

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 January 2022

Public Authority: Gateshead Council
Address: Gateshead Civic Centre
Regent Street
Gateshead
NE8 1HH

Decision (including any steps ordered)

1. The complainant requested information relating to a residential development. The Council disclosed some information, but withheld a Viability Report under the exception provided by regulation 12(5)(e) (commercial confidentiality).
2. The Commissioner's decision is the Council was correct to apply the exception to some parts of the Viability Report (namely, those parts specified in Annex A), however he has decided that it was not correct to apply the exception to the entirety of it. The Commissioner is satisfied that all other held information has been disclosed.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the Viability Report, but with those parts specified in Annex A redacted.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 14 May 2020, the complainant wrote to the Council and requested information in the following terms:
 1. *Copies of all original and amended plans and drawings showing measurements, datum points, adjacent property house footprints adopted to be provided.*
 2. *Specific correspondence, documentation and plans appertaining to [redacted address] showing adoption of a rear living space extension.*
 3. *Also I request all correspondence (emails, letters, meeting notes, council meeting minutes, planning committee minutes, ward councillor correspondence, etc) between GMBC, the land owner, Builder, Contractor and any interested parties appertaining to the approval and more recently development of land being built upon behind Marian Drive, adjacent to Gullane Close.*
6. The Council responded on 20 May 2020. It requested clarification about what information was sought.
7. On 20 May 2020, the complainant provided clarification.
8. The Council responded on 21 August 2020. It issued a substantive response in which it disclosed some information, referred to some already publicly accessible, and withheld the remainder (the Viability Report) under regulation 12(5)(e).
9. The Council maintained its position in an internal review on 2 November 2020.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled, and specifically that the Council was not entitled to withhold information under regulation 12(5)(e), and that additional information was likely to be held.
11. The scope of this case and of the following analysis is whether the Council is entitled to withhold information under regulation 12(5)(e), and whether it has otherwise disclosed all information under regulation 5(1).

Reasons for decision

Regulation 12(5)(e) – Commercial confidentiality

12. Regulation 12(5)(e) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

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

13. The Commissioner's public guidance¹ on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

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

14. The Commissioner's guidance goes on to clarify that, although condition (iv) is a necessary element of the exception, once the first three conditions are met, it is inevitable that condition (iv) will be satisfied.

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

15. In her guidance on regulation 12(5)(e) the Commissioner considers that *"for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party."* The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

16. The Council has informed the Commissioner that the withheld information is a Viability Report relating to the development, by Gentoo Homes, of 30 residential properties.

¹ <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

17. Having reviewed the withheld information in conjunction with the Council's explanation, the Commissioner is satisfied that the information is commercial in nature, and that the first condition has been met.

(ii) Is the information subject to confidentiality provided by law?

18. In the Commissioner's view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
19. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
20. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
21. The Council has informed the Commissioner that the information is not trivial, and that the Viability Report explicitly states, at paragraph 1.2, that it contains commercially sensitive information and is to be treated as confidential.
22. The Commissioner notes that the information relates to the anticipated profits and costs of the developer. As such, he agrees that it is not trivial in nature. Furthermore, he acknowledges that the information from the developer was provided to the Council with an expectation that it would be handled in confidence, and that it has not entered the public domain.
23. The Commissioner is therefore satisfied that the information is subject to confidentiality provided by law, and that the second condition has been met.

(iii) Is the confidentiality provided to protect a legitimate economic interest?

24. The First-tier Tribunal (Information Rights) ("the Tribunal") confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011)* that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect the legitimate economic interest of the person the confidentiality is designed to protect.
25. It is the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.

26. The Commissioner has been assisted by the Tribunal in determining how 'would' needs to be interpreted. He accepts that 'would' means 'more probably than not'. In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

*Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure **would** significantly damage the interest in question and assist its competitors. (Emphasis added)*

The Council's arguments

27. The Council has argued that the disclosure of the information contained in the Viability Report would place Gentoo Homes at an economic disadvantage. The disclosure of the financial breakdown (that the report contains) would provide competitors with a detailed summary of the profit and costs that Gentoo Homes expects in a development project of this size and nature. Gentoo Homes has stated to the Council that it considers that disclosure of the information would "*give competing businesses with an unfair insight into the commercial operation processes and transaction capabilities to gain a competitive advantage*".
28. At the time of the request, the site was still in development, with unsold properties subject to sales negotiations. The disclosure would also therefore provide potential buyers with costings which would place them at an advantage in negotiations, as they would know the basis of Gentoo Homes' profit margins. Disclosure would therefore erode Gentoo Homes' bargaining position in a difficult market, which has been compounded further by the economic consequences of the Covid-19 pandemic.

The Commissioner's analysis

29. Having considered the withheld information, the Commissioner is not satisfied that the entirety of it is covered by the Council's arguments. Whilst some parts of the report contain Gentoo Homes' profit and costing information, the remainder does not, and the Council has failed to demonstrate why the disclosure of this remaining information would create an adverse effect upon the legitimate economic interests of Gentoo Homes. For example, the first few sections of the report appear to contain only introductory information, either about the nature of the site, or about the general purpose of viability reports.
30. The Commissioner considers that the Council has sought to apply the exception in blanket form to the whole document, and has failed to consider the differing sensitivities of the information that it contains.

31. In respect of those parts of the report that the Commissioner is satisfied falls within the Council's arguments, these are specified in Annex A.
32. The Commissioner considers that the parts specified in Annex A relate to the expected profit and costing of the site.
33. The Commissioner recognises that this information relates to Gentoo Homes' decision on whether it is viable for it to commercially develop the site, and that it includes specific details of the costs envisaged by it to develop the site. Gentoo Homes has argued that the disclosure of this information would allow competitors to gain an unfair insight into its operation, and through this gain a competitive advantage in respect of future developments. The Commissioner accepts that this is information that Gentoo Homes would not otherwise expect to make available to its competitors, and that such information would reasonably allow competitors to undermine Gentoo Homes' bid in respect of any similar, future developments.
34. It is therefore reasonable for the Commissioner to accept that disclosure of this information would be disadvantageous to Gentoo Homes' ability to submit future bids in an otherwise level playing field.
35. In this sense the Commissioner accepts that the Council's and Gentoo Homes' arguments are merited and that this part of the test is engaged.

iv. Would the confidentiality be adversely affected by disclosure?

36. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it inevitable that this element will be satisfied. In his view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.

The public interest

37. As the exception is engaged for some of the information, the Commissioner has considered the associated public interest test required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

The public interest in the information being disclosed

38. The central public interest in the information being disclosed relates to creating greater transparency on the issue of council decisions on planning applications. There is a general public interest in transparency around the council's planning decisions, and in the public being able to effectively hold it accountable for those decisions.
39. In the circumstances of this case, the Commissioner understands that the complainant resides near to the development, and holds concerns about the Council's decision to approve planning permission for properties that impact upon the complainant's own residence.
40. A disclosure of this information would therefore provide additional context to the Council's decision to approve planning permission.

The public interest in the exception being maintained

41. The central public interest in the information being withheld relates to the protection of the legitimate economic interests of the developer, Gentoo Homes. The Viability Report contains detailed financial information about Gentoo Homes' position in respect of the development, and the public disclosure of this information would provide competitors insight into Gentoo Homes' expected profit and costings.
42. Although the Commissioner recognises that each site, and therefore each bid, will differ dependent upon the circumstances in the area proposed for development, some elements will remain the same, or similar, and the disclosure of the detailed costings submitted by Gentoo Homes in this Viability Report may therefore reasonably lead to competitors using such information to submit a more competitive bid on future development projects.

The balance of the public interest

43. Whilst the Commissioner recognises the complainant's interest in accessing all information relating to the development, it is noted that the development has already been subject to a public planning application process, and significant transparency about the development has been provided by the information already disclosed. In respect of the withheld information, the Commissioner does not perceive how this would significantly address the complainant's own concerns, which appear to relate to planning aspects, rather than issues of economic viability as faced by the developer.
44. Conversely, the Commissioner recognises the importance of preserving the integrity of commercial bargaining processes. There is a public interest in ensuring that private parties are not able to access

information about their competitors, their suppliers or their customers that would enable them to increase their prices, tailor their offerings, or otherwise change their behaviour in a way that gives them an unfair advantage over their suppliers or their customers (a public interest which is recognised by the enactment of competition legislation to prevent private parties sharing such information among themselves). The Commissioner considers that the disclosure of such information is not in the public interest.

45. The Commissioner has therefore concluded that, in this case, the balance of the public interest favours maintaining the exception.
46. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).
47. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

Regulation 5(1) – Duty to make information available on request

48. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions that may apply.
49. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
50. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

The Council's position

51. The Council has informed the Commissioner that the majority of information falling within the parameters of the request, and which is not already publicly accessible on the Council's planning portal website, would be held within the relevant case file. This case file is held electronically within the Council's records system ('Uniform'), and document management system ('Workflow 360').
52. The Council also undertook a keyword search of officer inboxes using the terms "*Gullane Close*" and the relevant planning application reference "*DC/17/01267/FUL*", and all known involved officers have been asked to search for any meeting notes that they hold outside the case file.
53. All information retrieved has been disclosed - except the Viability Report withheld under regulation 12(5)(e), and some redactions applied to documents for personal data.
54. Whilst additional information is available on the Council's website, the Council considers that such information is already accessible to the complainant, due to it being publicly accessible on the planning portal² by searching for the relevant planning application reference, or in published meeting papers³.
55. The Council has also clarified that, due to administrative issues, it did disclose some information to the complainant, but subsequently 'recall' the email. This information was subsequently disclosed but with personal data redacted, and with different file names - as some of the disclosed emails were combined into one .pdf document.

The Commissioner's conclusion

56. The Commissioner has considered the Council's position.
57. The Council has detailed the locations that it would expect relevant information to be held, and the steps that it has taken to retrieve that information either manually, or by keyword searches. The Council has also confirmed that involved officers have been consulted in case any extraneous information may be held in other locations.

² <https://public.gateshead.gov.uk/online-applications/>

³ <http://democracy.gateshead.gov.uk/ieListDocuments.aspx?CIId=134&MIId=1878>

58. There is no evidence available to the Commissioner that indicates the Council's searches have been deficient, and it is recognised that some of the requested information is already publicly available on the Council's online planning portal - and therefore accessible to the complainant. The Commissioner also notes that, whilst some of the information may have been previously provided to the complainant in emails that were recalled, the same information was subsequently disclosed, subject to redactions of personal data.
59. On this basis the Commissioner has concluded that, on the balance of probabilities, all relevant information has now been disclosed.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

61. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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

Annex A

63. The following parts of the Viability Report fall under the exception provided by regulation 12(5)(e):

- Paragraph 3.8
- Paragraph 3.12
- Appendix 1 Appraisal Summary