

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

Date: 14 May 2013

Public Authority: Brighton and Hove City Council
Address: King's House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant requested from Brighton and Hove City Council ("the council") the names of those who had expressed an interest in a proposal to develop Home Farm Buildings in Stanmer. The council sought to withhold all of the information using the exceptions under regulation 13(1) and 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR"). These exceptions relate to third party personal data and the confidentiality of commercial information.
2. The Commissioner's decision is that the council correctly withheld some information using regulation 13(1) however some information was incorrectly withheld using this exception. The Commissioner did not consider that the council had demonstrated that regulation 12(5)(e) was engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the names of the organisations or companies that expressed an interest in the development. The council may withhold the names of specific individuals.
4. The public authority 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 22 May 2012, the complainant requested information from the council in the following terms:

"We would like to make a Freedom of Information request to know the names of those who expressed an interest in the agricultural buildings at Stanmer".

6. The council responded on 18 June 2012. It attached a copy of the response it had already provided to another request, in similar although broader terms, citing regulation 12(5)(e) and 13(1).
7. The complainant requested an internal review on 20 June 2012. She said that she was dissatisfied that the council had sent the same response and that she did not agree that the names had been correctly withheld.
8. The council completed its internal review on 20 June 2012. It said that it wished to maintain its position that the information had been correctly withheld.

Scope of the case

9. On 5 September 2012, the complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether the council had correctly withheld the information.
10. Some third parties consented to the disclosure when consulted by the council and this information was therefore disclosed thereby informally resolving that particular aspect of the complaint.

Reason for decision

Regulation 13(1) – Third party personal data

11. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

12. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The council withheld the details of those who expressed an interest in the development. The council explained that it received twenty-three expressions of interest from prospective owners and occupiers comprising of a variety of private individuals, companies and other organisations. The Commissioner accepts that the names of specific individuals will be personal data in this context because he considers that there is a real risk of identification. However, the council also withheld the names of companies and organisations using this exception. The Commissioner does not accept that this information is personal data and it has not been considered any further under this exception. The remainder of this analysis therefore only relates to the names of specific individuals that have been withheld.

Would disclosure breach the Data Protection Principles?

13. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

14. The council explained that during the Commissioner's investigation, it had consulted all of the third parties involved. Based on those responses, some information was disclosed to the complainant however the council said that it would be right to withhold the information where the individuals had not responded to the consultation, where the response had not been sufficiently clear or where they had specifically objected. The council said that all those who replied to the expression of interest form compiled by its property agent had been given an explicit reassurance of confidence. The council provided a copy of the form to the Commissioner as evidence. The council argued that in the circumstances, disclosure would be outside the individuals' reasonable expectations.

Consequences of disclosure

15. The council referred to the possibility of unwanted contact. At least one of the third parties consulted expressed concerns about this.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

16. There is always some legitimate public interest in the disclosure of any information held by a public authority. This is because this helps to promote the aims of transparency and accountability. There is also a more specific public interest in disclosing information that would help the public to consider possible planning outcomes for particular sites. However, having regard to all the circumstances, the Commissioner did not consider that the legitimate interest in disclosure was strong enough to equal or outweigh the legitimate expectation of confidence that arose in this case with regard to individual names.
17. The Commissioner was not satisfied that there was sufficient evidence to demonstrate that disclosure of the information ought to have been within the reasonable expectations of those concerned. The Commissioner has expressed before that consent is not the only determining factor when considering whether a disclosure would be fair and public authorities should avoid giving this impression when responding to requests for information. However, it is a useful starting point for considering what the reasonable expectations of the individuals may have been. Some individuals have objected. Even where no specific objection or no response was received, the Commissioner was satisfied that the wider circumstances of the case support the council's conclusion that disclosure would not have been within the reasonable expectations of those concerned.
18. The council has been able to supply specific evidence to show that it explicitly reassured those who completed the form that the information would be kept confidential. Of course, again, this is not a determining factor in its own right. The Commissioner would like to stress that since the introduction of the legislation there can no longer be any absolute guarantees that information will never be disclosed to the public and public authorities should consider appropriate wording when obtaining third party information in light of this. However, it is still important to factor into any analysis of whether disclosure would be fair what, if anything, was said to the suppliers of the information.
19. In addition to this, the Commissioner did not consider that there was anything unreasonable about the expectation that the council would not disclose the specific names of individuals at such an early stage in the process. The Commissioner has often explained that in his view, the seniority of an individual is likely to affect their legitimate expectations of disclosure. The more senior an individual is, the greater the expectation is that their name may be disclosed. No evidence was presented to the Commissioner to indicate the seniority of these individuals however even if these individuals had been senior this is

only one factor to take into account. The Commissioner considered various other factors as explained below.

20. It is important to recognise that the individuals concerned are third parties, not public authority employees with public duties and responsibilities. This lessens the expectation of disclosure. In the case of companies or organisations, the name of the companies or organisation could be disclosed instead of the specific name of the individual who submitted the application. Disclosure of the precise name would add little additional value to any legitimate public interest in the Commissioner's view. Where a more proportionate disclosure would go some way to satisfying any legitimate public interest, it is more reasonable for individuals to expect that their particular names will not be disclosed.
21. Even in the case of private individuals not represented by a company or organisation, at the time of the request there was limited legitimate public interest in disclosure. The names only represent those who expressed an interest and at that time, no further negotiations had commenced. The more advanced the plans are, the greater the public interest in disclosure. However, no commitment had been made by either side at this stage and the information was provided in the very early stages of the process. Furthermore, the names in isolation would not go very far towards helping the public to understand the actual proposals for the site. It would be more appropriate in the Commissioner's view for the council to be transparent about its general aims and vision for the site given the early stages of the process.
22. In light of all of the above, the Commissioner decided that the legitimate expectation that specific names would not be disclosed was stronger than any legitimate public interest in the disclosure of the information at the time of this particular request. In view of that, the Commissioner considers that disclosure would be unfair, breaching the first data protection principle, and regulation 13(1) was engaged.

Regulation 12(5)(e) – confidential commercial information

23. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure? (This would apply if the information was disclosed under the EIR)

Is the information commercial or industrial in nature?

24. For clarity, the only information being considered under this exception is the names of the companies or organisations who expressed an interest in the development. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The Home Farm Buildings are owned by the council. The council engaged property agents to market the properties nationally and to identify interest. The information in question relates to the expressions of interest generated as a result of this marketing exercise. This project is clearly commercial and the Commissioner accepts that the identities of those who expressed an interest would be commercial information.

Is the information subject to confidentiality provided by law?

25. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
26. The Council presented an argument that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner’s approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
- Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
27. Having considered the information and the circumstances of this case, the Commissioner is satisfied that the information is not trivial and is not in the public domain. He therefore concludes that the information has the necessary quality of confidence.
28. The council explained to the Commissioner that an explicit obligation of confidence arose in this case. It supplied the Commissioner with a copy of the form it asked those expressing an interest to complete. This explicitly said that the information provided would be confidential. In view of this evidence and the complete circumstances of the case, the Commissioner was satisfied that an obligation of confidence arose and

there are no circumstances to suggest that this expectation was unreasonable.

Is the confidentiality required to protect a legitimate economic interest?

29. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In 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. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) 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".

30. The Commissioner will not accept speculation about prejudice to the interests of third parties. He expects public authorities to provide evidence that the arguments being presented genuinely reflect the concerns of the relevant third parties. This is in line with the decision of the Information Tribunal in the case of Derry City Council v the Information Commissioner (EA/2006/0014). In the latter case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air but as the arguments expressed only represented the council's own thoughts on the matter, the tribunal rejected the arguments.
31. In this case, the Commissioner referred to the above and he invited the council to demonstrate that the arguments it wished to present did not amount to speculation on behalf of the third parties concerned. In response, the council said that it had consulted the third parties and some had agreed to the disclosure (that information was subsequently disclosed as mentioned in the scope) but some objected, some of the responses were not clear and others did not respond at all. The council provided a table outlining a very brief summary of the responses received. None of the comments received from the third parties attempted to outline any kind of argument as to why disclosure would adversely affect their commercial interests. The Commissioner must

therefore reject the council's argument that disclosure would cause commercial prejudice to the third parties.

32. However, the council also argued that the disclosure would have prejudiced its own commercial interests. The council said the following:

"At the time when the request was received the Expressions of Interest exercise had been completed and the proposal to redevelop the buildings was an on-going project, with the possibility of more detailed negotiation or a more formal invitation to tender at a later date. Disclosure of the requested information would have undermined the process with the likelihood that at least some of the respondents would have lost confidence in the Council and would have declined to progress further if this or a similar opportunity had arisen. This stifling of competition would have an adverse effect on the council's commercial interests and its objectives of achieving Best Value on behalf of its taxpayers".

33. The Commissioner was not persuaded based on the above that the council had made a sufficiently strong case to meet the threshold required to engage this particular exception. The Commissioner would like to stress that the threshold is that it is more probable than not that disclosure would have prejudiced the council's commercial interests. In the Commissioner's view, the council's statement above, without any substantive supporting argument or evidence, amounts to speculation about what the third parties' reaction to the disclosure could have been. The Commissioner accepts that there is a *possibility* that the disclosure might have had this impact on some of the parties however that is not sufficient to engage the exception. There is no specific argument or evidence demonstrating that the outcome feared would be more probable than not in the circumstances of the case.
34. The Commissioner notes that many of the third parties did not respond to the council following consultation about their views. The Commissioner was not presented with any evidence from those that did respond to suggest that any of them would have lost confidence in the council to the extent that they would have declined to proceed with the project or other projects. The Commissioner notes that there would be some benefit to the third parties involved if the council were to select their proposal and in the Commissioner's view, this would substantially mitigate against any concerns that may have arisen due to the disclosure of the information. The Commissioner has also had regard to the nature of the withheld information and the fact that it is only the identities of the organisations or companies that expressed an interest. It does not reveal their specific proposals or more sensitive information such as proposed funding. The severity of any prejudice that may be caused to the third parties has an impact on the likelihood

that they would decline to proceed if the information was disclosed. In the Commissioner's view, the council's argument about prejudice to its own commercial interests was too limited and speculative to engage the exception in this case and has not therefore persuaded the Commissioner.

35. Given the above, the Commissioner was not satisfied that the council had provided sufficient evidence and argument to demonstrate that regulation 12(5)(e) was engaged. It was not therefore necessary to consider the impact of the public interest test in this case.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

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