A Review of the Trend towards Greater Transparency and Public Access to Information in the Planning Arena with a Particular Focus on Viability Appraisals

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We live in a world where data is at our fingertips. Twitter and Facebook keep us up to date with what someone on the other side of the world is having for breakfast; information leaks stories are becoming commonplace whether of Wikileaks and Panama Papers proportions or of the more day to day level such as leaks of exam papers. Providing information to those hungry for knowledge simply for curiosity and knowledge's sake is becoming *de rigueur*. So is it really that surprising that the planning world is also seeing changes to the accessibility to information?

There is an increasing trend towards greater transparency and public access to information in planning decision making. In a country that is revered by many across the world for its democracy, is greater transparency in how and why decisions in the planning world are taken really that abhorrent? Is it not a further step in living up to the democratic values we hold on to? Or should the right to have certain information kept confidential due to commercial sensitivities continue to limit disclosure? What information really is in the public interest to be disclosed and how will accessing that information make a difference to the public and decision making in the planning sphere?

From high profile regeneration schemes to most significant housing projects many will require viability appraisals to be undertaken; with there likely to be even more so in light of the introduction of starter homes via the Housing and Planning Act 2016. Viability appraisals by their very nature are contentious, as they pit developer against local planning authority in establishing values and often negotiating brokered, non-policy compliant affordable housing solutions. The lack of a consistent and balanced viability appraisal methodology, that developers and local planning authorities alike are comfortable with, is a significant hurdle. It can often result in the viability appraisal process being described as "the dark art of viability", suggestive of secrecy, underhand tricks and an overall aim to circumvent the need to mitigate the impacts of development in favour of inflated profits.

Statutory Framework

The relevant statutory rules relating to disclosure and access to information can be found in the Freedom of Information Act 2000 ("FOI Act") and Environmental Information Regulations 2004 as amended ("EIR"). The FOI Act covers a broad church of information types, whereas the EIR is only relevant to environmental information. If information is environmental then one must apply the EIR rather than the FOI Act, as environmental information is treated as exempted information under the FOI Act.[1]

The EIR are derived from European law. They implement the European Council Directive 2003/4/CE on public access to environmental information in the UK and comply with Article 1 of the Aarhus Convention. The EIR apply to those pieces of information that are considered to be environmental related. The EIR define environmental information thus:

[1] Section 39 of the FOI Act exempts environmental information

""environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)"[2]

Viability information is normally considered to be environmental information which means that requests and disclosures of viability information are normally made under the EIR, rather than the FOI Act. The EIR apply much in the same way as the FOI Act in terms of the obligations imposed on public bodies and applicability. However, the exemptions to disclosure are narrower under the EIR and there are no absolute exemptions to disclosure that apply to environmental information. The Information Commissioner's Office ("ICO") has published a useful assessment of the various types of information that would fall within the definition set out above.[3]

The FOI Act and EIR apply to England, Wales and Northern Ireland. Scotland has a similar suite of legislation enacted through the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations (Scotland) 2004. This paper does not look at the differences between the regimes, but the Scottish system is generally considered to be more rigorous.

Putting transparency and the associated risks into context

The development world is constantly evolving and there are many opportunities available to secure and develop public sector land, from public-private joint ventures, purchasing of public sector land, public sector brownfield regeneration sites with significant clean up costs, to local authorities becoming developers in their own right. "Get Britain Building" would be a suitable strap line for the current environment as everyone is looking for a piece of development action and this has been particularly encouraged by this, and the last, Government.

However, this raft of opportunities also means that it is not just the risk that viability appraisals will be disclosed that has to be considered by a developer. Where a private sector developer becomes involved with a public authority, whether via direct commissioning, joint venture or other form of partnering arrangement, communication between the developer and the public authority will be at risk of being disclosed. Likewise, those public authorities proactively seeking to develop their own land, often to help

[2] EIR reg. 2(1).
[3] What is Environmental Information: *https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf*.

balance the books following continued austerity budget cuts, will need to be alive to the fact that even though they act in the role of a developer, they are not actually on a level playing field with private developers in the context of protection of and accessibility to information. A great range of information held or created by these developing public authorities could be at risk of release into the public domain following a FOI Act/EIR request ("a request"). In comparison, information held or created by a private sector developer would only be at risk of disclosure to the public if that information had been provided to a public authority, such as in the case of viability appraisals submitted to support planning applications.

It is notable that the EIR Code of Practice[4] (published by the ICO pursuant to powers in reg.16 of the EIR) indicates that public authorities should avoid agreeing to confidentiality clauses in any contracts with private sector organisations. If accepting such a clause is unavoidable the public authority needs to be able to robustly justify its position to the ICO should a request be made to disclose documentation that is the subject of the confidentiality clause.

The risk that arises from information being publicly disclosed may vary from project to project, but is often that:

- commercially sensitive information is disclosed to the public, the supply chain or even competitors as a result of requests; and
- if requests are not dealt with properly by the public authority, so that information relevant to a third party making an objection to the application is not disclosed, it can leave the planning permission open to a judicial review challenge.

In addition, there is the risk of complaints to the ICO and of Tribunal proceedings. Decisions flowing from these processes are publicly available and where hearings are usually conducted in open court, this means that public scrutiny on a decision to disclose or withhold information becomes a debating issue.

Data included as part of a viability appraisal is usually derived from a range of sources. However, in most cases datasets are generic in nature, so the consequences of the information coming into the public domain would not be commercially prejudicial. For example, finance costs/rates are one of a number of pieces of data inputted into viability models. Where generic market rates are adopted there is no risk of breaching the confidentiality provisions of loan facility documentation. Yet if a developer wished to rely on specific funding rates this may create a problem, standard loan facility documentation usually contain restrictions on borrowers preventing disclosure of funding costs/rates of funds which individual lenders may have to charge in the event LIBOR rates are unascertainable through the usual methods. Nevertheless, as inclusion of the specific funding costs/rates in a viability appraisal, regardless of whether it was publicised, could breach the loan facility documentation terms, a developer will not wish to include such data.

Compare this to including information on anticipated rents for retail units within a proposed development scheme. Whilst viability data should be realistic, projecting rental income naturally will be a conservative exercise for the purpose of a viability appraisal and will also be based on information available at a point in time. As such the release of what may be relatively low rental income projections, contained in a viability appraisal, could result in a rental cap being established as prospective tenants may use this data to keep rents low given this will be pointed to as evidence of market value.

What information might actually be considered commercially sensitive?

There is no definitive list as to what information will be considered commercially sensitive, which is perhaps understandable as legislators and policy makers no doubt find it difficult to categorise information

[4] The EIR Code of Practice can be found at on the Information Commissioners website or as a PDF following this link: *https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf*.

in this way when arguably it is those whose data may get publicised who would be best placed to identify the commercial implications of publication. However, from the ICO and First Tier Tribunal ("FTT") decisions it is possible to establish some themes where information is unlikely to be considered by developers and indeed the ICO and FTT to be confidential. It is not uncommon for generic information to be utilised in viability appraisals where specific data is not available where, for example, construction contracts have not been let or no sales figures for new build dwellings exist for a locality.

On balance, the following are types of information relevant to viability that may be considered commercially sensitive:

- bespoke viability models themselves where they have been created for a specific project(s) as was the case with Lendlease's model in *Heygate*;
- estimated revenues from commercial rents which may impact on subsequent lease negotiations;
- build costs for specific identifiable works packages (for example, demolition and remediation works) which may impact on subsequent tender processes with potential contractors; and
- actual, specific development or construction finance rates (as opposed to estimates of finance rates).

The ICO decision in March 2016 on Bishopsgate Goodsyard contains a useful summary of the range of issues that may befall a developer if viability information were to be disclosed.[5] Whilst some of those listed in the decision will be fact sensitive, nevertheless taken as a whole they present a rounded justification for withholding information, which the ICO indeed agreed with in this case. However, what was key in this decision was the fact that negotiations between the developer and the local planning authority were at an early stage as regards settling the quantum of affordable housing and other s106 obligations and the authority's concern, which the ICO accepted, was that disclosure would prejudice those negotiations.

Who may make a disclosure request?

The FOI Act and EIR provide public access to information held by public authorities. They do this in two ways:

- public authorities are obliged to publish certain information about their activities; and
- members of the public are entitled to request recorded information from public authorities.

This paper focuses on the second limb where public requests are made to gain access to information held by a public authority.

Anyone can make a Request. They do not have to be UK citizens, or resident in the UK. Requests can also be made by organisations, for example, a campaign group or a company. Whilst one might assume that a local councillor would normally have full transparency of what is happening in their own authority, it is nevertheless not uncommon for councillors to submit Requests to their own authority to access data or establish if data exists.

A public authority is not obliged to notify nor consult with a developer when it receives a Request, nor when it releases any information it holds pursuant to the Request. However, Section VI of the EIR Code of Practice indicates that a commitment to consultation may be given, but any consultation does not override the authority's obligation to balance the public interest test favouring disclosure against any request from a developer to withhold the information.

Many Requests are becoming more focused as those who seek to gain access to information become more sophisticated and more information is available to help those making Requests, including some

[5] See in particular para.33 of the ICO decision FS50570729 (22 March 2016) London Borough of Tower Hamlets concerning Bishopsgate Goodsyard.

public authorities that have template disclosure request forms. However, for those seeking to obtain information, the following are some practical suggestions on how to get the most out of a Request in terms of responses received from local authorities (as opposed to the content of any disclosure):

- be as specific as possible and give a timeframe during which the information was created;
- use of email communication for Requests tends to result in faster response times;
- checking on websites such as "whatdotheyknow"[6] and the public authority's own website before submission of a Request is essential, so as to avoid a response with little benefit which simply directs you to these sources; and
- informal approaches to local authority officers seeking documentation can often prove fruitful without the need for a formal Request and will often be quicker than awaiting a Request to be processed. However, if a trawl to check that one has all the available information is what is required, then a formal Request should be used.

What information will be caught?

In the course of applying for planning permission there will be a large number of documents and information that pass between a developer and its consultant team and a range of local authorities and other public authorities such as the London Mayor's Office, Parish Councils, the Environment Agency, District Valuer and the HCA.[7]

The information, whether it is created by a public authority or a developer and their consultant team, can be subject to disclosure if held by the public authority. Information also extends to cover any correspondence received from members of the public or statutory consultees in connection with a planning application. The FOI Act addresses information that is described "as recorded in any form".[8] The EIR are equally comprehensive and refers to "any information in written, visual, aural, electronic or any other material form".[9] As such this would include printed documents, computer files, letters, emails, photographs, and sound or video recordings.

Information that is retained in someone's head, perhaps as a result of discussions at a meeting for which no meeting minute was taken, is not caught by the FOI Act or EIR because it is not in a recorded form. This can be advantageous during pre-application. For example, draft masterplan drawings could be tabled at a meeting for discussion, but copies not left with or subsequently sent to planning officers. The drawings would not be covered by the FOI Act nor EIR as the public authority will never have held them. The officer's awareness of them and any discussions (so long as not the subject of any meeting minute nor other correspondence) pertaining to them, would also not be caught nor would there be a requirement on the officer to document his recollections in the event a Request was submitted relating to the draft masterplan.

It is often common practice for people to maintain an email "chain" and it can be all too easy to overlook information that may be contained in earlier communications that may need to be withheld from disclosure. Where private-public partnerships exist this lesson is particularly important to heed and communication protocols or strategies between the parties and their consultant teams can be an effective tool to manage this risk.

[6] *https://www.whatdotheyknow.com*.
[7] Full details of all public authorities can be found in the Freedom of Information Act 2000 Sch..
[8] FOI Act 2000 s.84.
[9] IR reg.2.

Information: Pre-Application and Application Documents and London Lessons

Pre-application discussion meeting minutes and correspondence, whether formal or informal, as well as emails on negotiation of planning obligations are all at risk of disclosure. Whilst many developers will consider carefully what is contained in the documentation submitted as or in support of a planning application, the same care is not always carried through to what can be extensive email traffic surrounding the application. Yet all of this information may be the subject of Requests and be disclosed.

It is reasonable to assume that any documentation that forms part of or supports a planning application will be uploaded to the local planning authority's website or at the very least will be available for public inspection. However, once the application is validated there are often extensive discussions and written dialogue in varying forms between local planning authority officers and the applicant and their consultant teams. Debate can be quite heated in relation to planning obligations. Where viability is thrown into the mix and decisions have to be taken on what infrastructure and facilities will be sacrificed, it must be remembered that all such exchanges can be at risk of disclosure. There may not be much in those exchanges that would fall into the commercial confidentiality exception available in reg.12(5)(e) of the EIR. Certainly, care is often not taken to explain why any information provided is considered to be commercially confidential, although this is now starting to change in some cases as developers digest the lessons learnt from Information Commissioner decisions.

In London, in particular, we are seeing some important changes in the way some local planning authorities are approaching viability information and pre-application exchanges. For example, both Greenwich and Hounslow Councils have voted at full cabinet to adopt new local information requirements/validation checklists. In relation to viability both authorities require submission of "full, unredacted viability appraisals at the time of submission",[10] with Hounslow also stating appraisals would not be censored in any way. This requirement appears to only apply where the application proposes non-policy compliant affordable housing provision. Not only that, but the viability appraisal will be published along with all other application documents in full on-line. Greenwich were stimulated down this path of transparency following the *Shane Brownie* decision handed down by the FTT on 30 January 2015[11] requiring full disclosure of viability information. However, in both authorities' validation protocols there is no application of or reference to any exemptions that are usually available in law, nor weighing of what might be in the public interest. This appears a somewhat over-reaction to a single decision by the FTT which did not reflect most of the direction of travel to date for Tribunal decision-making nor of High Court decisions on disclosure. We are not aware of any legal challenges yet made to these protocol decisions by Greenwich and Hounslow to implement this level of transparency. Given Greenwich adopted their list in January 2016 and Hounslow in October 2015, it would now be, *prima facie*, too late for any judicial review of the decisions of these authorities to take this approach in general terms.

Since the Greenwich new requirements came into force, as at mid June 2016 only four major residential applications involving affordable housing had been submitted. Two involved 100% affordable housing provision. One was policy compliant offering over 35% affordable housing, whereas the other, for 12 flats, was not policy compliant as it proposed 33% provision. However, Greenwich allowed the non-policy compliant scheme to be validated without a viability appraisal, which seems at odds with its new validation requirements. For that application, the applicant stated that as the provision was so close to being policy compliant they did not consider it would be necessary to submit viability documentation. The local planning authority proceeded to validate contrary to their own protocols, which suggests that officers are prepared to exercise discretion on interpretation of their protocols. This is interesting given the tenor of statements within the Cabinet Reports for the meeting that resulted in the adoption of the new protocol, which suggested a rigorous approach would be applied.

[10] Extract from LBC Greenwich Local Information Requirements List as from January 2016
[11] First Tier Tribunal decision in *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122, 30 January 2015

Since the Hounslow protocol came into force, up until the middle of June 2016, there has been inconsistency as regards the application of the validation protocol. There have been 62 major applications validated in this timeframe. Of these, 16 are new applications, as opposed to variations involving residential development (either exclusively residential or mixed use schemes). A number of applications have been validated, notwithstanding the fact that a viability appraisal was not submitted at the point of validation, even where applicants have identified that a viability appraisal would be necessary. In many of those instances the applicant has stated the viability documentation will be submitted at a later date.

Southwark Council, also the subject of high profile FTT decisions on disclosure, has likewise introduced a new approach to disclosure of viability appraisals. On 15 March 2016 a new supplementary planning document was adopted by Southwark[12] which took a slightly different approach to Greenwich and Hounslow, i.e.:

- viability appraisals supporting pre-application discussions are to be treated confidentially according to the Southwark SPD. This at least means that there will be no automatic disclosure, but would not preclude a request being made for disclosure, should viability information be provided to the authority during the pre-application stage;
- executive summaries of viability appraisals are automatically published at validation stage. These must be updated prior to determination if the affordable housing content changes from that in the submission summary; and
- full viability appraisals are to be published prior to determination. This will enable representations to be made on their content and for committee members to have full access when determining any application.

It appears that six major applications (involving 10 or more dwellings) have been submitted as of the end of July 2016 in Southwark and 5 of those offered non-policy compliant affordable housing provision such that the policy applied. The sixth application was for a development consisting solely of affordable housing. The executive summaries of viability appraisals were submitted with all applications and have been published with other documents on the authority's website. At the time this paper was written all of the applications had yet to be determined so the requirement for disclosure of the full viability appraisal has yet to be dealt with.

All three authorities have taken these steps in an effort to reduce the potential for judicial reviews of their decisions and delays post-grant of planning permission of schemes due to on-going legal challenges and to bolster the scrutiny of viability evidence, particularly in relation to affordable housing provision. Yet the content of summaries of viability appraisals has long been considered sufficient to enable a robust and informed decision to be made on whether to grant planning permission. It is not clear if the actual decision itself will be much better informed, though it may well result in greater scrutiny of viability methodologies by third parties.[13]

This approach can be contrasted with one that the London Boroughs of Islington, Westminster, Brent and Waltham Forest are taking. This is where full viability appraisals are required at validation which will be presumed to be disclosed in full, unless applicants give clear justifications about what information is commercially sensitive and how adverse effects will result if disclosed publicly. This alternative approach aims to achieve full transparency as a default, but respects the law on disclosure that permits withholding of documentation where there would be commercial interests affected which are in the public interest to protect. The onus being placed on the applicant to establish, at the outset, what information is genuinely commercially sensitive is a reasonable, justified approach. This will focus many developers' minds on

[12] LBC Southwark Development Viability SPD

[13] See, for example, approaches in *R. (on the application of Ian Frazer English) v East Staffordshire BC v National Football Centre Ltd* [2010] EWHC 2744 (Admin) and *R. (on the application of Bedford) v Islington LBC* [2002] EWHC 2044 (Admin) and the *Stoke Newington* case (*R. (on the application of Perry) v Hackney LBC* [2014] EWHC 3499 (Admin)).

deciding how leaks or disclosure of information might actually impact their businesses. For some developers, who perhaps have not had to suffer the extensive debates before an ICO or FTT judge on the commercial sensitivities of types of data or the model they favour, this may encourage a move away from a default position that all viability appraisal data and models are, by their nature, confidential. It would be helpful if development industry trade bodies provided clear guidance concerning what specific data typically causes commercial concerns for their member businesses; this in turn may assist authorities adjusting their policies to ensure this sensitive data may usually be withheld and may also be used to inform evidence in front of ICO or FTT judges.

Kensington and Chelsea RLBC has published pre-application planning service guidance that states that from March 2016 all pre-application advice they provide will automatically be published, once the related planning application is submitted. In relation to Requests made for information in advance of a planning application being submitted, applicants are recommended to advise the authority at the time they seek the pre-application advice, if they consider it should not be disclosed. The authority will apply the usual legal tests set out in the FOI Act and EIR in those instances. Care will need to be taken in providing any viability information to officers during these pre-application discussions if applicants are concerned as to risk of disclosure.

Do the approaches of the London Boroughs of Greenwich, Hounslow and Southwark which are at present in the minority, mean that other London Boroughs and indeed many other local planning authorities across the country have an incorrect approach to viability information disclosure?

These approaches differ somewhat from other authorities across London and across the country who, at present, still often accept viability appraisals being submitted to third party valuation experts appointed by the authorities, who in turn review all the un-redacted data and model outputs and provide a summary of the outputs to the authority, to inform discussions about percentages of affordable housing that can be accommodated. At present, this remains a valid approach and High Court cases have indicated that a planning committee needs only to have "the gist of the appraisal".[14] The question often arises as to whether the authority itself "holds" the viability appraisal information if the actual information is "held" by a consultant appointed on the local planning authority's behalf to provide the summary of outputs. Dependant on the facts of the case, the ICO may decide that viability information held by a consultant is "held on behalf" of the authority.

In the cases of *Perry* from October 2014 and *Turner* from February 2015, both High Court Judges endorsed the approach where the planning officer summarised viability issues in the committee report, as opposed to providing full viability appraisals to committee members and to the public. Whilst in *Perry*, the Claimant sought to argue this was tantamount to an abdication by councillors of their decision making responsibility, Patterson J rejected this line of reasoning, referring to case law justifying the position that a decision-maker was entitled to rely on advice, so long as all the necessary information for the decision-maker to make a decision was made available. The cases demonstrate that the normal and acceptable local government practice of providing the decision maker with a summary of the viability issues sufficient to enable an understanding of the issues is robust. However, that is not the same thing as confirming that the actual information should remain undisclosed, just that the practice of providing summaries is acceptable.

[14] Approach taken in *R. (on the application of Ian Frazer English) v East Staffordshire BCncil and National Football Centre Ltd* [2010] EWHC 2744 (Admin) and *R. (on the application of Bedford) v Islington LBC* [2002] EWHC 2044 (Admin) and the *Stoke Newington* case (*R. (on the application of Perry) v Hackney LBC* [2014] EWHC 3499 (Admin) (Patterson J, October 2014) and *Turner v Secretary of State for Communities and Local Government* [2015] EWHC 375 (Admin) (Collins J, 26 February 2015).

In the more recent *Shane Brownie* and *Heygate*FTT cases, neither set of circumstances involved information being handled at arms' length in this way.[15] In *Shane Brownie*, the local planning authority initially received the viability information and appointed a third party valuer to review it, but nevertheless was in direct receipt of the information. In *Heygate*, a District Valuer was utilised, yet there too the local planning authority held the full viability information first. Care will need to be taken by developers to appoint independent valuers, other than the District Valuer, if they truly wish to avoid disclosure of viability information as a result of Requests being made. Providing detailed viability information and models to a District Valuer (employed by the District Valuer Service which is the specialist property arm of the Valuation Office Agency) is equivalent to providing the information to the local authority, as both are public bodies to whom Requests can be made in relation to information held.

Information: Appeals and Call Ins

What happens when a planning appeal is lodged or a call in of a planning application occurs?

The Planning Inspectorate ("PINS") receives communications from the various parties and, as a public authority, PINS has to comply with the FOI Act and EIR in the event a Request is made to PINS. Given that parties have no direct communication with the planning inspector this reduces the likelihood of material being produced that would be commercially sensitive or qualify for other exemptions. Nevertheless, PINS do not, as a matter of course, disclose questions raised by parties which could potentially be relevant to representations a third party may make or to a decision to apply to become a Rule 6 party to an appeal.

In *Perry*, the planning inspector did not have access to a full viability appraisal when making the decision on the appeal; instead only a third party valuer's report was made available. Even so, the High Court ruled this was adequate for a decision to be made and the full un-redacted viability appraisal did not need to be disclosed. It would appear that in relation to viability appraisals, at least at present, PINS are not requiring full disclosure, unlike some of the vanguard London authorities.

It is not uncommon for a MP or councillor to lobby the Secretary of State to have applications called in. However, the National Casework Policy Unit does not as a matter of course publish or provide information to interested parties as to whether any requests have been made and, if so, what they say. Requests for such information are sometimes met with a mixed reception. However, it would seem reasonable and appropriate that this information be published as a matter of course given this may influence the matters that the Secretary of State will focus on in arriving at a decision to grant permission or not. It is likely the FOI Act would be engaged for this type of information. In the event an MP or councillor were writing as individuals, their personal details would be protected from disclosure, as would any of the content of the letter that related to personal matters.[16] As is more likely in the situation of a request for a call in, the MP or councillor will be writing in their public representative capacity. In such case, only information that related to personal details of a constituent, the MP or councillor would be protected. It is considered that the substance of a request for call in would rarely be related to personal or commercially sensitive matters and as such would fall outside of the personal data protection provisions within the FOI Act and EIR, subject to any exemptions applying under the FOI Act or EIR as applicable.

Consideration should be given here to the differences that may occur where a direct application may be made to the Secretary of State pursuant to ss62A of the Town and Country Planning Act ("TCPA") 1990 where there has been under-performance by a local planning authority. The PINS 2014 Guidance states that pre-application advice will not routinely be made available but may be subject to a Request. It

[15] *Southwark v Information Commissioner and Lendlease and Glasspool* (EA/2013/0162, 9 May 2014).
[16] This is because s.40 of the FOI Act is an absolute exemption that protects personal data, linking with the Data Protection Act 1998.

also states all representations will be made public (save addresses and contact details) and none will be kept confidential. Negotiations will continue with the local planning authority in order to settle planning obligations which would be presented to the Inquiry. This all is comparable to how many local planning authorities usually operate. However, it is unclear how viability appraisals will be treated and if PINS will evolve their guidance to require full viability appraisals rather than summary reports. This is because, to date, it is understood that only a single direct application has been made so PINS practice in this area is still evolving. The direct application was made by Gladman in relation to a site in Blaby DC and was refused. The application did not deal with viability matters.

Information: Local Plan Procedure and Hearings

An appeal or call in can be contrasted with a local plan hearing. There is often frequent communication between the local planning authority and the Inspector (usually via the programme officer or PINS) concerning practical arrangements for the hearings, but sometimes in relation to matters of soundness and queries over the evidence in the build up to examination hearings and afterwards. It is also not unusual for a local planning authority to hold back interim decision letters and other communications from the Inspector for a few days or weeks before publicising them. This is often done for so-called "fact checking" purposes but in reality also provides a window of time for the implications to be digested by the local planning authority and a considered response or tactical approach to be settled. An example of this was in relation to the decision letter from the Inspector in connection with the Birmingham Local Plan which was ultimately released in 21 April 2016 but was dated 11 March 2016. Other information does not get routinely publicised such as questions raised by the local planning authority on procedural matters and the response from PINS/the Inspector.

Information: Comparison with Development Consent Orders Procedures

It is interesting to juxtapose local plan, direct application and s.78 of the TCPA appeal arrangements in relation to how information is handled with the approach in the sphere of Development Consent Orders ("DCO"). In the DCO regime, one sees PINS placing a greater emphasis on the publication of information encapsulated in its "openness and transparency" policy which it largely inherited from its predecessor, the Infrastructure Planning Commission ("IPC").

The Planning Act 2008 and associated legislation places a positive duty on PINS to maintain and publish a record of the advice it gives to applicants and others about applying for a DCO or about making representations about such an application.[17] As such, PINS maintains the National Infrastructure Planning website. This website hosts both generic resources, such as statutory guidance, national policy statements, PINS' advice notes and a register of pre-application advice, as well as project specific pages for each project that PINS has been notified. The project specific pages include an overview, a register of pre-application advice, examination timetable, documents accepted for examination and any relevant representations. This allows all interested parties to have ready access to information in relation to projects throughout their promotion, but also allows other future DCO promoters to draw on the experiences, good and bad, of other promoters.

Pre-application advice, meeting notes, records of telephone enquiries and exchanges of correspondence are routinely published on the PINS National Infrastructure Planning website, whilst in the direct application and s.78 appeals process they are not. Whilst PINS does not publish draft DCO documents that are submitted to it for review prior to formal submission, PINS does publish its comments and advice on the draft documents. PINS publishes all DCO examination documents, together with relevant and written

[17] See also reg.11 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009/2264.

representations to fulfil its duties under the examination procedure rules.[18] This can, and frequently does, include email and other correspondence that raises substantive issues that are accepted in to the examination at the discretion of the examining authority. By way of comparison, in the local plan hearing, direct application and s.78 appeals arena, most inquiry or examination documents are of course published and available. The common exception is viability documentation that may be considered at s.78 appeals and possibly direct application inquiries.

The way in which the "openness and transparency" policy is applied in practise has evolved since the inception of the DCO. Following a review of the regime in 2014, PINS published a prospectus for its pre-application advice service.[19] The prospectus acknowledges the need to strike an appropriate balance between openness and enabling potential investors to protect sensitive information at the earliest stages of a project. It acknowledges the concerns of applicants aired during the government review that the prospect of advice and project information immediately entering the public domain deters early stage pre-application engagement with PINS. To mitigate this, PINS has introduced a policy where it will delay the publication of early project discussions by up to six months, provided the applicant can reasonably justify the delay and has not formally commenced the statutory pre-application process.[20] Importantly, under this policy PINS will delay the establishment on its website of the project specific web page.

The tensions between an open process on the one hand and on the other hand attempts to assert confidentiality and the protection of commercially sensitive information which is found in relation to handling viability appraisals under the TCPA 1990, is to some extent mirrored in the DCO process in respect of funding statements. A funding statement is submitted with a DCO application to demonstrate that the applicant will be in a reasonable position to satisfactorily proceed with the DCO scheme and, in particular, will be in a position to pay compensation if it is granted powers of compulsory acquisition. Examining authorities are increasingly seeking greater levels of information and certainty in relation to funding statements, though experience does vary. More certainty can be provided either through detailed financial information or through some other mechanism such as a parent company guarantee or a provision in the DCO requiring the Secretary of State's approval of a suitable financial instrument before such powers can be exercised. To some promoters, particularly special purpose vehicles with a private limited company as a parent, it can sometimes be commercially preferable to incur these costs or liabilities as an alternative to airing sensitive financial information in a very public arena.

There is undoubtedly a greater focus on accessibility and transparency in the DCO process compared to most other types of planning processes. The reasons for this are perhaps at least threefold: the IPC was an independent commission with a resulting perceived need for a greater amount of scrutiny and transparency as to the processes it operates; when introduced, the Planning Act 2008 regime needed to establish its effectiveness in practice; and the DCO procedure was designed to be largely front-loaded and in writing, lending further importance to rapid and easy access to information involved in the process.

Information: Comparison with Disclosure in Judicial Review Challenges

When a challenge is made by way of judicial review to a local planning authority's decision relating to a planning application, there is a risk that a disclosure order will result in commercially sensitive information being released. Whilst Practice Direction 54A, paragraph 12.1 indicates that disclosure is not required unlike other court cases, there is an increasing trend to greater disclosure in court cases. However, there is some comfort that in relation to orders relating to disclosure, there is at least procedurally an opportunity

[18] See art.21 of the Infrastructure Planning (Examination Procedure) Rules 2010/103

[19] *Pre-application service for Nationally Significant Infrastructure Projects*, The Planning Inspectorate, May 2014 (*https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2014/05/NSIP-prospectus_May2014.pdf*)

[20] By making a request for an EIA screening opinion or notifying the Secretary of State of an intention to submit an environmental statement with the application for development consent in both cases under regulation 6 Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

to make submissions as to the appropriateness of disclosure which helps to defend against "fishing expeditions".

The content of witness statements also poses a risk if they stray into discussing commercially sensitive information which would otherwise have been withheld under the FOI Act or EIR exemptions, should the witness not be aware of the sensitivity or because of a need to argue a point of challenge. Lawyers and witnesses alike need to ensure that statements do not inadvertently wander into sensitive areas without cause.

Information: Compulsory Purchase Proceedings

In the compulsory purchase arena, given the impact on someone's interest in land which, subject to the payment of compensation, can be taken from them without their consent, it is clearly important that people affected by a compulsory purchase order ("CPO") are able to assess the proposals and engage meaningfully with the process — that requires information. Compulsory purchase guidance states that "the acquiring authority should provide substantive information as to the sources of funding … If the scheme is not intended to be independently financially viable … the acquiring authority should provide an indication of how any potential shortfalls are intended to be met".[21] It also requires that the "funding should generally be available now or early in the process".[22] This all makes sense, since there must be certainty of money being available to pay the compensation that will be due in the event that the CPO is confirmed and implemented, and to pay for blight claims in advance of that. It does not though, in itself, lead to a need for the disclosure of viability information associated with the scheme.

However, linked to this is that there is a requirement, in policy terms, that a scheme intended to be delivered through the use of a CPO does not have any impediments to it and is likely to come forward. If not, then the confirmation of the CPO is unlikely to be justified, lacking the compelling case in the public interest sufficient to outweigh the impact on third parties' human rights. Particularly with regeneration CPOs, made pursuant to s.226 of the Town and Country Planning Act 1990, this will entail analysis of the viability position, since the starting position on many schemes will be that it is not likely to be built unless the scheme is commercially attractive.

During the earlier stages of a CPO when the acquiring authority is considering whether to make the Order and is drafting the Statement of Reasons, commonly alongside or just after the planning process, the viability information is often largely kept behind closed doors with acquiring authorities having assessed the position for themselves (potentially at arm's length via consultants) and confirming in public documents simply that the scheme is viable. The information provided by the acquiring authority and developer then increases through the detailed evidence and inquiry phases. The promoters seek to tread the line between being open, so proving the development is attractive and likely to proceed, and not disclosing commercially confidential information or aspects of the "deal" which could undermine on-going negotiations with land owners.

Ultimately, a significant amount of viability and related information is often made public through the compulsory purchase process, as objectors often challenge deliverability and the burden of proof is firmly on the promoter with a high bar to reach. However, in other ways the compulsory purchase process is similar to the planning process, the provision of information is not often achieved early in the course of a CPO, and third parties may often still feel that they have not had sufficient access to it, sufficiently early, in order to be able to consider and challenge it. The combined planning and CPO processes may provide a sufficiently long timeline for information request procedures to have gone through a number of rounds,

[21] *Guidance on compulsory purchase process and the Crichel Down Rules*, October 2015, DCLG.
[22] *Guidance on compulsory purchase process and the Crichel Down Rules*, October 2015, DCLG, para.14, p.12.

and to lead to some disclosure, but it does take a determined or well-resourced objector to significantly push a promoter hard on these matters

Overview of Procedure for Dealing with Requests

The law relating to disclosure procedure as set out in the FOI Act and EIR is relatively clear and made more so by guidance on procedures issued by the ICO. It is the application of exemptions and the public interest test where matters become more uncertain. Appendix 1 to this Paper sets out a synopsis of the key procedural stages with relevant references.

The Independent Commission set up by the government to consider the balance between transparency, accountability and need for sensitive information to be protected in the context of the FOI Act (not EIR) published its report on 1 March 2016.[23] Chapter 6 identified concerns that additional burden, cost and uncertainty arises due to the replication of an independent body conducting a full merits review twice in the current system, the ICO and the FTT both undertake the same exercise. The Independent Commission issued a number of recommendations one which proposed the removal of the FTT appeal stage so that following the ICO decision an appeal (only on points of law) would be made to the Upper Tribunal and on from there as appropriate to the Court of Appeal and finally Supreme Court. Steps to implement the legislative changes proposed by the Independent Commission's report have yet to be taken, but this would be an easy and pragmatic step for government to take which should have no real detrimental effect on any party. The Independent Commission also recommended that the ability for the public authority to extend the period to disclose where the public authority are considering applicability of public interest exemptions be constrained so it is only extended by a further 20 working days and only where information being considered is complex, voluminous or involves consultation with third parties who may be affected by the release of information. As regards internal reviews of decisions taken by the public authority on the release of information, the Independent Commission suggests this should have a statutory limit imposed on it of 20 working days.

Exemptions to Disclosure

Whilst the FOI Act and EIR have largely similar procedures, the key differences relate to the application of exemptions from disclosure. The table in Appendix 2 to this Paper provides a brief summary of the different exemptions available for the FOI Act and EIR. The EIR do not include any absolute exemptions and all exemptions are qualified by the public interest test.

The ICO and the FTT have generally adopted the approach that the EIR contains the relevant law to be applied when considering the disclosure of viability information held by public authorities, at least in respect of large scale development. Crucially, in relation to viability appraisals, this means there are no absolute exemptions to disclosure and so in each case the public interest test must be run to ascertain if disclosure must occur. However, it is quite common for some local planning authorities to seek to apply FOI Act, rather than EIR, provisions to requests for viability information, which can lead to errors in the application of the exemptions. For those wishing to submit a request for viability appraisal information it would be wise to specifically point out the relevant statutory provisions that apply.

The reg.12(5)(e) exemption has been the key discussion point in cases before the ICO and the FTT in their decision making. Since 2010, the ICO has considered this exemption by asking itself four questions or tests, established by the FTT case of *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association*:[24]

[23] *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf*.

[24] *Bristol CC v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012).

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

The above tests are also usefully considered in the ICO publication "Confidentiality of commercial or industrial information".[25]

FTT and ICO decisions have commonly identified: (a) that a viability appraisal would be commercial or industrial in nature; (b) that viability appraisals could be protected by the common law of confidentiality; indeed the ICO in *Portland and Brunswick Square Association* said it is "usual practice" that viability appraisal are documents containing costings information and so are considered confidential whether they are specifically marked as such or not; and (c) that where the first three tests referred to above are satisfied, it is has been determined that the fourth test will follow from it, i.e. that confidentiality would be adversely affected by disclosure.

The ICO decisions make clear that the test is that disclosure "would" (not "may" or "could") cause harm and there is an expectation that some evidence of what this harm would be needs to be provided. In the ICO decision relating to the Walthamstow Greyhound Stadium, there is a useful assessment of the ICO's thinking and conclusions on the need to demonstrate "would adversely affect" as referred to in reg.12(5) EIR.[26] This is often assessed as the risk of harm occurring is "more probable" than not across the number of ICO decisions addressing this point.

As all EIR exemptions are qualified, once an exemption is established under the EIR, one must then address the impact of the public interest test as set out in reg.12. Regulation 12(2) is clear that there is a presumption in favour of disclosure. However, this presumption can be tempered where "the public interest in maintaining the exception outweighs the public interest in disclosing the information" as provided for in reg.12(1). It is clear from FTT and ICO decisions that the public interest test is finely balanced and so small differences between factual circumstances can tip the balance between a decision ordering disclosure or information being withheld.

Tribunal and Court Trends

Where a land deal or partnership arrangement between private and public sector bodies exists, then there is a heightened risk that a member of the public will seek disclosure of documentation whether to do with the contractual arrangements between parties or any subsequent planning application. This was exactly the position in relation to the FTT *Shane Brownie* decision referred to earlier involving Royal Borough Council of Greenwich and land on the Greenwich Peninsula, the majority of which was owned by the Greater London Authority.[27] There had been a number of developers involved in the project over the years. Knight Dragon acquired a 60% interest in the project development company in 2012 and then increased its interest in 2013 to own the company outright. Following increasing its interest, Knight Dragon sought to renegotiate the quantum of affordable housing to be provided, significantly reducing the affordable housing numbers by 500 units. The Tribunal was critical of this given Knight Dragon would have been aware of the quantum to be provided and the impacts of the downturn were well known at the time it chose to increase its interest in the project. The Tribunal ultimately ordered full disclosure of the viability appraisal with no redactions permitted. A number of important points arise out of that decision, including as follows:

[25] Document can be found at : *https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf*.

[26] Paragraphs 60–66 inclusive LB Waltham Forest (27 September 2012) FER0449366 (Walthamstow Dogs Track).

[27] First Tier Tribunal decision in *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122, 30 January 2015.

- where there is a public-private partnership of any form, there will be "a strong public interest in these developments succeeding and not being undermined".[28] This weighed heavily in the Tribunal's decision to order disclosure as the public interest in understanding why a lower quantum of affordable housing was to be delivered from the development of public land was important. Essentially, it is seen that the public has a vested interest in the development of public land and so will wish to ensure that the land delivers facilities/homes that the public need;
- in relation to housing at least, the Tribunal considered[29] that the eventual sales price will be dictated by the market at the time the housing is sold, rather than assumptions made at the time of what will be much earlier viability appraisals. This is a reasonable assumption, especially given the vagaries of the housing market and one that followed other Tribunal cases such as the *Heygate* case from May 2014 where the same Judge came to a consistent conclusion as regards private purchasers of housing.[30] It is relevant to note that the Judge treated commercial property sales and rentals differently, which is dealt with later in this paper at para.95;
- the value of information to a competitor diminishes over time;[31] and
- the Tribunal has not accepted that market forces that may operate, in the event information on the price that had been paid for a site or that a seller may be prepared to sell a site, would be disadvantageous to the public interest.[32] Indeed, the Tribunal suggested that the market price of an asset at a later date would be determined by (a) the number of potential bidders for the asset (given the more bidders the more likely the price will rise) and their relative purchasing power; and (b) the buyer's estimate of the value of the asset.

It is not always easy to discern the consistency of approach applied by the FTT to its judgments on disclosure of viability information. Each case is treated on its merits, but, for example, the circumstances in *Heygate* (May 2014) were arguably not so different to the *Shane Brownie* decision[33] (January 2015) where the Tribunal ordered the disclosure of the full viability report which had previously been provided in a redacted form. The *Heygate* decision did involve extensive debate about the protection of the bespoke viability model that Lendlease had used, which is seen by some as the differentiator between the decisions. However, the same FTT judge on both cases did not himself choose to draw comparisons or distinctions between the two cases.

The ICO has indicated in judgements on other matters that it does not consider it is bound by the decisions of the FTT,[34] although occasionally it does reference aspects of previous FTT decisions. This is in contrast to the Courts that do consider and apply previous cases where circumstances are relevant. As has been mentioned previously, the Independent Commission considers that the ICO and FTT essentially undertake the same function as independent bodies, both conducting full reviews, so perhaps it is not surprising that the ICO does not feel bound by the FTT decisions. Indeed, the Independent Commission recognised that the FTT is not a superior court of record and so FTT "decisions do not create legal precedents". Consequently, neither the FTT itself nor the ICO or public bodies need to ensure their future decisions accord with existing FTT decisions.

[28] At [21] of the First Tier Tribunal decision in *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122, 30 January 2015 known as the *Shane Brownie* decision.

[29] At [22] of the First Tier Tribunal decision in *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122, 30 January 2015 known as the *Shane Brownie* decision.

[30] At [57]of the First Tier Tribunal decision of *Southwark v Information Commissioner and Lendlease and Heygate* (EA/2013/0162, (9 May 2014).

[31] At [22] of the First Tier Tribunal decision in *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122, 30 January 2015 known as the *Shane Brownie* decision.

[32] At [19] of the First Tier Tribunal decision in *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122, 30 January 2015 known as the *Shane Brownie* decision.

[33] *Royal Borough of Greenwich v IC and Shane Brownie* EA/2014/0122.

[34] See by way of example para.22 of ICO decision Reference: FS50512828 dated 5 February 2015 involving the Ministry of Justice.

Grappling with Preservation of Confidentiality Myths

Myth 1: Use of protective "confidential" markers means information will not be disclosed

The ICO and FTT decisions to date make clear that protective "confidential" markers such as "Confidential" or "Commercially Sensitive" do not prevent disclosure. Indeed, markers have been used as evidence that the parties involved were aware of the exemptions discussed above, and thus potential disclosure may apply.

However, such markers do have the benefit of ensuring that all parties are aware that the status of the information has been asserted. This flags to officers at a public authority if they should consider the application of exemptions, rather than simply accede to a request for disclosure. Protective markers are especially useful in relation to information where the FOI Act rather than EIR applies and so a wider range of qualified exemptions and the benefit of absolute exemptions can be employed. Care should be taken with the use of such markers to make sure they are consistently applied.

Myth 2: Temporary or restricted access to information means the public authority won't hold the information for the purpose of Requests

Both the FOI Act and EIR apply to information that is "held" by a public authority. Thus if information is held by a public authority, even on a temporary basis, that information may be disclosable.

Whether information is disclosable where a public authority has restricted access (for example, a data room) will be fact sensitive, but will be dependent on whether or not it can be said that the documents are being held by a third party 'on behalf' of a public authority. Clarity can be sought by ensuring that there is a contractual mechanism which makes clear who has control of the information and the way in which it is held. Key considerations as to whether the public authority will be considered to "hold" the information include:

- access to the information is controlled by the other person - suggests the authority does not hold the information;
- the authority (at its own discretion) does not provide any direct assistance in creating, recording, filing or removing the information, if the authority does not undertake these actions it is suggestive that the authority does not hold the information, as these are all acts that such control would usually warrant; or
- the authority can only access but does not control the storage facility, whether physical or electronic, where the information is held - again this indicates that the authority does not control the information. This is especially the case where the authority is restricted from downloading or printing data room documents. Where the authority does download or print documents, this could constitute "holding" of the information.

Myth 3: Confidentiality contractual clauses definitely prevent disclosure

Introducing a confidentiality contractual clause can help to make the case for the Regulation 12(5)(e) exemption. The ICO and FTT decisions have identified that one of the elements of making out this exemption is showing that a reasonable person would assume that the information is considered as confidential by the persons involved. Having such a clause can help create this assumption.

However, as explained above, whilst this exemption does exist, it can be outweighed by the public interest of disclosure, as proven in decisions to date. Such clauses therefore cannot be relied upon to prevent disclosure.

Myth 4: Draft documents do not have to be disclosed

Draft documents are generally caught by disclosure requirements. However, it is possible to defer the disclosure by applying certain exemptions:

- Section 22 of the FOI Act provides an exemption where information is intended for future publication. This exemption applies if, at the time a Request is received, the material is still being prepared, but nevertheless is definitely intended to be published. A confirmed date for publication is not required to have been set, but the intention that the final material will be published must be clear and must have existed before the Request, rather than be a reaction to the Request. As this is a qualified exemption the public interest test must be applied and the FOI Act makes it clear that a decision to withhold the draft must be reasonable in light of all the circumstances relating to that material. More detail on this and a discussion on the types of draft material and their treatment can be found in the ICO guidance paper "Information Intended for Future Publication and Research Information".[35]
- Regulation 12(4)(d) of the EIR also addresses draft material that is still in the course of completion, unfinished documents or incomplete data. Draft document versions preceding the final, published document are still considered unfinished, even if the final version has been produced. Data that is being used or relied on at the time of the request is not considered incomplete, even if it may be modified later. This exemption is also qualified by the public interest test. The ICO has also produced guidance on this exemption which provides useful detail on reasons for withholding disclosure: "Material in the course of completion, unfinished documents and incomplete data (regulation 12(4)(d))".[36]

Myth 5: Once the commercial sensitivity exemption is engaged it will always be engaged notwithstanding the passage of time.

The FTT has recognised on a number of occasions that as information becomes aged the likelihood of any commercial sensitivity existing will diminish. Equally it may be said that in the planning world, the more time has elapsed, after a planning decision to which the information relates, the less interest there will be in the information because the opportunity to challenge the decision diminishes or disappears. As such it might be expected that there will be a reduction in Requests as time passes from the relevant planning decision.

Myth 6: Transparency and disclosure avoid third party challenges

There is a myth or, perhaps better described as a misconception by some public authorities, that greater transparency will avoid third-party challenges. It would be a rarity that third parties make FOI Requests merely out of curiosity with no intention to otherwise use the information disclosed for other means which may include third party challenges. Often FOI Requests are received for viability appraisal information as third parties are looking for grounds to challenge a decision to grant planning permission. It is not the act of disclosure that determines whether a challenge will be made or not, but rather the robustness of the decision making on the basis of the information made available to the Committee or officer taking the decision. The cases mentioned in footnote 14 made it clear that a decision maker does not need to have available to him a full, un-redacted viability appraisal in order for the decision making to be robustly undertaken.

[35] *https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf.*

[36] *https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf.*

Conclusions, Recommendations and Predictions

So what lessons can be learnt from recent years FTT decisions and High Court judgments?

Recent decisions suggest that:

- Making sure that a public authority does not actually hold information is the only way to ensure the information is not susceptible to disclosure;
- Where possible, consider separating out information that is genuinely commercially confidential within viability appraisals, especially for mixed use developments, making it easier for authorities to disclose and withhold information from within the viability appraisal. The FTT is more likely to distil its decision so that it determines disclosure of specific types or individual pieces of information, whereas the Court more often seems to take a more holistic approach;
- Projects that involve publicly owned land or land that was previously held as such, will come under significant scrutiny and, whilst the Courts may still preserve commercially sensitive exemptions, the FTT appears more likely to consider disclosure is in the public interest;
- Where significant numbers of affordable homes are in the balance as a result of the viability results, the FTT appears to be somewhat swayed towards disclosure in the public interest;
- The FTT and the ICO have not been persuaded that disclosure would undermine a local planning authority's ability to negotiate with other developers in the future, or that it would dissuade developers from negotiating with that authority in the future for fear of having to disclose information; and[37]
- The Courts are generally more likely to withhold disclosure and uphold exemptions when weighed against the public interest in disclosing the information, contrasted with the FTT that shows a recent inclination towards increased disclosure.

How does one reconcile the law and decisions on disclosure of information and the position taken by the vanguard London authorities?

It is clear that a number of local planning authorities are following the emerging trend of greater transparency. Whilst this has merit and is intended to make planning decision-making more accessible and transparent for the general public, the balance between public interest and other valid exemptions available under the FOI Act and EIR, has been side-stepped in many instances. This undermines the recognition in statute and the Courts that a blanket policy to disclose all information is not appropriate. As set out previously, it is interesting that in Greenwich and Hounslow, for example, local information validation requirements have been used to introduce the requirement for un-redacted, full viability appraisals to be submitted with planning applications and which will automatically be made available on-line. This essentially seeks to remove the ability of an applicant to seek to have some parts of the data assessed for applicability of exemptions and whether disclosure is against the public interest test as required by the FOI Act and EIR. This is a troublesome development that sees local authorities not have full regard to black letter law and established case law.

[37] See *Shane Brownie*ICO decision and Westminster ICO Decision Notice (decision number FS50587175).

Will there therefore be less development in those areas where authorities have adopted local validation lists that require full disclosure from the outset, as developers choose to avoid those areas for fear of the implications for their commercial interests?

This is probably unlikely as those areas where such requirements have been introduced generally remain desirable development locations.

Will there be legal challenges made to the vanguard London authorities' approaches?

There have been none that the author is aware of so far, though some have been contemplated, but the longer the validation lists are in place without challenge and the more developers proceed to work with the validation requirements, the less likely such a challenge will be. The appropriate route for an overarching challenge of the validation lists would have been via a judicial review of the decision to apply the revised validation list.

The time for a judicial review of the overarching decision to introduce the validation list changes has since past. Nevertheless, should an applicant wish to dispute the new validation procedures, it could elect not to submit the full viability appraisal at validation. The anticipation would be that the local authority would refuse to validate the application given the omission of the viability appraisal, leaving open a possibility of a challenge to the decision to refuse to validate. Whilst this would not be a straightforward challenge, it would seek to open the debate about the lawfulness of the authority's decision to introduce a validation requirement that is not required by national law nor policy relating to validation and further steps away from the EIR. To impose a requirement which seeks to remove the legal right to seek to apply an exemption by removing all exemptions and pre-judging the public interest test in such a blanket fashion seeks to remove the protection afforded by law to applicants and their information.

An option to appeal for non-validation to PINS might be considered, although PINS may not wish to entertain many such appeals; indeed, PINS themselves have said that they do not usually accept such appeals and those that they do are escalated to the Secretary of State for a decision that usually takes many months. There is no statutory period or performance timescale for a response from the Secretary of State to such decisions. So for many applications where timing of determination is critical, this may not present a palatable option. Yet, for viability appraisals that contain highly sensitive data this route may need to be given more considered thought.

Equally, in the case of Southwark where local policy now exists which requires full viability appraisal disclosure in advance of determination, it is too late to undertake a generic challenge to the introduction of this policy. Indeed, developers wishing to influence the way in which local planning authorities approach viability should aim to engage in consultation on such emerging policies (as well as validation requirements). However, unlike the case with the Greenwich and Hounslow validation lists where a challenge could be made before any viability data would be in the public domain, with Southwark the case for a judicial review is more nuanced. A summary viability report would be produced at validation and a full appraisal would need to be disclosed later for non-policy compliant schemes. This would enable the applicant to refuse to submit a full appraisal at a later stage preserving the ability to appeal for non determination or refusal. Indeed, one presumes that this approach would be likely to result in a refusal, requiring the applicant to pursue a s.78 appeal in an effort to secure planning permission. This being the case, an applicant would thereafter not need to supply a full validation appraisal, as the Planning Inspectorate does not currently require full validation appraisals to be submitted in order that an inspector determine an appeal - this being in accordance with the line of cases on this point. One might argue that the local planning authority could elect to determine without a full validation appraisal being submitted and disclosed given the requirement is policy rather than law. Other material considerations would need to be relied upon, on a case by case basis, by the authority in order to justify this stance. However, as the policy has only recently been

introduced, such action has the potential to undermine the purpose of introducing the policy. Further, this approach would increase the risks of third party challenge to any consequent decision to grant permission.

Will we see more policy compliant schemes in the vanguard London authority areas, thus avoiding the need for viability appraisals?

This would be one way to avoid disclosure of potentially sensitive information as a result of local authorities' policies and requirements. In London, emerging London mayoral Housing Supplementary Planning Guidance ("SPG") policy and the introduction of Starter Homes into the viability mix may complicate the position in terms of ease of ensuring "policy compliance", however. What would that mean in practice and is it actually realistic?

For new land negotiations it may mean developers focus more on assuming a policy compliant approach in bids for land acquisition. This may result in a check on land values or alternatively some landowners may choose not to release their sites to the market until the policy and planning environment is more favourable. There will no doubt be a point at which no developer would wish to bring forward a scheme where the price of doing so would preclude a reasonable developer profit. Inevitably, this may colour the decision whether to bid for land, so could result in some potential land development opportunities not coming forward as would otherwise be expected. However, in relation to housing schemes at least, on balance, given the continual need for development companies to produce housing product for sale to generate constant turnover, it is hard to see a case where the risks associated with full disclosure will outweigh the financial benefits and necessity of progressing with development schemes. There have been some non-policy compliant schemes being applied for in the vanguard authorities, although not in great numbers. There may not be a causal linkage to the introduction of the new protocols and the drop in applications, as there have been other extraneous factors such as the Brexit vote that has influenced development opportunities being brought forward within London in the first six months of 2016. As set out above, the new emerging Mayoral Housing SPG and the Housing and Planning Act implications in relation to potential Starter Homes may, however, potentially make it harder to achieve "policy compliance" going forward so the effect of that will need monitoring.

For those schemes which are being promoted on land already under contract, decisions will need to be taken as to whether sensitive data that would be contained in a viability appraisal will actually be commercially sensitive and whether its disclosure would, in reality, be prejudicial.

For pure residential schemes, the FTT in *Heygate* considered that in negotiations with private purchasers and indeed registered providers of social housing, a developer would not be disadvantaged by disclosure of data contained in the viability appraisal relating to anticipated sales values. This was on the basis that the market values at the time of sale would be more likely to influence sales negotiations and the Council would seek to ensure that a reasonable deal was brokered with the registered providers. Contrast the situation where commercial premises such as offices or retail units, were to be included within a project, the FTT reasonably identified that there would be a "real risk that future commercial customers would use […] projections to their advantage in negotiations" such that public interest in maintaining exceptions outweighs disclosure.

After many sound bites during campaigning and manifesto promises that new schemes coming forward would have to provide 50% affordable housing, the Mayor of London, Sadiq Khan announced on 29 July 2016 in an interview with an Estates Gazette reporter, that City Hall is reviewing its stance on the provision of affordable housing and the relationship with viability appraisals and that a lower threshold of circa 35% is being mooted. Affordable housing SPG is expected to be published in the autumn of 2016 and City Hall have suggested that one route they are exploring with London Boroughs is setting a flat tariff for affordable housing provision below which permission would be refused. It would appear that the Planning

Officers Society January 2016 Planning Manifesto's proposals for a flat rate of 35% affordable housing provision have found some supporters in City Hall.[38]

After initially suggesting that a flat rate tariff would negate the need for viability appraisals, City Hall have subsequently refined their comments and indicated that applicants may choose not to submit a viability appraisal, simply instead opting to accept a flat rate of affordable housing. However, whilst affordable housing tends to be the victim of reduced viability, it is not the only obligation that could be reduced to improve viability. Depending on whether CIL is in force and the content of the Regulation 123 list, other on site mitigation works and/or off-site contributions may all be capable of being reduced to improve viability. So whilst it is likely that a flat rate tariff would reduce the frequency of viability appraisals being used in London, it would not of itself remove the possibility as there may be schemes where the flat rate would still not present a viable development option. City Hall's anticipated supplementary planning guidance is expected to address viability appraisal methodology and approach.

Given the delay in allowing due process and time taken for appeals to run their course, what actual benefit can the public receive from access to information at a point after the planning decision has been made?

A major criticism of the current system, apart from some inconsistency in the approach to disclosure, is that the person making a Request may have to wait months or even years for a decision to be made on release of information. By this time information may of course have lost some of its sensitivities but also its importance/relevance. It is often too late when information is finally disclosed for the information to have much relevance or benefit, especially if the information disclosed reveals a ground for a judicial review challenge to a decision made by a planning committee. Whilst a late judicial review may still be entertained, a Court may be more unwilling to grant relief if the development is under way by that stage.

Projects involving compulsory purchase can be particularly affected as regards the relevance of information when disclosure may eventually occur. The viability of a project can often change between the date planning permission is granted and the date when a compulsory purchase order is made and confirmed. For a third party, access to viability information may come too late to allow a judicial review of the underlying planning permission, but may still enable doubt to be cast over the financial case for the compulsory purchase as well of course as for the compensation valuation assessment process.

What recommendations might be offered to the Government, public authorities and developers to encourage improvements to the system?

The system could benefit from some refinement. The direction of travel towards greater transparency and automatic disclosure is likely to ripple out to other authorities in time. However, given the Government is intending to review red tape in the planning system through a forthcoming Bill following hot on the heels of the Housing and Planning Act 2016, there would be scope to introduce some refinements via legislative means. The following are some areas where consideration might be given to improvements:

- where a Request has been made but results in the need for further information or clarification to obtain the information which the requestor was seeking, a shorter time frame could be offered to address the edited search, provided that such an edited follow up Request was made within a certain timeframe. Given the public authority would have recently undertaken the search, it would be reasonable to assume that they would have readily available the

[38] *http://www.planningofficers.org.uk/downloads/pdf/POS%20Manifesto_Affordable%20Housing_Jan16.pdf.*

search criteria from the original Request which may reduce the time taken to address any edited Request;

- employing a governance manager within each authority who ensures consistency of approach across authority departments, ensuring best practice and also that disclosure is controlled rather than accidental. This will ensure best practice within every public authority;
- more consistency of approach across all areas of planning and compulsory purchase as regards the approach to transparency and disclosure. Given, for example, the different arrangements that are adopted in the field of DCO compared to local authorities' disclosure for development control information, local plan and the compulsory purchase process (in the latter there is significantly more redaction and CPO scheme viability is an even more sensitive affair due to compensation negotiations) there is significant opportunity to bring into line (or at least be clearer as to the differences and why) in relation to the various practices which will make it easier for all to engage and work across the various parts of the planning and compulsory purchase system;
- standardised viability models for sites as far as possible, rather than a multitude of models. Introduction and application of a standard viability model would greatly help speed up review of viability appraisals, introduce a degree of confidence in the outputs of the model and ensure a consistency that will result in easier comparisons being drawn between developments and viability appraisal outputs between schemes. Viability appraisal models for regeneration schemes may need to remain more bespoke to capture long term development programmes and risk quantification where reliance on current information is not feasible. However, the introduction of a standard model may become more challenging following the Brexit vote as developers seek to adjust to the economic uncertainty and it is unlikely to be the right time to impose further constraints that could further hamper economic growth arising from development. It is possible that the cost of bringing forward development schemes and the risk associated with doing so will be increased. This will need to be reflected in models, and due to the higher risks, higher developer profits may be appropriate to compensate for these risks. Developers may structure their development, its funding, costs and risks in different ways as they adjust to the new economic outlook and that in turn will affect viability modelling;
- creation of an accreditation by RICS for this type of specialist valuation appraisal could be a valuable step. RICS could provide initial accreditation training to ensure consistency of approach in what information is properly confidential and what is not and other relevant techniques and approaches to viability appraisals. Thereafter they could provide continued professional development training to maintain quality and standards, together with developing best practice. If valuers are recognised as having particularly suitable qualifications and expertise in viability valuation this may help to dispel the disquiet amongst some councillors and third party objectors to development schemes who may claim that: valuers are in their view not conducting a robust, independent assessment of data on behalf of authorities; the process is not transparent enough, and therefore full disclosure of all information is the only way forward; and
- the development industry could sensibly agree, perhaps through representative industry bodies, those items of input/raw data that can automatically be disclosed. This can then be adopted as standard practice by local authorities. This may reduce the need in many cases for Requests to be made or would allow Requests to be more focussed which in turn would reduce officer time spent dealing with Requests and introduce more transparency, but in a

balanced way. Given the extensive debate and judgments on viability data it would seem that there is scope to focus on a good degree of common practice.

Given the on-going narrative surrounding under-delivery of affordable housing and the emerging debate about the potential introduction, at least in London, of a more flat rate approach to delivery of affordable housing, perhaps it is now time to consider further the pros and cons of allowing affordable housing to be classed as relevant infrastructure to benefit from CIL? Indeed, this would be equivalent to introducing more of a flat rate as CIL would be a mandatory payment and could not be avoided. However, planning judgment and a number of viability and disclosure of information arguments in relation to site planning applications would be avoided where CIL is levied for the purposes of affordable housing provision. Clearly, there would be a number of downsides in terms of the common concerns over the inflexibilities of CIL in terms of: area based rather than site specific viability and quickly out of date area based viability appraisals used to support the case for CIL during the CIL examination; not providing mixed communities; and uncertainty over timescale of delivery of affordable housing, together with the requirement for the local planning authority to identify sites that the CIL monies could be used for to bring forward affordable housing, although with the amount of public land coming to the market it may be possible to find suitable sites where such monies could usefully be spent. There may be some scope to introduce "mix and match" CIL with s.106 Agreements for affordable housing provision, with local authorities deciding to adopt a lower CIL rate to fund a tighter reg.123 list of infrastructure, including a lower fixed percentage of affordable housing, with s.106 agreements used to "top up" affordable housing provision on a site specific basis where required. However, this also does not appear to provide the answer to removing the possibility of viability appraisals being submitted and so addressing how to balance disclosure of information as discussed above.

How might Brexit affect the FOI Act and EIR?

The FOI Act is purely a creation of domestic law so will remain unaffected by Brexit. Whether government decides to revisit the FOI Act will not be as a result of Brexit but other sources of pressure for reform such as arising from recommendations by the Independent Commission.

In relation to the EIR, these derive from a European Directive and also help adhere to the EU Charter of Fundamental Rights which includes access to information. The European Directive has as its source the Aarhus Convention. When the European Communities Act 1972 is repealed, it is likely that there will be saving provisions to allow continuation of the EIR. This would allow time for any potential changes to be considered. However, given the need to comply with the Aarhus Convention, the EIR are likely to be retained in some form. Nonetheless, it is envisaged though that due to the level of scrutiny that viability appraisals in particular have, and continue to be subject to, the need for changes to the EIR may well be the subject of debate.

Other than changes arising from Brexit, what might the future hold for disclosure of viability appraisals?

With the cultural shift towards greater transparency it is hard to see how this will not continue to influence the way that the planning system deals with disclosure. This is illustrated by recent manifesto commitments by the new Mayor of London, Sadiq Khan, who stated that as Mayor he would "support councils to enforce clear, new rules to maximise the affordable housing in new developments, with greater transparency around viability appraisals, and the option to set local affordable housing targets". This suggests that the Mayor may well be supportive of the approaches taken by the vanguard authorities, although at this stage the approach of the GLA to the treatment of viability appraisals where the Mayor is the determining

authority is evolving. However, the new Deputy Mayor for Housing, James Murray, has said publicly he intends to ensure that there is a "clearer approach" to establishing viability and to push for more affordable housing. Viability appraisals are already coming under the "Murray spotlight".

It appears that a number of London boroughs are reviewing their positions on viability. Some are electing to have a system that promotes publication of viability appraisals, whilst still maintaining the public interest test but placing the onus on applicants to proactively state whether any exemptions should apply to data submitted. The London Borough of Haringey is one of the authorities which is reviewing its processes surrounding viability appraisals with a view to encouraging greater transparency. So there will no doubt be further changes across the London boroughs in particular given the focus on affordable housing in particular, but this plethora of different approaches across the London Boroughs makes it more difficult for applicants and third parties alike to engage in the planning system with certainty of consistent approach. Whilst these issues are currently coming to the fore in London, issues relating to disclosure of viability appraisal information are of course not solely a London phenomenon and we can expect to see more debate on this topic in authorities across the country.

If authorities generally move to the full disclosure model there is a possibility that we will see more assumed and generic costs/data being utilised, rather than site specific information. This lower quality information, which is unlikely to be commercially sensitive, may discourage developers from being entrepreneurial and could potentially decrease quality and place-making initiatives because that can often add enhanced bespoke costs. It may also discourage more complex sites including some brownfield sites, from coming forward where bespoke costs and models become necessary to reflect longevity of build and other sensitivities; such was the case with *Heygate* where Lendlease created a bespoke model to accommodate the unusual circumstances of the large, long term regeneration project.

Developers may have to do some soul searching to decide if the potential consequences to their commercial interests arising from disclosure of information are a risk they are prepared to accept in order to bring forward development in areas with full disclosure requirements. Those developers who place significant value on their reputation may find it challenging to decide whether to decide on their priority as between fighting disclosure which can often result in poor public relations versus the business risks and costs of sensitive information getting into the hands of competitors, tenants and other parties. Certainly some developers are becoming more sophisticated in identifying which information is commercially sensitive and explaining why to local authorities in an attempt to provide protection from disclosure. Schedules of information and explanations of why they are commercially sensitive are now becoming more common.

It is unlikely that the propensity for greater transparency will end with the vanguard authorities, but what remains to be seen is whether the courts will be turned to as a means of placing a check on protocols stipulating automatic full transparency. The recent trends suggest a move to even more transparency in relation to viability appraisals. This will need to be tempered to ensure the system is fair and balanced, which could be assisted by the following:

- introduction of an accreditation by RICS for viability valuation (as mentioned above) to include initial detailed accreditation training and on-going continued professional development training on matters relevant to this type of valuation exercise such as what information would be considered to be commercially sensitive. These experts would receive full un-redacted viability appraisals and information at arms length to the local planning authority, would assess data and produce recommendations to the local planning authority. Given their independence and expertise it would be reasonable for officers and committee members to rely on their recommendations in the same way as in *Perry* and *Turner*;
- referral of viability information to an independent expert pre-application (i.e. prior to validation) such that there is sufficient time to conclude that process and have the

recommendation available for the statutory consultation period giving third parties greater opportunity to comment. The pre-application process could accommodate this and applicants could fund the appointment of the independent expert for the local planning authority as part of the pre-application fees arrangements or via planning performance agreements;

- publication of the independent expert's report when they are received could then happen as a matter of course. If this was undertaken at pre-application stage, the recommendation report could be a validation requirement.

Whatever the approach that is taken, a balance is needed that: (a) enables business and development to be conducted and much needed development to come forward with certainty, without undue delay and without developers being detrimentally impacted; and (b) ensures that robust and informed decisions are being made in the public interest. The move to implement procedures that require full blanket transparency is not helpful to achieve this balance and it is further refinement of procedures that is needed to enable fairness for all.

Appendix 1: Synopsis of Key Procedural Stages

FOI Act Requests

Stage 1: Public Authority Response to an FOI Request

Following an FOI Act Request, information has to be made available (or a notice of refusal issued) as soon as possible and no later than 20 working days after the date of receipt of the request (ss.10(1) and 17(1) of the FOI Act).

Stage 2: Internal Complaint Review

If an individual is not satisfied with a public authority's response to a FOI Act Request the individual should first complain to the public authority and ask it to conduct an internal review pursuant to its internal complaints process. Guidance from the ICO recommends that such a review is carried out as soon as possible and in any event within two months of receiving the public authority's final response. However, this is not a statutory timeframe. Under the FOI Act, a public authority is not required to have an internal complaints process. If there is not an internal complaints process, then an individual should submit a complaint direct to the ICO within three months of the last meaningful contact they had with the public authority concerned.

Stage 3: Referral to ICO

If an individual believes that the public authority has not dealt with a complaint properly, or if a public authority does not have an internal complaints process, then the matter should be referred to the ICO within three months of the last meaningful contact with the public authority concerned. This is not a statutory timeframe for making the complaint but guidance from the ICO.

EIR Request

Stage 1: Public Authority Response to an EIR Request

Following an EIR Request, information has to be made available (or a notice of refusal issued) as soon as possible and no later than 20 working days after the date of receipt of the Request (reg.5(2) of the EIR).

A public authority may extend the period of 20 working days to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to comply with the request within the earlier period (reg.7(1) of the EIR). However, it must notify the requester that it is proposing to extend the period, within the original 20 working day period.

Stage 2: Internal Complaint Review

If a public authority refuses all or part of an EIR request, it must send a written refusal notice (reg.14(1) of the EIR). This includes when it does not hold the information requested. If an individual wishes to complain about the response to their EIR request for information, then the individual must do so in writing within 40 working days of when he/she believes the public authority breached the requirement concerned (reg.11(2)); in practice this is usually the date of receipt of the refusal letter. The EIR require public authorities to have an internal review or complaints procedure. A public authority should respond to any complaints received as soon as possible and in any event no later than 40 working days (reg.11(4) of the EIR). Note that it is not necessary for an individual to specifically request an internal review in their complaint, the ICO's EIR Code of Practice states that any correspondence in which an individual has expressed dissatisfaction over the handling of their request should be addressed through the internal review procedure.

Stage 3: Referral to ICO

If, after going through a public authority's complaints procedure, the individual is still dissatisfied, or if the public authority fails to review its original decision, then the individual can complain to the ICO. Such a complaint must be submitted within six months of the issuing of the outcome of the internal review. This is not a statutory timeframe, but guidance from the ICO.

FOI and EIR Requests

Stage 4: ICO Decisions

The enforcement and appeal provisions of the FOI Act are imported into the EIR by reg.18 of the EIR, so the process for Stage 4 is the same for both types of request. The ICO can refuse to decide a complaint if there appears to have been "undue delay" in making that complaint (s.50(2)(b) of the FOI Act). The ICO cannot award compensation; its main aim is to improve the information rights practices of organisations, where there is an opportunity for them to do so. It is also important to note that the ICO will often seek to resolve complaints informally, rather than issuing a formal decision notice. For example, the requester may withdraw their complaint once the ICO has explained the law to them. By way of illustration, only about a third of valid FOI Act cases referred to the ICO result in a formal decision notice.

Stage 5: Appeal to FTT

If an individual is not satisfied with the ICO's decision, they must lodge an appeal with the FTT within 28 calendar days of the date of the decision (Rule 22 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009).

Stage 6: Appeal to Upper Tribunal

If an individual is not satisfied with the decision of the FTT it must request permission from the FTT to appeal within 28 days of the decision (Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General

Regulatory Chamber) Rules 2009). If permission is refused, then an individual has one month from that refusal to request permission to appeal directly from the Upper Tribunal (Rule 21 of The Tribunal Procedure (Upper Tribunal) Rules 2008). If permission is granted by either route, then an individual has a further one month to lodge an appeal with the Upper Tribunal (Rule 23 of The Tribunal Procedure (Upper Tribunal) Rules 2008).

Stage 7: Appeal to Court of Appeal

If an individual is not satisfied with the decision of the Upper Tribunal it must request permission from the Upper Tribunal to appeal to the Court of Appeal within one month of the decision (Rule 44 of The Tribunal Procedure (Upper Tribunal) Rules 2008). If permission is refused, then an individual can request permission to appeal from the Court of Appeal directly.

Stages 5–7: Extensions

If the time limits are missed, an individual can ask for more time to appeal (with reasons). The tribunal (or the Court) has discretion as to whether to accept a late case.

Appendix 2: Summary of Exemptions under FOI Act and EIR

FOI Act Absolute Exemptions
"Other Means": Section 21 "Information accessible by other means (e.g. in the Publication Scheme)"
"Security": Section 23 "Information supplied by, or relating to, bodies dealing with security matters"
"Court Records": Section 32 "Court records, and information held in relation to court proceedings"
"Parliamentary Privilege": Section 34 "To avoid infringing the privilege of either the House of Commons or House of Lords"
"Public Affairs": Section 36 "Prejudice to effective conduct of public affairs only where such information is held by the House of Commons or House of Lords"
"Crown": Section 37 "Communication with Crown or their heir" (communication with members of the Royal Family other than the ruling monarch and the Royal Household is subject to qualified exemption)
"Personal": Section 40 "Personal data of which the applicant is the data subject"
"Confidence": Section 41 "Information that was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under FOI Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"
"Illegality": Section 44 "Information whereby disclosure is prohibited by an enactment or would constitute contempt of court"

FOI Act Qualified Exemptions	**EIR Qualified Exemptions**
"Future Publication": Section 22 "Information intended for future publication"	"Improper": Regulation 12(4) Because either: "Information is either not held; request is manifestly unreasonable; request is too generalised, even after assistance is given; request relates to material which is still in the course of completion, to unfinished documents or to incomplete data" or "The information is 'internal communications'."
"International Relations":Sections 24, 26–28 "Information held for national security, defence, or international relations purposes; or which would prejudice relationships with and between the devolved administrations and the UK"	"National Security": Regulation 12(5)(a) "International relations, defence, national security or public safety would be adversely affected"
"Economy": Section 29 "Information which would prejudice the UK or devolved administrations' economic interests"	"Fair Justice": Regulation 12(5)(b) "The course of justice; fair trail or inquiry would be adversely affected"
"Investigations": Section 30 "Investigations & proceedings conducted by public authorities"	"Intellectual Property Rights: Regulation 12(5)(c) "Intellectual property rights would be adversely affected"
"Law enforcement": Section 31 "Disclosure would prejudice the prevention of crime, the administration of justice, and the maintenance of security (in all forms)"	"Confidentiality of Proceedings": Regulation 12(5)(d) "The confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law would be adversely affected"
"Audit": Section 33 "Information held by a public authority in relation to audit functions"	"Commercial Interests": Regulation 12(5)(e) "The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest"
"Policy": Section 35 "Information relating to the formulation or development of government policy, Ministerial communications, government legal advice, and the operation of any ministerial private office"	"Legal Obligation": Regulation 12(5)(f) "The interests of a person who was under no legal obligation to provide it or supply it such that it would be required to be consented; and has not consented to its disclosure"
"Public Affairs": Section 36 "Disclosure would prejudice the collective Cabinet responsibility or inhibit the free and frank provision of advice and deliberations'	The disclosure of personal data is exempted under Regulation 13 unless a subject data request is also submitted.
"Health and Safety": Section 38 "Disclosure would endanger physical and mental health or endanger the safety of any individual'	
"EIR": Section 39 "Information is exempt under FOIA if it is required to be disclosed under the EIR"	
"Legal Professional Privilege": Section 42 "Information in respect of which a claim to legal professional privilege or, could be maintained in legal proceedings is exempt information"	

FOI Act Qualified Exemptions	EIR Qualified Exemptions
"Commercial Interests": Section 43 "Information that constitutes a trade secret and/or disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)"	