SERVICE**

**Merseyside Fire & Rescue
Authority Headquarters
Strategy and Performance
Bridle Road
Bootle
Merseyside
L30 4YD**

Telephone: 0151 296 4000
(Calls may be recorded)

Julie Yare / Jean Crimmins
0151 296 4479/4474
Debbie Appleton 0151 296
4402

Fax: 0151 296 4631
Web Site:
www.merseyfire.gov.uk

Samantha Bracegirdle
Senior Case Officer
The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Your Ref: FS50592270

Our Ref: FOI/74/2015

Date: 3rd September 2015

Dear Ms Bracegirdle,

In response to your e-mail dated the 26th August 2015 for the complaint from Mr John Brace regarding the handling of the request referenced above, please find enclosed the requested information that we consider exempt under the Freedom of information Act 2000. We believe that Section 44 applies as an exemption and our understanding is that EIR does not apply for the reasons set out in the Internal Review which is enclosed.

As explained in our response we consider these exemptions apply because as a Public Authority Merseyside Fire & Rescue Authority in the public interest, have a duty to negotiate the best possible financial deal to protect the public purse which then enables the Authority to provide the best possible service with the funds it has available. This information contains expenditure and income breakdown and so any other companies negotiating for the land would be at a commercial advantage if it were to be disclosed. Such negotiations are continuing and therefore this remains confidential for these same reasons.

As requested, we have enclosed a copy of the withheld information for your consideration.

Yours sincerely

J. Crimmins

Julie Yare
Corporate Information Sharing Officer

SCANNING
04 SEP 2015

PP

enc.



2004-2005
Services for Older People
FOI/74/2015 Mr Brace ICO Complaint 03/09/2015



CAPITAL COSTS OF THE NEW FIRE STATION

	EXPENDITURE		INCOME
	£000	£000	£000
Land <i>(Notional only)</i>	300		
Build	3700		
Grant			-1500
Partners			tba
Sale of land -			
Upton			-350
West Kirby			-200
Total	4000		-2050
Net		1950	

This page is intentionally left blank

CAPITAL COSTS OF THE NEW GREASBY FIRE STATION

	EXPENDITURE		INCOME
	£000	£000	£000
Land	300		
Build	3700		
Grant			tba*
Partners			tba
Sale of land - Upton			-350
West Kirby			-200
Total	4000		-550
Net		3450	

*Bid for DCLG Transformation Funding made in June 2014. Outcome awaited.

This page is intentionally left blank

Yare, Julie

From: Henshaw, Janet (Legal)
Sent: 31 July 2015 12:08
To: 'request-274177-3ac50d7b@whatdotheyknow.com'
Subject: Internal Review

Dear Mr Brace

INTERNAL REVIEW OF YOUR REQUEST FOR INFORMATION

I have considered the request for Information made on 14th June 2015 along with the response from the Authority's Freedom of Information Team of 8th July 2015 and your request for an Internal Review of the decision of 8th July dated 15th July 2015.

Environmental Information Regulations 2004 (EIR 2004)

I have carefully considered the definition of "Environmental Information" in Regulation 2 of the EIR 2004 which you have replicated in full in your email of 15th July 2015. However I do not consider that Regulation 2(1)(c) or 2 (1)(e) apply in the case of the two report Appendices (CFO/101/14 Appendix H and CFO/003/14 Appendix F) that you have requested. This is because these reports relate to estimated capital costs of building and do have any implications for either :

(c) " measures (including administrative measures), such as policies, plans, programmes, environmental agreements and activities **affecting or likely to affect the elements and factors referred to in (a) and (b)** (these being various elements of the environment as you have replicated in your email) **as well as measures or activities designed to protect these elements.**" my emphasis OR

(e) "cost- benefit and other economic analyses and assumptions **used within the framework of the measures and activities referred to in (c)** my emphasis.

As these reports have no bearing upon anything affecting the elements described above the EIR 2004 cannot be applied.

Freedom of Information Act 2000

You have stated that there is "... no such thing..." as the Freedom of Information Act 2004, which was quoted in the decision letter to you of 8th July 2015. Further you have asked if this is meant to refer to the Freedom of Information Act 2000. This is correct and the reference to the 2004 Act was quite clearly a typographical error and nothing more

Exempt Items on the Agenda of the Authority Meeting of 30th June 2015

Report Appendices CFO/101/14 Appendix H and CFO/003/14 Appendix F were both subject to exemptions under Paragraph 3 of Part 1 to Schedule 12A of the Local Government Act 1972 which constitutes information relating to the financial or business affairs of any particular person, including the authority holding the information. This is not subject to a recommendation to or Resolution of the Authority or Committee but is a decision made by myself as the Monitoring Officer of this Authority. In considering this decision I took due regard to the public interest but decided that in all the circumstances and due to ongoing negotiations between MFRA and landowners of the land involved and the potential for publication to affect such negotiations, along with consideration of the best use of public and taxpayers money, there was and remains a need for commercial sensitivity.

Authority elected Members are at liberty to question such decisions and indeed do so on occasion and it is part of the role of the Monitoring Officer to advise Members in this regard, should they have any questions or wish to

change this decision. However there was no such questioning with regard to these particular report appendices. It should also be noted that only this very small part of the reports in question had been subject to this exemption. The remainder of both reports were fully publicised.

It should also be noted that the Openness of Public Bodies Regulations 2014, Regulation 9 (1) and (2) provide that "Nothing in this Part—

- (a) authorises or requires a relevant local government body to disclose to the public or make available for public inspection any document or part of a document if, in the opinion of the proper officer, that document or part of a document contains or may contain confidential information; or
- (b) requires a relevant local government body to disclose to the public or make available for public inspection any document or part of a document if, in the opinion of the proper officer, that document or part of a document contains or is likely to contain exempt information

The Decision Letter

You have complained that the Decision Letter of 8th July 2015 in that it relates to Regulation 12 (5) (d) and (e) of the EIR 2004. Having reviewed your request refusal I am clear that the EIR 2004 does not apply to this request. Consequently Regulation 12 of these is not applicable. However I am satisfied that as these report appendices were subject to exclusion from the press and public under the Local Government Act 1972, Schedule 12A of Part 1 Paragraph 3, that the exemption under the Freedom of Information Act 2000 section 44 applies. Section 44 (1) (a) provides that information is exempt where it's disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment.

You have a further right of appeal to the Information Commissioner and this should be sent to:

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

Telephone: 0303 123 1113
<http://www.ico.org.uk>

Yours sincerely

Janet Henshaw
Solicitor to the Authority and Monitoring Officer
Merseyside Fire and Rescue Authority
Bridle Road
Bootle
Merseyside
L30 4YD



Information Commissioner's Office

Upholding information rights

Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
Tel. 0303 123 1113 Fax. 01625 524 510 www.ico.org.uk

Our ref: FS50592270
Your ref: FOI/74/2015

Julie Yare
Corporate Information Sharing Officer
julieyare@merseyfire.gov.uk

29 September 2015

Dear Ms Yare

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

Complainant: John Brace
Date of request: 14 June 2015

Thank you for your letter of 3 September 2015. I apologise for the delay in my response.

From the information you have provided it is my preliminary view that the requested information is not intrinsically linked to any of the definitions of "environmental information" at regulation 2(1) of the EIR. Therefore the Information Commissioner intends to review the handling of the request under the FOIA.

You have applied the exemption at section 44(1)(a) (prohibitions on disclosure – by or under any enactment). Please specify the enactment and the specific provision(s) of that enactment which prohibit disclosure of the withheld information. Please explain in detail why the provision(s) in question would prohibit disclosure of the withheld information. Where relevant, please explain why Merseyside Fire and Rescue Authority has concluded that the gateways to disclosure or exceptions to the prohibition contained within the enactment are not engaged in respect of this request.

In composing your response, please be aware that the Commissioner considers that Schedule 12A of the Local Government Act 1972 does **not** operate as a statutory bar to disclosure under the FOIA. His reasons for this are set out in this decision notice: https://ico.org.uk/media/action-weve-taken/decision-notices/2014/970282/fs_50517099.pdf

Mr Brace has supplied specific reasons for believing that the information should be disclosed, and has cited sections of the Local Government Act 1972 which he believes support his view. I attach a copy of his submission and would ask that you address the points he makes, in your response.

If, in light of the above, you consider that the information should in fact be disclosed to Mr Brace, please do so and arrange to send me a copy of what you send him.

I would be grateful for your response by 27 October 2015.

Yours sincerely

Samantha Bracegirdle Senior Case Officer
The Information Commissioner's Office

The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
T. 01625 545749 F. 01625 524510 www.ico.org.uk
-I am not in the office on Thursdays and Fridays-

We are often asked for copies of the correspondence we exchange with third parties. We are subject to all of the laws we deal with, including the Data Protection Act 1998 and the Freedom of Information Act 2000. You can read about these on our website (www.ico.org.uk). Please say whether you consider any of the information you send us is confidential. You should also say why. We will only withhold information where there is good reason to do so.

I would like to draw ICO's attention to s.100J of the Local Government Act 1972 c.70 which states:

100J Application to new authorities, Common Council, etc.

(1) Except in this section, any reference in this Part to a principal council includes a reference to ----

....

(f) a fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies.

The Merseyside Fire and Rescue Authority is a fire and rescue authority that falls within this definition and therefore falls within the definition of "local council" in the following section.

Section 100(C) of the Local Government Act 1972 (which like s.100J is also in part VA) states

100C Inspection of minutes and other documents after meetings

(1) After a meeting of a principal council the following documents shall be open to inspection by members of the public at the offices of the council until the expiration of the period of six years beginning with the date of the meeting, namely—

....

(d) a copy of so much of any report for the meeting as relates to any item during which the meeting was open to the public.

Both agenda item 10 (Proposals for Upton and West Kirby Fire Stations) at the public meeting of the Merseyside Fire and Rescue Authority of the 2nd October 2014 (which relate to the appendix H part of the request) and agenda item 5 (West Wirral Operational Response Considerations (Post Consultation) at the public meeting of the Merseyside Fire and Rescue Authority of the 29th January 2015 were both open to the public.

Please find attached the Information Commissioner's correspondence regarding Mr Brace's complaint.

From: Crimmins, Jean [mailto:JeanCrimmins@merseyfire.gov.uk]
Sent: 02 October 2015 15:56
To: casework
Cc: Freedom of Information Team
Subject: Reference FS0592270 (FOI/74/2015)

Dear Ms Bracegirdle,

In response to your letter of 29th September 2015, please see the attached correspondence.

Kind regards,

Jean Crimmins
Corporate Information Sharing Officer
Strategy and Performance
Merseyside Fire and Rescue Service Headquarters
Bridle Road
Bootle
L30 4YD

(T) 0151 296 4474
(F) 0151 296 4631

Mail to: jeancrimmins@merseyfire.gov.uk
Secure e-mail: jean.crimmins@mfrs.ejsm.net

Intranet/Portal <http://intranetportal/sites/KIM/default.aspx>
Internet www.merseyfire.gov.uk

This e-mail and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this e-mail in error please notify the originator of the message.

Any views expressed in this message are those of the individual sender, except where the sender specifies and with authority, states that they are those of Merseyside Fire and Rescue Service.

Incoming and outgoing emails may be monitored in line with current legislation.

Steps have been taken to ensure that this email and attachments are free from any virus. In keeping with good computing practice the recipient should not open any attachments if they do not expect them.

<http://www.merseyfire.gov.uk/>

Information Commissioner's
Office
Samantha Bracegirdle

**Merseyside Fire
& Rescue
Authority
Headquarters**
Strategy and
Performance
Bridle Road
Bootle
Merseyside
L30 4YD

Telephone: 0151
296 4000
(Calls may be

Your Ref: FS50592270

Our Ref: FOI/74/2015

Date: 2nd October 2015.

Dear Ms Bracegirdle

FREEDOM OF INFORMATION ACT 2000 - INFORMATION REQUEST

Thank you for your letter dated 29th September 2015 regarding the complaint for the above Freedom of Information request from Mr Brace. Although the Decision Notice reasons appear to conflict with Schedule 12A of the Local Government Act 1972, we consider that if the Decision Notice is accepted then, because we exempted the requested information due to commercial sensitivity, we now would say that Sec 43 of Freedom of Information Act 2000 (Commercial Interests) applies and reiterate that we consider this information to be commercially sensitive because:

1. We are in the process of asking a local council for a piece of land upon which we wish to build a new fire station (to enable the Authority to merge two existing stations and so try to make savings in relation to government cuts)
2. We have been consulting upon this proposal and do not yet have either the agreement of the said council to transfer the land, or indeed planning permission
3. The information requested by Mr Brace relates to potential land values – if this was to be in the public domain it could prejudice any future commercial negotiations.
4. The amount to be paid and negotiated for the land in question is to come from public monies and the Authority has a duty to obtain value for money in any purchase or sale – if this information was in the public domain at this crucial stage it may not be possible to obtain best value for money.

Yours sincerely

Julie Yare
Corporate Information Sharing Officer

Our ref: FS50592270
Your ref: FOI/74/2015

Julie Yare
Corporate Information Sharing Officer
Merseyside Fire and Rescue Authority
julieyare@merseyfire.gov.uk

20 October 2015

Dear Ms Yare

Freedom of Information Act 2000 (FOIA)
Complainant: John Brace
Date of request: 14 June 2015

Thank you for your letter of 2 October in which you withdrew MFRA's reliance on section 44 to withhold the requested information and substituted instead section 43. The Commissioner will consider the late application of a new exemption, but to do so I will need some further information from you.

Section 43(2)

You have explained that you consider the information to be commercially sensitive. Section 43(2) applies in respect of information the disclosure of which would prejudice the commercial interests of any person (including MFRA).

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and please provide copies of correspondence MFRA has had with third parties in relation to this request.

Please also address the point made in the complainant's submission (supplied with my last letter) that the requested information was publicly discussed in open meetings, and that MFRA has a duty under section 100(c) of the Local Government Act 1972 to allow access to such information.

Likelihood of prejudice

Section 43 is a prejudice based exemption. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to, prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

Please confirm which threshold of likelihood MFRA is relying on in this case, i.e. the lower threshold that disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

Public interest test

Section 43 is a qualified exemption and so even if engaged, it is necessary to consider whether the public interest nevertheless favours the disclosure of the information. Please therefore explain:

- What public interest arguments in favour of disclosing the information were taken into account when considering the application of section 43?

- What public interest arguments in favour of maintaining the exemption were taken into account?

- Why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information. Please

include details of any particular weighting exercise that has been carried out.

Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments. In putting together your response you might find the Commissioner's guidance on section 43 helpful.

https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

You can see the approach the Commissioner takes to the application of section 43 by looking at his recent decision notices (the notices are searchable by section)

<http://search.ico.org.uk/ico/search/decisionnotice>

I would be grateful for your response by 17 November 2015.

Yours sincerely

Samantha Bracegirdle **Senior Case Officer**
The Information Commissioner's Office

The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
T. 01625 545749 F. 01625 524510 www.ico.org.uk
-I am not in the office on Thursdays and Fridays-

From: Crimmins, Jean [mailto:JeanCrimmins@merseyfire.gov.uk]
Sent: 13 November 2015 11:32
To: casework
Cc: Appleton, Debbie; Henshaw, Janet (Legal); Yare, Julie
Subject: FOIA Complaint (Ref. FS50592270)

Dear Ms Bracegirdle,

In response to your e mail of 20th October 2015, please see the attached correspondence.

Kind regards,

Jean Crimmins
Corporate Information Sharing Officer
Strategy and Performance
Merseyside Fire and Rescue Service Headquarters
Bridle Road
Bootle
L30 4YD

(T) 0151 296 4474
(F) 0151 296 4631

Mail to: jeancrimmins@merseyfire.gov.uk
Secure e-mail: jean.crimmins@mfrs.cjsm.net

Intranet/Portal <http://intranetportal/sites/KIM/default.aspx>
Internet www.merseyfire.gov.uk

This e-mail and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they
If you have received this e-mail in error please notify the originator of the message.

Any views expressed in this message are those of the individual sender, except where the sender specifies and with authority, states that
Incoming and outgoing emails may be monitored in line with current legislation.

Steps have been taken to ensure that this email and attachments are free from any virus. In keeping with good computing practice the r
<http://www.merseyfire.gov.uk/>

Ms Bracegirdle

**Merseyside Fire
& Rescue
Authority
Headquarters**
Strategy and
Performance
Bridle Road
Bootle
Merseyside
L30 4YD

Telephone: 0151
296 4000

Your Ref:

Our Ref: FS50592270

Date: 13th November 2015.

Dear Ms Bracegirdle

Freedom of Information Act 2000 (FOIA)

Complainant: John Brace

Date of request: 14 June 2015

Thank you for your letter of 20th October 2015 in which you said The Commissioner will consider the late application of a new exemption being applied section 43. Please see below for further information requested to support our reason for applying section 43.

We have set out the ICO comments and questions contained within your letter, followed by our responses in red. If you require any further clarification or have any further queries, please do not hesitate to contact us.

Section 43(2)

ICO

You have explained that you consider the information to be commercially sensitive. Section 43(2) applies in respect of information the disclosure of which would prejudice the commercial interests of any person (including MFRA).

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Response

The commercial interests of MFRA would be seriously prejudiced if the appendices were disclosed.

ICO

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.

Response

The disclosure of this information would prejudice MFRA's position as a purchaser and vendor in a commercial environment. Please see the further information below.

ICO

Please ensure that you provide evidence which demonstrates a clear link between disclosure of

the information that has actually been requested and any prejudice to commercial interests which may occur.

Response

If the information was disclosed then MFRA's purchasing and selling position would be compromised, as it relates to the potential land values for the existing Upton and West Kirby fire stations and the purchase of land for a new fire station. As previously referred to in our response letter of 3rd September 2015, if this information was placed in the public domain then it could prejudice any future commercial negotiations. More details are provided in later responses below.

ICO

If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and please provide copies of correspondence MFRA has had with third parties in relation to this request.

Response

The prejudice does not relate to a 'third party' so the provision of copies of any correspondence is not relevant in this case.

ICO

Please also address the point made in the complainant's submission (supplied with my last letter) that the requested information was publicly discussed in open meetings, and that MFRA has a duty under section 100(c) of the Local Government Act 1972 to allow access to such information.

Response

The requested information (contained in the appendices) was not discussed in an open meeting as the information was exempt by virtue of Schedule 12A to the Local Government Act 1972. Section 100 (A) (B) and (C) of the LGA 1972 ***Inspection of Minutes and other documents after meetings*** does state that a public authority should allow the information to be made available for inspection, however section 100B (2) provides that " *if the proper officer thinks fit, there may be excluded from the copies of reports provided in pursuance of subsection (1) above the whole of any report which, or any part which, relates only to items during which, in his opinion, the meeting is likely not to be open to the public.*" There is no requirement to publish any document which discloses exempt information (section 100B (2) and 100D). These provisions are also however subject to the public interest test and this was applied in exactly the same way as was the case in reference to section 43 of the Freedom of Information Act.

It should also be noted that the report itself was made public and only one Appendix was exempted under the LGA Schedule 12A to each of two separate reports. This was to ensure that all the requisite information was available without prejudicing ongoing and serious negotiations. Therefore the meeting was open to the public for the report and the public and press were only excluded for this particular appendix being considered.

Likelihood of prejudice

ICO

Section 43 is a prejudice based exemption. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to, prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would

be likely to' occur.

With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

Please confirm which threshold of likelihood MFRA is relying on in this case, i.e. the lower threshold that disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

Response

We are applying the higher threshold in this particular case because of the clear need for commercial sensitivity as outlined below, which **would have** a prejudicial effect as negotiations would be damaged by knowledge which would be in the public domain – this in turn would undermine the Authority's duties to the taxpayers of Merseyside to provide the best possible value for money.

Public interest test

ICO

Section 43 is a qualified exemption and so even if engaged, it is necessary to consider whether the public interest nevertheless favours the disclosure of the information. Please therefore explain:

- What public interest arguments in favour of disclosing the information were taken into account when considering the application of section 43?

Response

The Authority has a duty to be transparent and provide sufficient information for understanding and participation in debate and the spending of money. However the decision was arrived at when these issues were weighed against the need to maintain commercial sensitivity at the time. This situation continues as due to local planning issues, the negotiations have not yet commenced.

ICO

What public interest arguments in favour of maintaining the exemption were taken into account?

Response

The disclosure of the information would adversely affect MFRA's position with regards to any future negotiations concerning the sites in question.

ICO

Why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information. Please include details of any particular weighting exercise that has been carried out

Response

The response in the letter that was sent to the ICO on 8th July 2015 still applies: "The reason why the public interest favours withholding the information is because the information contained within these documents is deemed to be commercially sensitive and the disclosure of such information is

not deemed to be in the public interest as it may jeopardise the Authority's position with regards to any future negotiations concerning the sites in question.

As a Public Authority Merseyside Fire & Rescue Authority has a duty to negotiate the best possible financial deal to protect the public purse which in course enables the authority to provide the best possible service." The decision was arrived at as the information provided within the body of the report gave more than enough information to provide accountability and transparency. The report itself and the other appendices allowed the Authority to make an informed decision and allowed members of the public to understand decisions which may affect them and indeed to challenge such if they wish to. The information contained within the exempted appendix would not have added to or improved accountability, transparency or information and understanding by the public but would nevertheless have created considerable commercial confidentiality issues for the Authority.

However, more detail is provided below to explain the response:

It is important that the Authority achieves the highest possible price for the sale of Upton and West Kirby fire stations and pays the lowest possible price for the purchase of land at Saughall Massie on which it hopes to build the proposed new fire station. To reveal what the Authority expects to pay for the new land or what it expects to receive for the sale of the existing sites would give potential purchasers (and the owner of the new site) a commercial advantage. In effect, the Authority would be "showing its hand". This cannot be in the public interest as the Authority is funded from the public purse and must achieve the best possible price for the premises it sells and pay a reasonable sum for the land it purchases. Hence why the information was contained in appendices to the Authority report that were Exempt and not intended for publication.

The following may provide some useful background to the Authority's position:

Over the last four years, the Authority has had to make savings of £20 million as a result of Government spending cuts. The Authority is required to make a further £6.3 million savings in 2015/16. It is also clear that the Authority will also face further significant cuts over the course of the next Parliament. The Authority has already made significant reductions in its support services and staffing. The number of firefighters the Authority employs has been reduced from 1,400 to 764 over the period, with fire engines reduced from 42 to 28 across the county. All but two stations have only one fire engine based there. Prior to the start of this change process, what had not altered was the number of fire stations (26). This number has now reduced to 25 with the closure of Allerton fire station (in Liverpool) on 1st April 2015.

To save £6.3 million in 2015/16, the Authority has identified £2.9 million from support services (such as finance, human resources and estates management) and technical areas such as debt financing. The remaining £3.4 million, therefore, has to come from our emergency response and this will require the equivalent of at least four station mergers or outright station closures. A station merger is where the Authority closes two fire stations and opens one new one to replace them. The savings come from the removal of 22 firefighter posts, as the new fire station only has one whole time (24/7) fire appliance based there.

The plan to close West Kirby and Upton fire stations and build a new station midway between the two (at Saughall Massie) is one of the stations mergers. Others are in Knowsley (approved by the Authority) and St Helens (the public consultation phase has just finished).

The Authority is making these changes reluctantly, but the situation is such that the existing number of fire stations cannot be maintained in the future.

In this context, I hope it is now clear why the Authority cannot risk potential purchasers of its land and property gaining a commercial advantage and potentially buying Authority property at a lower

rate than could be achieved if the Authority remained silent on the price it expects to achieve. Similarly, why it cannot risk a land owner inflating a price of land the Authority wishes to purchase.

Yours sincerely

Deb Appleton

Janet Henshaw

Director of Strategy & Performance

Director of Legal Services

And Senior Information Risk Owner

Our ref: FS50592270
Your ref: FOI/74/2015

Deb Appleton
Director of Strategy & Performance

Janet Henshaw
Director of Legal Services

Merseyside Fire & Rescue Authority
c/o
JeanCrimmins@merseyfire.gov.uk

2 December 2015

Dear Ms Appleton & Ms Henshaw

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

Thank you for your letter of 13 November 2015.

My letter of 20 October 2015 set out my preliminary view, based on the information before me at the time, that the requested information did not constitute environmental information. However, having considered the additional information in your letter of 13 November and having taken further advice on the matter, I now consider the EIR to be the applicable access regime.

"Environmental information" is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Information Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "*any information...on*" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be environmental. Information *on* something falling within these definitions will be environmental information.

The information in this case is concerned with plans to build a new fire station. "Plans" fall within the definition of "measures" at regulation 2(c). The plans involve selling existing land to raise capital with which to buy new land on which to build. The consequent use of the land is likely to affect several of the elements of the environment referred to in 2(1)(a). The withheld information therefore relates to a measure which will or will be likely to affect the environment and the EIR apply.

So far, you have provided arguments in support of the application of section 43 (commercial interests) under the FOIA. However, in your refusal notice you cited regulation 12(5)(e) (confidentiality of commercial or industrial information) as being the applicable grounds for refusing the request. I assume that you would want to maintain this as your basis for refusing the request.

That being the case I require some further information from you.

In considering the application of regulation 12(5)(e) the ICO believes that the following four criteria have to be met:

- (i) The information has to be commercial or industrial in nature;
- (ii) The information has to be subject to a duty of confidence provided by law;
- (iii) The confidentiality has to be required to protect an economic interest; and
- (iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.

I am satisfied that you have already demonstrated that (i) applies. However, with reference to each of the further three criteria, please explain why the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) (in preparing your response it may help you to refer to recent 12(5)(e) decision notices on the ICO website <https://search.ico.org.uk/ico/search/decisionnotice>).

With regard to point (ii), the ICO accepts that confidentiality can be provided either by virtue of common law or by virtue of a specific statutory provision. Please ensure that your response clearly explains on what basis MFRA believes that the information is covered by a law of confidence.

With regard to point (iv), please ensure that you clearly explain how disclosure of the withheld information would adversely affect the particular economic interest that has been identified. Please ensure that this explanation demonstrates a clear link between disclosure of the information that has actually been withheld and the adverse affect envisaged.

Please also clarify:

- From sources are the figures in the withheld information drawn? When were they drawn up? Are they still current or have they been revised?
- At the time of the request, were negotiations actively underway for the purchase of a particular piece of land? If so, do the figures relate to that piece of land? Or are they speculative, representing what the MFRA would expect/can afford to pay for an appropriate piece of land?
- Similarly, were negotiations underway for the sale of land to a particular purchaser?
- What timescale do you anticipate for the land sale/purchase?

Public interest arguments

Your previous responses, to the complainant and to the ICO, focus on the public

interest arguments in favour of not disclosing the information. I would invite you to explain what public interest arguments in favour of disclosing the information were taken into account and why you consider that on balance the public interest in maintaining the exception outweighs that in disclosing the withheld information.

I would be grateful for your response by the 6 January 2016.

Yours sincerely

Samantha Bracegirdle Senior Case Officer
The Information Commissioner's Office

The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
T. 01625 545749 F. 01625 524510 www.ico.org.uk
-I am not in the office on Thursdays and Fridays-

Dear Ms Bracegirdle

Please see the attached letter in response to your letter dated 2nd December 2015.

Kind Regards

Julie Yare

Corporate Information Sharing Officer
Strategy & Performance
Merseyside Fire & Rescue Service HQ
Bridle Rd
Bootle
Liverpool
L30 4YD

(T) 0151 296 4479

(F) 0151 296 4631

Mailto: julleyare@merseyfire.gov.uk

julie.yare@mfrs.cjsm.net

<http://intranetportal/sites/smd/default.aspx>

Internet: www.merseyfire.gov.uk

From: casework@ico.org.uk [mailto:casework@ico.org.uk]

Sent: 20 October 2015 09:19

To: Yare, Julie

Subject: Re: FOIA complaint, John Brace[Ref. FS50592270]

Our ref: FS50592270

Your ref: FOI/74/2015

Julie Yare

Corporate Information Sharing Officer
Merseyside Fire and Rescue Authority
julieyare@merseyfire.gov.uk

20 October 2015

Dear Ms Yare

Freedom of Information Act 2000 (FOIA)

Complainant: John Brace

Date of request: 14 June 2015

Thank you for your letter of 2 October in which you withdrew MFRA's reliance on section 44 to withhold the requested information and substituted instead section 43. The Commissioner will consider the late application of a new exemption, but to do so I will need some further information from you.

Section 43(2)

You have explained that you consider the information to be commercially sensitive. Section 43(2) applies in respect of information the disclosure of which would prejudice the commercial interests of any person (including MFRA).

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and please provide copies of correspondence MFRA has had with third parties in relation to this request.

Please also address the point made in the complainant's submission (supplied with my last letter) that the requested information was publicly discussed in open meetings, and that MFRA has a duty under section 100(c) of the Local Government Act 1972 to allow access to such information.

Likelihood of prejudice

Section 43 is a prejudice based exemption. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to, prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must

Ms Bracegirdle

**Merseyside Fire &
Rescue
Authority Headquarters**
Strategy and Performance
Bridle Road
Bootle
Merseyside
L30 4YD

Telephone: 0151 296 4000
(Calls may be recorded)

Julie Yare / Jean Crimmins
0151 296 4479/4474
Debbie Appleton 0151 296
4402

Your Ref:

Our Ref: FS50592270

Date: 6th January 2016.

Dear Ms Bracegirdle

**Freedom of Information Act 2000 (FOIA)
Environmental Information regulations 2004 (EIR)
Complainant: John Brace**

Thank you for your response dated 2nd December 2015.

After considering your additional advice in your letter dated 2nd December 2015 we now consider the EIR to the applicable access regime.

This is because the requested information is Financial Information related to the costs of redeveloping land and building a new fire station. As you have stated "Plans" fall within the definition of "measures" at regulation 2(c). The plans involve selling existing land to raise capital with which to buy new land on which to build. The consequent use of the land is likely to affect several of the elements of the environment referred to in 2(1) (a). The withheld information therefore relates to a measure which will or will be likely to affect the environment and the EIR apply.

We would still like to cite regulation 12(5) (e) For the purpose of confidentiality (1) (a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

In considering the application of regulation 12(5) (e) you advised MFRA to consider the following four criteria have to be met:

- (i) The information has to be commercial or industrial in nature;
- (ii) The information has to be subject to a duty of confidence provided by law;
- (iii) The confidentiality has to be required to protect an economic interest; and
- (iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.

You are satisfied that we have already demonstrated that (i) applies. However, with reference to each of the further three criteria, you have asked us to explain why the withheld information is

exempt from disclosure by virtue of regulation 12(5) (e) (in preparing our response we have looked at the decision notices in the link provided).

With regard to point (ii) you have said ICO accepts that confidentiality can be provided either by common law or by virtue of a specific statutory provision.

At the time this information was produced it was produced with an expectation of confidence until any negotiations were completed.

Points (iii) The confidentiality has to be required to protect an economic interest; and
(iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information

It has already been established under (i) that the information is commercial or industrial and while the requested information is not contractual the sensitive nature of the information is deserving of legal protection, in that to disclose the information would put organisations that are bidding for the land at commercial advantage as they would know the potential value that MFRA have placed on the land, and so know what MFRA are willing to bid. This would mean the bargaining position of MFRA (with accountability for public funds) would be adversely affected in the context of future negotiations establishing that the economic interests and confidentiality will be adversely affected by disclosure.

Public Interest made in favour of disclosure.

It was considered that there is a public interest in openness, transparency and accountability of public authorities such as MFRA and that there would be interest from the public regarding matters concerning the environment and spending of public monies. However it was considered that disclosure of the requested information at this stage would not be considered to benefit the public because while its disclosure would show transparency and the public may be interested in the information it would not be in the public good because of the points detailed below.

- MFRA intend to negotiate with Wirral Borough Council for a piece of land upon which we wish to build a new fire station (to enable the Authority to merge two existing stations and so try to make savings in relation to government cuts and maintain a high level of public service).
- MFRA have been consulting upon this proposal and do not yet have either the agreement of the said council to transfer the land, or indeed planning permission.
- The information requested by Mr Brace relates to potential land values – if this was to be in the public domain it could prejudice any future commercial negotiations as previously stated (iii) and (iv).
- The amount to be paid and negotiated for the land in question is to come from public monies and the Authority has a duty to obtain value for money in any purchase or sale – if this information was in the public domain at this crucial stage it may not be possible to obtain best value for money.

Demonstrating that disclosure of the information at this stage would adversely affect the economic interest of MFRA and this would adversely affect the fire and rescue services we provide to the people of Merseyside, under normal circumstances, but more so at present because of the severe economic cuts that MFRA are subject to.

You also asked us to clarify the following points, please see our response in red.

Q. From what sources are the figures in the withheld information drawn?

R. Officer's best estimates using current knowledge of similar transactions & current market values.

Q. When were they drawn up?

R. At the time the report was drafted

Q. Are they still current or have they been revised?

R. Still current

Q. At the time of the request, were negotiations actively underway for the purchase of a particular piece of land?

R. No

Q. If so, do the figures relate to that piece of land? Or are they speculative, representing what the MFRA would expect/can afford to pay for an appropriate piece of land?

R. Purely speculative

Q. Similarly, were negotiations underway for the sale of land to a particular purchaser?

R. No sale was involved in these papers it is a potential purchase only.

Q. What timescale do you anticipate for the land sale/purchase?

R. Purchase within 2016; if approved; possible sale of other land late 2017.

MFRA have tried to be as transparent as possible by publishing the vast majority of the information requested (please see the links below) and the exempted information forms only a very small part of the information and may be published once negotiations are completed.

<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CId=142&MId=562&Ver=4>

<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CId=142&MId=651&Ver=4>

Yours sincerely

Julie Yare
Corporate Information Sharing Officer

Dan Stephens
Chief Fire Officer
Merseyside Fire and Rescue Authority
Fire Service Headquarters
Bridle Road
Bootle
Merseyside
L30 4YD

16 February 2016

Dear Mr Stephens

Environmental Information Regulations 2004 (EIR)
Complainant: John Brace
Case Reference Number: FER0592270
Your ref: FOI/74/2015

Please find enclosed a decision notice relating to a complaint from John Brace.

The complaint has been considered by the Commissioner and the decision notice sets out the reasons for the decision. If you disagree with the decision notice you have the right to appeal to the First-tier Tribunal (Information Rights).

The Commissioner will publish this decision on the ICO website, but will remove all names and addresses of complainants. If you choose to also reproduce this decision notice, then the Commissioner expects similar steps to be taken.

I hope the above information is helpful.

Yours sincerely

Samantha Bracegirdle
Senior Case Officer

Julie Yare
Corporate Information Sharing Officer
Merseyside Fire and Rescue Authority

By email only: julieyare@merseyfire.gov.uk

16 February 2016

Dear Ms Yare

Environmental Information Regulations 2004 (EIR)

Complainant: John Brace

Case Reference Number: FER0592270

Your ref: FOI/74/2015

Please find attached a copy of the decision notice relating to a complaint from John Brace. This has been sent to Dan Stephens.

The complaint has been considered by the Commissioner and the decision notice sets out the reasons for the decision. If you disagree with the decision notice you have the right to appeal to the First-tier Tribunal (Information Rights).

The Commissioner will publish this decision on the ICO website, but will remove all names and addresses of complainants. If you choose to also reproduce this decision notice, then the Commissioner expects similar steps to be taken.

I hope the above information is helpful.

Yours sincerely

Samantha Bracegirdle
Senior Case Officer

Environmental Information Regulations 2004 ("EIR")

Decision notice

Date: 16 February 2016

Public Authority: Merseyside Fire and Rescue Authority
Address: Merseyside Fire and Rescue Authority
Headquarters
Bridle Road
Bootle
Merseyside
L30 4YD

Complainant: John Brace
Address: john.brace@gmail.com

Decision (including any steps ordered)

1. The complainant has requested information about the estimated costs involved in building a new fire station. Merseyside Fire and Rescue Authority ("MFRA") refused the request, citing section 44(1)(a) (prohibitions on disclosure) of the Freedom of Information Act 2000 ("the FOIA"). During the Information Commissioner's investigation MFRA agreed that the EIR, rather than the FOIA, was the correct access regime. MFRA revised its position, applying regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner's decision is that the EIR was the applicable access regime. The Commissioner's decision is that MFRA was entitled to withhold the requested information under the exception at regulation 12(5)(e). The Commissioner requires no steps to be taken.

Request and response

3. On 14 June 2015 the complainant wrote to MFRA and requested information in the following terms:

"This request is for:

a) the 2 A4 page Appendix H (capital costs) to report CFO/101/14 of the Chief Fire Officer (which was presented to the Authority meeting of the 2nd October 2014) and

b) the 2A4 Appendix F (capital costs) to report CFO/003/14 of the Chief Fire Officer (which was presented to the Authority meeting of the 29th January 2015).

Part (a) of this request was connected to an agenda item titled "Proposals For Upton And West Kirby Fire Stations" and part (b) of this request was connected to an agenda item titled "West Wirral Operational Response Considerations (Post Consultation)".

Both reports detail "the costs of any new build station, together with an estimate of the potential income from the sale of the buildings and land at Upton and West Kirby."

As both reports fall under the meaning of "environmental information" as defined in the Environmental Information Regulations 2004 then I expect this request to be considered under the Environmental Information Regulations 2004

(<http://www.legislation.gov.uk/ukxi/2004/3391/contents/made>), which unlike a request made under the Freedom of Information legislation the Environmental Information Regulations have a presumption in favour of disclosure (see Regulation 5 <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/5/made>)."

4. MFRA responded on 8 July 2015. It said that the FOIA, rather than the EIR, was the applicable access regime in respect of the requested information. However, when exempting the requested information from disclosure it cited two EIR exceptions, regulation 12(5)(d) (confidentiality of public authority proceedings when covered by law) and regulation 12(5)(e) (confidentiality of commercial or industrial information, when protected by law to protect a legitimate economic interest). It stated that it was not in the public interest for commercially sensitive information which could jeopardise the authority's negotiating position to be disclosed.
5. The complainant asked for an internal review, disputing MFRA's contention that the requested information was not environmental information, and challenging the reasons given for the application of the two exceptions cited.
6. Following an internal review, MFRA wrote to the complainant on 31 July 2015. It revised its response, stating that section 44(1)(a) of the FOIA applied. It explained that the information was exempt from disclosure by

virtue of prohibitions contained in paragraph 3 of Part 1 to schedule 12A of the Local Government Act 1972.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the request should be dealt with under the EIR or FOIA and to instruct MFRA to issue a fresh response to the request which did not rely on any of the exemptions or exceptions it had previously cited.
8. During the Commissioner's investigation, MFRA agreed that the EIR rather than the FOIA was the correct access regime. It withdrew its reliance on section 44(1)(a) and substituted instead regulation 12(5)(e).
9. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
10. The Commissioner considers that the requested information would fall within the definition of environmental information as stipulated in the EIR. The scope of this decision notice is therefore to consider whether MFRA was entitled to rely on regulation 12(5)(e).

Reasons for decision

Applicable regime

11. The EIR and FOIA give rights of public access to information held by public authorities. The regimes are, however, distinct from each other. The EIR derived from European law and exclusively covers environmental information. FOIA, by contrast, provides an access regime to most other types of official records held by public authorities. A public authority must therefore decide under which piece of legislation information should be considered.
12. "Environmental information" is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "any

information...on" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be environmental. Information *on* something falling within these definitions will be environmental information.

13. The complainant asserted that the request should have been dealt with under the EIR, as the information he requested (the capital costs of building a new fire station) fell within the definition of environmental information at regulation 2(1)(c) and (e).
14. Regulation 2(1)(c) of the EIR defines environmental information as "*measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect*" the state of the elements of the environment. Regulation 2(1)(e) defines it as "*cost-benefit and other economic analyses...within...the measures and activities referred to in (c).*"
15. The Commissioner has seen the withheld information. It comprises only a brief table of figures (income and expenditure) concluding with an estimated overall cost for the proposed build. The figures include estimated sale prices for land currently owned by MFRA, estimated purchase prices for new land, and income from grants and partners.
16. The withheld information is concerned with plans to build a new fire station. "Plans" fall within the definition of "measures" at regulation 2(c). The plans involve selling existing land to raise capital with which to buy new land on which to build. The consequent use of the land is likely to affect several of the elements of the environment referred to in 2(1)(a). The Commissioner is therefore satisfied that the withheld information relates to a measure which will or will be likely to affect the environment.
17. He therefore considers that the withheld information is environmental under regulation 2(c) of the EIR and the request should be considered under this access regime.

Regulation 12(5)(e)– confidentiality of commercial or industrial information

18. Regulation 12(5)(e) of the EIR allows that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

19. The construction of the exception effectively imposes a four-stage test, each condition of which must be satisfied for the exception to be engaged:
- (i) The information is commercial or industrial in nature.
 - (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
 - (iii) The confidentiality is protecting a legitimate economic interest.
 - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary element of the exception, the Information Tribunal (*Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010)¹ found that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information. As such, if the preceding three stages of the test are fulfilled, it will follow that the exception will be engaged. Where this is the case, a public authority must next go on to consider the balance of the public interest in disclosure.
20. The Commissioner has considered each point of the above test.
- (i) Is the information commercial or industrial in nature?*
21. The withheld information comprises a brief table of figures (income and expenditure) concluding with an estimated overall cost for the proposed build of a new fire station. The figures include estimated sale and purchase prices for land and income from grants and partners. MFRA considers that all of this information is self-evidently commercial in nature.
22. The Commissioner's guidance² on the exception states that for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. He

1

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

goes on to say that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The information in this case relates to the sale of an asset and the purchase of more land and therefore the Commissioner is satisfied that the document satisfies the description of information that is commercial in nature.

(ii) Is confidentiality provided by law?

23. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
24. MFRA has submitted that financial information about the proposed sale and purchase of land is subject to the common law of confidence. The common law of confidence will apply where information has the necessary quality of confidence and is shared in circumstances importing an obligation of confidence.
25. For information to have the necessary quality of confidence, the information must not be trivial nor can it already be in the public domain. The Commissioner is satisfied that both of these factors are present in this situation.
26. With regard to the creation of an obligation of confidence, this can be explicit or implied and may depend on the nature of the information and the relationship between the parties. The Commissioner considers that a useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
27. MFRA has argued that information relating to a commercial property transaction would normally be expected to import an obligation of confidence. It stated that at the time this information was created it was produced with an expectation of confidence until any purchase and sale negotiations were completed. This is reflected in the exclusion of the costing information from the published minutes of the meetings at which the proposed transaction was discussed. In the circumstances, the Commissioner accepts that the common law of confidence does apply and therefore this stage of the test is met.

(iii) Is the confidentiality protecting a legitimate economic interest?

28. The Commissioner's guidance explains that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable

information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

29. When determining whether there is an economic interest that needs protection, a public authority must consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish it is more probable than not that disclosure would cause some harm.
30. MFRA considers that its own economic interests would be harmed through the release of the information. MFRA explained that the proposed sale and purchase figures were arrived at using its knowledge of similar transactions and market values and that they remain current. They represented what MFRA could afford or would be willing to pay for a piece of land and what it expects the sale of its existing land to achieve. At the time of the request it was intended that if an appropriate site could be identified, purchase of new land would take place within 12 months.
31. It has provided the following information relating to the purchase of a new site:

"...while the requested information is not contractual the sensitive nature of the information is deserving of legal protection, in that to disclose the information would put organisations that are bidding for the land at commercial advantage as they would know the potential value that MFRA have placed on the land, and so know what MFRA are willing to bid. This would mean the bargaining position of MFRA (with accountability for public funds) would be adversely affected in the context of future negotiations establishing that the economic interests and confidentiality will be adversely affected by disclosure."

32. MFRA explained that its own commercial interests would be prejudiced by disclosure of information revealing the amounts it was expecting to buy and sell land for. In effect, it would be "showing its hand". Disclosure would place it at a disadvantage when trying to negotiate competitively when purchasing new land, both with existing owners and any rival bidders. This could result in it either paying more than necessary, or being outbid on a particular location. With regards to the sale of its existing land, knowledge by prospective purchasers of what MFRA hoped to achieve for it would similarly undermine its ability to engage in competitive negotiations and achieve best value for money.

33. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage or avoiding disclosures which would otherwise result in a loss of revenue or income. In this case the Commissioner accepts that a link can be drawn between disclosure of the withheld information and protecting MFRA's commercial bargaining position. At the time of the request MFRA intended purchasing land imminently and, clearly, if the owners of prospective plots knew the amount MFRA was willing to pay this would make it more difficult for it to secure the best terms when negotiating for a plot.

(iv) Would the economic interest, and thereby its confidentiality, be adversely affected by disclosure of information?

34. 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. 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.

35. The Commissioner is satisfied that disclosure would adversely affect the confidentiality of the withheld information and that the confidentiality is necessary to protect MFRA's legitimate economic interests. Since all exceptions under the EIR are qualified, the Commissioner has gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exception.

Public Interest Test

Public interest arguments in favour of disclosure

36. The information relates to the purchase of land to build a new fire station and the sale of publicly owned land to finance this. MFRA acknowledged that there is a public interest in openness, transparency and accountability of public authorities such as MFRA and that there would be interest from the public regarding matters concerning the environment and spending of public monies.

37. Building on this, the Commissioner considers that there will always be a significant level of public interest in a decision to sell land and property owned by a public authority and to buy new land and property. The reasons for this are threefold.

38. Firstly, the public will want to be reassured that the sale and purchase are either necessary or in the best interests of the public authority and therefore the community it serves. Secondly, a public authority has a fiduciary duty to the community it serves and therefore the public will want to know that the authority is maximising value for money. Thirdly, (and with particular regard to the disposal of land) it will be important to the public that the authority has adequate safeguards in place to ensure that the future use of the land corresponds with a wider planning policy.
39. The complainant argued that disclosure was in the public interest because the information had been omitted from the public record of the meeting at which it was discussed, without proper procedures being followed. He considered this to be tantamount to unlawful concealment and therefore that the interests of transparency would be served by its disclosure. He also referred to the presumption in favour of disclosure inherent in the EIR.

Public interest arguments in favour of maintaining the exception

40. MFRA has submitted that it is in the public interest for it to be able to function effectively in a commercial sphere. The disclosure of the commercially sensitive costing information would jeopardise its position with regards to any negotiations concerning the purchase or sale of the sites in question.
41. It said that as a public authority, it has a duty to negotiate the best possible financial deal to protect the public purse, which in turn enables it to provide the best possible service. Over the last four years, it has had to make savings of £20 million as a result of budgetary spending cuts. It is required to make a further £6.3 million savings during 2015/16. It is therefore vitally important that it achieves the highest possible price for the sale of its existing fire station and pays the lowest possible price for the purchase of land at the new site on which it hopes to build a new fire station. Any prejudice to its ability to negotiate competitively in this regard would be likely to have serious repercussions for service delivery.
42. MFRA has acknowledged the importance of transparency relating to the proposed transactions. It contests, however, that the wider aspects of the transactions have been adequately explained to the public via the minutes of meetings at which the matter was discussed³. The

3

<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CIId=142&MIId=562&Ve>

information provided within the body of the minutes and the associated documents allows members of the public to understand decisions which may affect them and to challenge them if they so wish. The addition of the withheld information would not significantly inform the public's understanding of the transactions and therefore the prejudice to MFRA's commercial confidentiality could not be justified.

43. It dismissed the complainant's claim that, in failing to publish the whole report, it had not followed proper procedures, stating that it was not obliged by the Local Government Act 1972⁴ to publish any document which discloses exempt information.

Balance of the public interest arguments

44. The Commissioner has considered the competing arguments. The importance placed on transparency is conveyed by regulation 12(2) of the EIR, which expressly states that a public authority should apply a presumption in favour of disclosure. To that end, there is a public interest in disclosure to the extent that it would permit scrutiny of the way in which MFRA disposes of existing assets and spends public money. Therefore the arguments surrounding transparency and accountability do carry some weight.
45. However, there will often be a tension between those interests that, on the one hand, promote public participation in decisions relating to planning matters and those that, on the other, seek to ensure that a public authority is able to carry out its commercial activities effectively. In the case of truly commercially sensitive information, any disclosure that could jeopardise the sale of land from which a public authority will gain or the delivery of a project designed to benefit the local community is unlikely to be in the public interest.

r=4 and
<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CIId=142&MIId=651&Ve>
r=4

⁴ See section 100(b)(2) and section 100(d)

46. Furthermore, the Commissioner recognises that MFRA has already disclosed a certain amount of information about the land transactions and this goes some way to meeting the public interest in disclosure.
47. As regards the public interest in maintaining the exception the Commissioner considers that the arguments for withholding the information are very strong given that the sale and purchase transactions have yet to go ahead but are likely to within the next 12 months. MFRA has confirmed that the costs estimates remain current and have not been revised. That being the case, disclosure would prejudice its ability to negotiate competitively. This has the potential to adversely impact its ability to get best value for money in both sale and purchase. This would in turn, impact on its service delivery.
48. Taking all the above into account the Commissioner considers that the benefit afforded to the public in terms of accountability and transparency is not sufficient to justify the impact of the disclosure on MFRA's ability to negotiate competitively and the resultant effect this would be likely to have on public services. For this reason the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the regulation 12(5)(e) exception outweighs the public interest in disclosure.

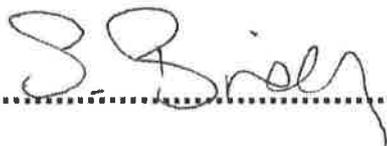
Right of appeal

49. 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

50. 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.
51. 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 

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Dear Julie Yare,

As requested, please find attached an electronic (unsigned and complainant's name redacted) version of the signed decision notice dated and posted 16 February 2016. I have copied below the covering letter:

Julie Yare
Corporate Information Sharing Officer
Merseyside Fire and Rescue Authority

By email only: julieyare@merseyfire.gov.uk

16 February 2016

Dear Ms Yare

Environmental Information Regulations 2004 (EIR)

Complainant: John Brace

Case Reference Number: FER0592270

Your ref: FOI/74/2015

Please find attached a copy of the decision notice relating to a complaint from John Brace. This has been sent to Dan Stephens.

The complaint has been considered by the Commissioner and the decision notice sets out the reasons for the decision. If you disagree with the decision notice you have the right to appeal to the First-tier Tribunal (Information Rights).

The Commissioner will publish this decision on the ICO website, but will remove all names and addresses of complainants. If you choose to also reproduce this decision notice, then the Commissioner expects similar steps to be taken.

I hope the above information is helpful.

Yours sincerely

Samantha Bracegirdle
Senior Case Officer

Environmental Information Regulations 2004 ("EIR")

Decision notice

Date: 16 February 2016

Public Authority: Merseyside Fire and Rescue Authority
Address: Merseyside Fire and Rescue Authority
Headquarters
Bridle Road
Bootle
Merseyside
L30 4YD

Decision (including any steps ordered)

1. The complainant has requested information about the estimated costs involved in building a new fire station. Merseyside Fire and Rescue Authority ("MFRA") refused the request, citing section 44(1)(a) (prohibitions on disclosure) of the Freedom of Information Act 2000 ("the FOIA"). During the Information Commissioner's investigation MFRA agreed that the EIR, rather than the FOIA, was the correct access regime. MFRA revised its position, applying regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner's decision is that the EIR was the applicable access regime. The Commissioner's decision is that MFRA was entitled to withhold the requested information under the exception at regulation 12(5)(e). The Commissioner requires no steps to be taken.

Request and response

3. On 14 June 2015 the complainant wrote to MFRA and requested information in the following terms:

"This request is for:

a) the 2 A4 page Appendix H (capital costs) to report CFO/101/14 of the Chief Fire Officer (which was presented to the Authority meeting of the 2nd October 2014) and

b) the 2A4 Appendix F (capital costs) to report CFO/003/14 of the Chief

Fire Officer (which was presented to the Authority meeting of the 29th January 2015).

Part (a) of this request was connected to an agenda item titled "Proposals For Upton And West Kirby Fire Stations" and part (b) of this request was connected to an agenda item titled "West Wirral Operational Response Considerations (Post Consultation)".

Both reports detail "the costs of any new build station, together with an estimate of the potential income from the sale of the buildings and land at Upton and West Kirby."

As both reports fall under the meaning of "environmental information" as defined in the Environmental Information Regulations 2004 then I expect this request to be considered under the Environmental Information Regulations 2004 (<http://www.legislation.gov.uk/uksi/2004/3391/contents/made>), which unlike a request made under the Freedom of Information legislation the Environmental Information Regulations have a presumption in favour of disclosure (see Regulation 5 <http://www.legislation.gov.uk/uksi/2004/3391/regulation/5/made>)."

4. MFRA responded on 8 July 2015. It said that the FOIA, rather than the EIR, was the applicable access regime in respect of the requested information. However, when exempting the requested information from disclosure it cited two EIR exceptions, regulation 12(5)(d) (confidentiality of public authority proceedings when covered by law) and regulation 12(5)(e) (confidentiality of commercial or industrial information, when protected by law to protect a legitimate economic interest). It stated that it was not in the public interest for commercially sensitive information which could jeopardise the authority's negotiating position to be disclosed.
5. The complainant asked for an internal review, disputing MFRA's contention that the requested information was not environmental information, and challenging the reasons given for the application of the two exceptions cited.
6. Following an internal review, MFRA wrote to the complainant on 31 July 2015. It revised its response, stating that section 44(1)(a) of the FOIA applied. It explained that the information was exempt from disclosure by virtue of prohibitions contained in paragraph 3 of Part 1 to schedule 12A of the Local Government Act 1972.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the request should be dealt with under the EIR or FOIA and to instruct MFRA to issue a fresh response to the request which did not rely on any of the exemptions or exceptions it had previously cited.
8. During the Commissioner's investigation, MFRA agreed that the EIR rather than the FOIA was the correct access regime. It withdrew its reliance on section 44(1)(a) and substituted instead regulation 12(5)(e).
9. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
10. The Commissioner considers that the requested information would fall within the definition of environmental information as stipulated in the EIR. The scope of this decision notice is therefore to consider whether MFRA was entitled to rely on regulation 12(5)(e).

Reasons for decision

Applicable regime

11. The EIR and FOIA give rights of public access to information held by public authorities. The regimes are, however, distinct from each other. The EIR derived from European law and exclusively covers environmental information. FOIA, by contrast, provides an access regime to most other types of official records held by public authorities. A public authority must therefore decide under which piece of legislation information should be considered.
12. "Environmental information" is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "*any information...on*" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be

environmental. Information *on* something falling within these definitions will be environmental information.

13. The complainant asserted that the request should have been dealt with under the EIR, as the information he requested (the capital costs of building a new fire station) fell within the definition of environmental information at regulation 2(1)(c) and (e).
14. Regulation 2(1)(c) of the EIR defines environmental information as "*measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect*" the state of the elements of the environment. Regulation 2(1)(e) defines it as "*cost-benefit and other economic analyses...within...the measures and activities referred to in (c).*"
15. The Commissioner has seen the withheld information. It comprises only a brief table of figures (income and expenditure) concluding with an estimated overall cost for the proposed build. The figures include estimated sale prices for land currently owned by MFRA, estimated purchase prices for new land, and income from grants and partners.
16. The withheld information is concerned with plans to build a new fire station. "Plans" fall within the definition of "measures" at regulation 2(c). The plans involve selling existing land to raise capital with which to buy new land on which to build. The consequent use of the land is likely to affect several of the elements of the environment referred to in 2(1)(a). The Commissioner is therefore satisfied that the withheld information relates to a measure which will or will be likely to affect the environment.
17. He therefore considers that the withheld information is environmental under regulation 2(c) of the EIR and the request should be considered under this access regime.

Regulation 12(5)(e)– confidentiality of commercial or industrial information

18. Regulation 12(5)(e) of the EIR allows that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
19. The construction of the exception effectively imposes a four-stage test, each condition of which must be satisfied for the exception to be engaged:

- (i) The information is commercial or industrial in nature.
- (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
- (iii) The confidentiality is protecting a legitimate economic interest.
- (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary element of the exception, the Information Tribunal (*Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010)¹ found that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information. As such, if the preceding three stages of the test are fulfilled, it will follow that the exception will be engaged. Where this is the case, a public authority must next go on to consider the balance of the public interest in disclosure.

20. The Commissioner has considered each point of the above test.

(i) Is the information commercial or industrial in nature?

21. The withheld information comprises a brief table of figures (income and expenditure) concluding with an estimated overall cost for the proposed build of a new fire station. The figures include estimated sale and purchase prices for land and income from grants and partners. MFRA considers that all of this information is self-evidently commercial in nature.
22. The Commissioner's guidance² on the exception states that for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. He goes on to say that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The information in this case relates to the sale of an asset and the purchase of more land and therefore the Commissioner is

1

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

satisfied that the document satisfies the description of information that is commercial in nature.

(ii) Is confidentiality provided by law?

23. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
24. MFRA has submitted that financial information about the proposed sale and purchase of land is subject to the common law of confidence. The common law of confidence will apply where information has the necessary quality of confidence and is shared in circumstances importing an obligation of confidence.
25. For information to have the necessary quality of confidence, the information must not be trivial nor can it already be in the public domain. The Commissioner is satisfied that both of these factors are present in this situation.
26. With regard to the creation of an obligation of confidence, this can be explicit or implied and may depend on the nature of the information and the relationship between the parties. The Commissioner considers that a useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
27. MFRA has argued that information relating to a commercial property transaction would normally be expected to import an obligation of confidence. It stated that at the time this information was created it was produced with an expectation of confidence until any purchase and sale negotiations were completed. This is reflected in the exclusion of the costing information from the published minutes of the meetings at which the proposed transaction was discussed. In the circumstances, the Commissioner accepts that the common law of confidence does apply and therefore this stage of the test is met.

(iii) Is the confidentiality protecting a legitimate economic interest?

28. The Commissioner's guidance explains that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

29. When determining whether there is an economic interest that needs protection, a public authority must consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish it is more probable than not that disclosure would cause some harm.
30. MFRA considers that its own economic interests would be harmed through the release of the information. MFRA explained that the proposed sale and purchase figures were arrived at using its knowledge of similar transactions and market values and that they remain current. They represented what MFRA could afford or would be willing to pay for a piece of land and what it expects the sale of its existing land to achieve. At the time of the request it was intended that if an appropriate site could be identified, purchase of new land would take place within 12 months.
31. It has provided the following information relating to the purchase of a new site:
- "...while the requested information is not contractual the sensitive nature of the information is deserving of legal protection, in that to disclose the information would put organisations that are bidding for the land at commercial advantage as they would know the potential value that MFRA have placed on the land, and so know what MFRA are willing to bid. This would mean the bargaining position of MFRA (with accountability for public funds) would be adversely affected in the context of future negotiations establishing that the economic interests and confidentiality will be adversely affected by disclosure."*
32. MFRA explained that its own commercial interests would be prejudiced by disclosure of information revealing the amounts it was expecting to buy and sell land for. In effect, it would be "showing its hand". Disclosure would place it at a disadvantage when trying to negotiate competitively when purchasing new land, both with existing owners and any rival bidders. This could result in it either paying more than necessary, or being outbid on a particular location. With regards to the sale of its existing land, knowledge by prospective purchasers of what MFRA hoped to achieve for it would similarly undermine its ability to engage in competitive negotiations and achieve best value for money.
33. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or

future negotiations, avoiding commercially significant reputational damage or avoiding disclosures which would otherwise result in a loss of revenue or income. In this case the Commissioner accepts that a link can be drawn between disclosure of the withheld information and protecting MFRA's commercial bargaining position. At the time of the request MFRA intended purchasing land imminently and, clearly, if the owners of prospective plots knew the amount MFRA was willing to pay this would make it more difficult for it to secure the best terms when negotiating for a plot.

(iv) Would the economic interest, and thereby its confidentiality, be adversely affected by disclosure of information?

34. 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. 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.
35. The Commissioner is satisfied that disclosure would adversely affect the confidentiality of the withheld information and that the confidentiality is necessary to protect MFRA's legitimate economic interests. Since all exceptions under the EIR are qualified, the Commissioner has gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exception.

Public Interest Test

Public interest arguments in favour of disclosure

36. The information relates to the purchase of land to build a new fire station and the sale of publicly owned land to finance this. MFRA acknowledged that there is a public interest in openness, transparency and accountability of public authorities such as MFRA and that there would be interest from the public regarding matters concerning the environment and spending of public monies.
37. Building on this, the Commissioner considers that there will always be a significant level of public interest in a decision to sell land and property owned by a public authority and to buy new land and property. The reasons for this are threefold.
38. Firstly, the public will want to be reassured that the sale and purchase are either necessary or in the best interests of the public authority and therefore the community it serves. Secondly, a public authority has a fiduciary duty to the community it serves and therefore the public will

want to know that the authority is maximising value for money. Thirdly, (and with particular regard to the disposal of land) it will be important to the public that the authority has adequate safeguards in place to ensure that the future use of the land corresponds with a wider planning policy.

39. The complainant argued that disclosure was in the public interest because the information had been omitted from the public record of the meeting at which it was discussed, without proper procedures being followed. He considered this to be tantamount to unlawful concealment and therefore that the interests of transparency would be served by its disclosure. He also referred to the presumption in favour of disclosure inherent in the EIR.

Public interest arguments in favour of maintaining the exception

40. MFRA has submitted that it is in the public interest for it to be able to function effectively in a commercial sphere. The disclosure of the commercially sensitive costing information would jeopardise its position with regards to any negotiations concerning the purchase or sale of the sites in question.
41. It said that as a public authority, it has a duty to negotiate the best possible financial deal to protect the public purse, which in turn enables it to provide the best possible service. Over the last four years, it has had to make savings of £20 million as a result of budgetary spending cuts. It is required to make a further £6.3 million savings during 2015/16. It is therefore vitally important that it achieves the highest possible price for the sale of its existing fire station and pays the lowest possible price for the purchase of land at the new site on which it hopes to build a new fire station. Any prejudice to its ability to negotiate competitively in this regard would be likely to have serious repercussions for service delivery.
42. MFRA has acknowledged the importance of transparency relating to the proposed transactions. It contests, however, that the wider aspects of the transactions have been adequately explained to the public via the minutes of meetings at which the matter was discussed³. The

3

<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CIId=142&MIId=562&Ve r=4> and
<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CIId=142&MIId=651&Ve r=4>

information provided within the body of the minutes and the associated documents allows members of the public to understand decisions which may affect them and to challenge them if they so wish. The addition of the withheld information would not significantly inform the public's understanding of the transactions and therefore the prejudice to MFRA's commercial confidentiality could not be justified.

43. It dismissed the complainant's claim that, in failing to publish the whole report, it had not followed proper procedures, stating that it was not obliged by the Local Government Act 1972⁴ to publish any document which discloses exempt information.

Balance of the public interest arguments

44. The Commissioner has considered the competing arguments. The importance placed on transparency is conveyed by regulation 12(2) of the EIR, which expressly states that a public authority should apply a presumption in favour of disclosure. To that end, there is a public interest in disclosure to the extent that it would permit scrutiny of the way in which MFRA disposes of existing assets and spends public money. Therefore the arguments surrounding transparency and accountability do carry some weight.
45. However, there will often be a tension between those interests that, on the one hand, promote public participation in decisions relating to planning matters and those that, on the other, seek to ensure that a public authority is able to carry out its commercial activities effectively. In the case of truly commercially sensitive information, any disclosure that could jeopardise the sale of land from which a public authority will gain or the delivery of a project designed to benefit the local community is unlikely to be in the public interest.
46. Furthermore, the Commissioner recognises that MFRA has already disclosed a certain amount of information about the land transactions and this goes some way to meeting the public interest in disclosure.
47. As regards the public interest in maintaining the exception the Commissioner considers that the arguments for withholding the information are very strong given that the sale and purchase transactions have yet to go ahead but are likely to within the next 12

⁴ See section 100(b)(2) and section 100(d)

months. MFRA has confirmed that the costs estimates remain current and have not been revised. That being the case, disclosure would prejudice its ability to negotiate competitively. This has the potential to adversely impact its ability to get best value for money in both sale and purchase. This would in turn, impact on its service delivery.

48. Taking all the above into account the Commissioner considers that the benefit afforded to the public in terms of accountability and transparency is not sufficient to justify the impact of the disclosure on MFRA's ability to negotiate competitively and the resultant effect this would be likely to have on public services. For this reason the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the regulation 12(5)(e) exception outweighs the public interest in disclosure.

Right of appeal

49. 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

50. 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.
51. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF