

PLANNING DEVELOPMENT CONTROL COMMITTEE

9 February 2012

CONFIDENTIAL INFORMATION – INFORMATION COMMISSIONER DECISION

REPORT OF HEAD OF LEGAL SERVICES

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RECENT REFERENCES:

NONE

EXECUTIVE SUMMARY:

This report informs the Committee of a decision of the Information Commissioner in respect of a financial viability report which formed part of a planning application. The information had been treated as confidential and was not disclosed to the public. The Information Commissioner decided that some of the report (but not all of it) should be disclosed. The Head of Legal Services has prepared guidance to planning staff on the treatment of similar information in the future.

RECOMMENDATIONS:

- 1 That the Guidance issued by the Head of Legal Services on confidential information and planning applications, as set out in Appendix 1 to the report, be noted.
- 2 That the Head of Legal Services be instructed to keep the Guidance reviewed and updated as necessary.

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DETAIL:

1 Introduction

1.1 Members considered a planning application in respect of Freemans Yard, Cheriton, in June 2010. The application submission included a financial viability report which the applicant asked to be kept confidential. A local resident questioned the decision-making process, and ultimately pursued a complaint to the Information Commissioner.

1.2 The Information Commissioner agreed that some of the information in the report was confidential and should not be disclosed. He directed that these confidential parts of the report should be redacted and a copy of the redacted report be sent to the complainant. The decision has been complied with a copy of the redacted report sent to the complainant.

1.3 Following the decision, officers have reviewed procedures for dealing with confidential information which is submitted with planning applications. A copy of the Guidance document which has been issued by the Head of Legal Services is attached to this report as Appendix 1.

2 Background

2.1 The planning application for Freemans Yard included a financial viability report, seeking to justify the proposed development on the basis that development of the site under an earlier planning permission was no longer viable. The report was submitted on the basis that information in it would be discussed with officers on a private and confidential basis. The report was not published on the website, but the contents of the report were fully considered by officers in preparing the Committee report, and the Head of Estates gave a full presentation to the Committee on viability issues relating to the site when the application was discussed. Having considered the report and the presentation, Members resolved to grant the application, subject to a Section 106 agreement and conditions.

2.2 After the Committee meeting, a resident of Cheriton questioned the decision-making process. Although the complainant did not specifically ask for a copy of the viability report, officers considered whether it would have been disclosed had such a request been made. The matter was assessed under the Environmental Information Regulations 2004, which set out a framework

for determining requests for disclosure of environmental information such as planning information. Views were sought from the applicant, and it was decided that the nature of the report was such that it would not have been disclosed (had a request been made), as the information was within one of the exceptions in the Regulations, and it should not be disclosed as the public interest in maintaining the exception outweighed the public interest in disclosing the information.

2.3 The decision was reviewed by the Chief Executive in line with the Council's complaints procedure, and the decision was upheld. Subsequently, the complainant formally asked for a copy of the report and complained to the Information Commissioner.

2.4 The Information Commissioner concluded that some information was confidential in nature and the public interest test lay in favour of maintaining this confidentiality. However, he ruled that a copy of the report, redacted to remove this confidential information, should be given to the complainant. The decision was complied with.

2.5 The Head of Legal Services has considered the decision of the Information Commissioner and prepared Guidance for staff in the Planning Management team as to how confidential information should be handled in the future. A copy of the Guidance is attached as Appendix 1 to this report.

3 Treatment of Confidential Information

3.1 The rights of the public to access information held by public authorities have increased in recent years, and Members will be familiar with the effect of the Freedom of Information Act 2000. Most planning applications and associated information fall under the Environmental Information Regulations 2004, which is similar to the Freedom of Information Act, albeit with some differences. Requests to see such information therefore have to be considered under these Regulations.

3.2 In summary, the legislation requires information to be disclosed, unless 1) a specified exception applies, and 2) the public interest in maintaining the exception outweighs the public interest in disclosing the information. Essentially, therefore, a balance has to be considered in decided whether the information should be released or withheld.

3.3 In general, dealing with planning applications is a very public function of the Council, and openness and transparency is followed wherever possible. In general, therefore, planning applications, supporting material, and representations are made available to the public on the Council's website, and for inspection at the City Offices. In most cases, therefore, members of the public seeking information can be referred to the website to obtain the information they are seeking.

3.4 In certain circumstances, information may be submitted (for or against an application) which by its nature or content means that some or all of it should

not be disclosed to the public. Often, the person submitting it will ask that it be kept confidential. Sometimes, it will be self-evident from the content that consideration should be given to keeping it confidential and not making it available to the public. The Guidance at Appendix 1 sets out examples, including financial viability reports of the type which was the subject of the complaint to the Information Commissioner.

- 3.5 Where information is submitted with a request that it is kept confidential, or where the nature of the information is such that the question of confidentiality should be considered, the Guidance at Appendix 1 requires an assessment to be made as to whether or not it should be published on the website.
- 3.6 Where it is decided that information is of such a nature that it should not be disclosed, it is important to ensure that the public are made aware of the fact that the information exists. The Guidance therefore requires that a note of the nature of the information is included in the information published on the website for the application in question. If a member of the public considers that the information should be disclosed, and makes a request accordingly, this can be considered (along with the views of the applicant) and the relevant statutory tests applied. This will avoid information being disclosed when it should not be disclosed, but preserves the public's rights to information where appropriate.
- 3.7 The Guidance advises that where applicants wish to submit confidential information in support of their application, planning officers should encourage them to submit it in such a form as to permit partial publication of the document, so that only information which is truly confidential is withheld from the website.
- 3.8 Information which is treated as confidential will still be assessed by the planning officer when considering the application. It will be summarised in the Committee report (with care being taken to avoid the confidential information being thereby disclosed). In exceptional cases, the Committee would be able to go into Exempt Business to consider the confidential information, if the tests for going into Exempt Business are met.
- 3.9 Members have certain rights to access confidential information. Where a Member wishes to see such information, they should speak to the Head of Planning Management or the Head of Legal Services.
- 3.10 It is intended to keep the Guidance updated in light of changes in legislation, guidance, and experience.

OTHER CONSIDERATIONS:

4 SUSTAINABLE COMMUNITY STRATEGY AND CHANGE PLANS (RELEVANCE TO):

- 4.1 This report relates to the objectives of open and transparent decision-making.

5 RESOURCE IMPLICATIONS:

- 5.1 Given the relatively low occurrence of confidential material, there are no resource implications from this report.

6 RISK MANAGEMENT ISSUES

- 6.1 Implementation of the Guidance will mitigate the risk of a challenge from applicants or the general public.

BACKGROUND DOCUMENTS:

None

APPENDICES:

Appendix 1 - Handling of Confidential Information in Planning Applications

Winchester City Council

Handling of Confidential Information in Planning Applications

1 Introduction

- 1.1 This Guidance Note sets out the procedures to be following in dealing with documents and other information which is submitted to the Council in connection with planning applications. The guidance covers information which is expressed to be, or should be inferred as being, of a confidential nature. It applies to confidential information from any source. Normally, it would be received from an agent, applicant or supporter pursuant to a planning application, but applies equally to confidential information submitted by an objector.
- 1.2 In this note, the term “confidential information” is used for ease of understanding, to cover any information where there may be an issue about its disclosure to the public, rather than in any formal legal sense. Officers should be aware that there are specific legal terms and meanings in information law, but this note does not seek to give detailed guidance on such terms. The note is for general guidance only, and officers should consult the Head of Legal Services for more detailed information on a particular issue.
- 1.3 **Where information is treated as confidential in accordance with this guidance, any request received which seeks the disclosure of such information MUST be referred to the Head of Legal Services.**

2 Background

- 2.1 Dealing with planning applications is a very public function of the Council, and openness and transparency should be followed wherever possible. In general, therefore, planning applications, supporting material, and representations will be made available to the public on the Council’s website, and for inspection at the City Offices.
- 2.2 In certain circumstances, information may be submitted (for or against an application) which by its nature or content means that some or all of it should not be disclosed to the public. Often, the person submitting it will ask that it be kept confidential. Sometimes, it will be self-evident from the content that consideration should be given to keeping it confidential and not making it available to the public.
- 2.3 Legislation has been in place for many years to balance the need for open and transparent decision-making, with the interests of applicants, the public and others involved in planning applications. The legislation has evolved over time, and has developed particularly in recent years with the introduction of

freedom of information legislation and (of particular relevance to planning) the Environmental Information Regulations.

3 General Approach

- 3.1 The general approach should always be that information should be made public and placed on the website for public inspection, to allow the public and applicant to see all the relevant information on a particular application, and thereby ensure that the planning process is an open and transparent one.
- 3.2 If, exceptionally, information is such that it should not be published, the guidance in this note should be followed, and appropriate advice sought.
- 3.3 Committee reports summarise the application itself (including any supporting information), consultations and representations, and the relevant issues, before concluding with a recommendation to assist Members in determining the application. Documents are not normally appended to Committee reports, and this practice will equally apply to documents which include confidential information. Officers should ensure that reports properly summarise the issues involved, without disclosing confidential information.

4 Examples of Confidential Information

- 4.1 The following are examples of information which *may* give rise to the need for a decision on whether to withhold the information from publication.

Documents where a specific request is made (either on the face of the document or in the covering letter) for the information to be kept confidential.

- 4.2 Merely stating or requesting that information should be treated as confidential is not in itself a ground for withholding it from publication. However, the information should be assessed and advice taken, before deciding whether to treat it as confidential.

Accounts

- 4.3 Public companies are required to publish accounts, and therefore accounts submitted by such companies in support of an application would not be confidential.
- 4.4 Smaller private companies may not be obliged to publish full accounts, and therefore detailed accounts which are submitted will require assessment before publication.
- 4.5 Individuals and partnerships are not required to publish accounts, and therefore accounts submitted by such applicants will require an assessment before publication.

Financial Viability Reports

- 4.6 Financial viability reports may be submitted in support of an application, either because of a requirement in national or local policy, or to justify a particular type or extent of development. Applicants may well seek to keep such reports confidential because of the desirability to avoid the information being made known to their competitors or other interested parties such as landowners.
- 4.7 Although a report may be labelled “confidential”, it is likely that not all of the report will need to be treated as such. Where possible, reports should be in a form which allows partial publication (of non-confidential material) with confidential information restricted to e.g. an appendix which is not published. Otherwise, redaction (removal or obscuring of confidential information) should be considered (in conjunction with the Head of Legal Services and the applicant).

Medical or Other Sensitive Personal Information

- 4.8 Sometimes, detailed information on the medical condition of an applicant (or relative) will be submitted in support of an application (e.g. an extension for a granny flat). Whilst the fact that e.g. a relative is of an age where support/care is required may not be confidential, information which discloses particular conditions or e.g. the life expectancy of a person will need careful assessment before publication.
- 4.9 Occasionally, objections are made which contain allegations or particularly offensive remarks. In general, such objections will be published, although a judgement will be made in these cases and the right to not publish the material will be reserved by the Council.

Security Information

- 4.10 Applications and supporting information in respect of military sites, banks, sensitive industrial sites, etc., may have particular details which, if disclosed, may compromise the security of the site or its personnel. Such information will usually be expressly noted in the submission as being confidential, but care needs to be taken even if this is not the case.

5 Advice to Staff

- 5.1 Staff involved in processing applications and objections should be conscious of the following:-
- a) Specific requests on the face of the document or covering letter asking that the information is kept confidential;
 - b) Information being of a certain nature or type where consideration should be given to not publishing the information (e.g. as set out in

Section 4 above). Even if there is no request for the information to be treated as confidential, an assessment must be made when this type of information is received to determine whether it should be published on the web.

- 5.2 Planning officers will often discuss proposals for development with applicants and agents before a formal application is submitted. They may be informed as part of such discussions that the applicant intends to submit information, such as a financial viability report, in support of their application, but only on the basis that the information is used by officers only and not made public. In such circumstances, applicants should be encouraged to format the information so as to facilitate publication of at least part of the document, with any confidential information being contained in a separate appendix that can be withheld from publication if appropriate. Officers should avoid undertaking to keep information confidential, and should remind applicants that the Council may be legally required to make information public.
- 5.3 Where information may be confidential, in accordance with this guidance, an assessment should be made as to whether it should be published on the website. **Advice should be sought from Legal Services in case of any doubt.**
- 5.4 If, following such an assessment, it is decided that information submitted by an applicant on a confidential basis *should* be published, the applicant should be advised and given an opportunity to comment before any publication. It could also be suggested that the applicant resubmit

6 Treatment of Confidential Information

- 6.1 Where an assessment suggests that, exceptionally, the information in a document (or part of a document) should not be made public, it is nevertheless important to ensure that the public are made aware of the existence of the information.
- 6.2 Where information which has been submitted is in a form where part of it can be published, the “open” part of the information should be published on the website, and a note added to the document to show that some information has been withheld (see below).
- 6.3 **In all cases where it is decided that the information will not be published on the website, a note should be placed on the website under the relevant application, so as to be viewable by the public looking at the application online. The note should set out the nature and other outline details of the information.**
- 6.4 Where a member of the public wishes to see information which has been withheld from publication, they can submit a request to see a copy of it. Although “Freedom of Information” or other legislation may be quoted, this is

not required and all requests should be considered against the relevant legislation (usually the Environmental Information Regulations) and a decision taken as to whether to disclose the information, disclose a redacted version, or refuse the request. **Where a request is received to see such withheld information, advice from the Head of Legal Services MUST be sought before any action is taken.** This is because the decision in respect of such requests must take into account all relevant factors and legislation. Disclosure may give rise to action against the Council for breach of confidentiality, and decisions to withhold or redact information must be issued in a specific form.

- 6.5 In certain circumstances, City Councillors may be entitled to see information even if it has been withheld from publication. **Where a City Councillor asks to see any withheld information, advice from the Head of Legal Services MUST be sought before any action is taken**
- 6.6 Where an application is considered by the Planning Development Control Committee, the committee report should make reference to (without disclosing the contents of) any confidential information which has been withheld from publication. Care should be taken in drafting the report, and advice sought from relevant officers in other Teams. In exceptional cases, it may be necessary to discuss the confidential elements of the application in “Exempt Business” without the public present, but this should be avoided if at all possible. The Head of Legal Services’ representative will give advice on this as necessary.

Howard Bone
Head of Legal Services

January 2012