

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

Date: 2 July 2013

Public Authority: Cambridgeshire County Council
Address: Shire Hall
Castle Hill
Cambridge
CB3 0AP

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence the public authority had with McCarthy & Stone regarding a property in Cambridge. The request was for information over the last three years. Cambridgeshire County Council ("the Council") disclosed most information but made some redactions which it later identified as being under regulations 12(5)(e) and 13(1) of the EIR.
2. The Commissioner's decision is that the Council correctly withheld the agreed sale price and dates and the names and contact details of third parties from the information. He does not require the Council to take any steps.

Request and response

3. On 3 September 2012, the complainant wrote to the Council and requested information in the following terms:

"Please supply me with copies of all correspondence, email printouts, notes of all meetings, telephone contacts and all other contact in relation to "Croylands", 30 Cambridge Road, Ely, Cambs. with regard to McCarthy & Stone and any party representing their interest. This request is for disclosure for the period over the last three years."

4. The Council responded on 11 October 2012. It provided the information requested by the complainant but made some redactions. On 12 October the complainant wrote to the Council to express his concern that information regarding the contract between McCarthy & Stone and the Council had been redacted along with the negotiated price.
5. The Council responded again on 12 October to explain that the contract with McCarthy & Stone was subject to planning permission being granted and if it was refused the property would be remarketed. In the event of this happening the Council considered the disclosure of the information could affect the value it would be able to obtain for the property as the agreed price with McCarthy & Stone would become a matter of public record.
6. A further email was sent by the complainant on 12 October disagreeing with the Council's reasoning for rejecting contract details and values and querying why the values of offers made by other companies had been redacted. In this email the complainant asked the Council to conduct an internal review of its decision.
7. An internal review was conducted and the outcome communicated to the complainant on 7 November 2012. In this response the Council explained it had identified a small number of emails within the scope of the request that had not been provided and disclosed these to the complainant. Where redactions had been made in relation to contractual information the Council confirmed it considered the information to be prejudicial to the commercial interests of both the Council and McCarthy & Stone.
8. The complainant had also referenced specific lines in emails and correspondence disclosed to him which he considered suggested there was further information available. The Council addressed each of these points in its internal review and explained to the complainant why no further information was held.

Scope of the case

9. The complainant contacted the Commissioner on 8 October to complain about the way his request for information had been handled. In particular the complainant's concerns focused on the redactions made to the disclosed information.
10. The Commissioner wrote to the Council to establish what specific exemptions under the FOIA or exceptions under the EIR it was relying on to withhold the information that had been redacted from the information disclosed to the complainant. The Council reviewed the

Commissioner's guidance on the provisions of the EIR and concluded that the information in this case was environmental. As such the Council considered regulation 12(5)(e) to be the relevant exemption. The Council has also withheld contact details of staff under regulation 13(1).

11. The Commissioner therefore considers the scope of his investigation to be to determine if the quoted exceptions are engaged and if so, where the balance of the public interest lies. The Commissioner will also consider whether all relevant information has been identified by the Council.

Reasons for decision

12. Before analysing the application of the exceptions by the Council the Commissioner has first considered whether the Council has identified all the relevant information within the scope of the request.
13. During the complaint the complainant had raised some concerns that some correspondence implied there may be other relevant emails and that correspondence with other bidders had not been disclosed. Whilst the Council did address these concerns and the complainant did not indicate this was part of his complaint to the Commissioner, as the Council did identify further emails during the internal review the Commissioner did ask the Council to clarify how it identified information within the scope of the request.
14. The Council explained that the proposed sale of the property was led by one team with the use of external marketing agents and legal officers. Documentation for these sales involves the creation of a specific property file and all relevant documentation, including that dealt with by the external agents, is kept in the file. The Council was therefore confident that any relevant information would be held in this file.
15. During the internal review process the Council double-checked that all relevant emails in inboxes had been printed and were in the file and identified that a small number of emails had not been printed. However most of these emails formed part of threads which had been disclosed already.
16. The Commissioner is satisfied with the explanations offered by the Council and the assurances that information on the sale of this property would not be held in any other locations. As such he is satisfied that all relevant information within the scope of the request has been identified.

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

17. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
18. When assessing whether this exception is engaged the Commissioner will consider the following points:
 - 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?

Is the information commercial or industrial in nature?

19. 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 a profit.
20. The Council has applied regulation 12(5)(e) to information to references to the agreed sale price with McCarthy & Stone, the deposit details, planning contribution figures and longstop/planning dates.
21. The Commissioner accepts that the agreed sale price and deposit details are clearly commercial information as they relate directly to the sale of the property and therefore part of the commercial activity of the Council. Similarly the longstop date (the date at which the offer expires) and planning contribution figures are likely to be commercial information as they are intrinsically linked to the agreed sale price and the proposed sale of the property.
22. The Commissioner recognises that at the time of the request the offer had been conditionally accepted awaiting confirmation that planning permission would be granted. Despite the conditional nature of the sale the Commissioner is satisfied the withheld information does relate to a business activity for commercial gain and the information is commercial in nature.

Is the information subject to confidentiality provided by law?

23. With regards to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
24. In terms of the agreed sale price the Council explained that the contract between itself and McCarthy & Stone makes it clear that the sale price will become a matter of public record once the sale has been completed as is the established process for property sales. However, until the sale is completed the Council considers the agreed sale price and deposit details to be covered by the common law duty of confidence. The Council also argues that for the planning figures and longstop dates the common law duty of confidence applies.
25. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain. The Council has argued that there is a common and reasonable expectation for parties involved in property transactions that agreed prices will not be disclosed until completion. The Council is of the view that premature disclosure of this information would have a clear detrimental effect on the parties involved and their future negotiating positions should the sale not go ahead. For this reason the Commissioner would accept that the sale price and deposit information is not trivial in nature, not in the public domain and therefore has the necessary quality of confidence.
26. For the planning contribution figure, longstop and planning dates this information is not in the public domain and the Council has explained these are contractual terms agreed between the Council and the prospective buyer. The Council argues that there is a well established process through which planning applications are considered and these figures and dates were established with the expectation that they would remain confidential to allow the planning application process to continue in a fair manner. As with the sale price, the Commissioner therefore accepts the information is not trivial and was imparted in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

27. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person 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.

28. The Council argues that the confidentiality is designed to protect the legitimate economic interests of itself and McCarthy & Stone. The Council argues that as the sale is conditional on approval of the planning application that disclosure of the withheld information would have an adverse effect on its own position in the event of the sale not completing and that of McCarthy & Stone.
29. The Council considers disclosure would adversely affect its own interests because if the sale to McCarthy & Stone does not proceed and the Council need to remarket the property, its bargaining position will be compromised by other prospective bidders knowing what offer would be likely to be accepted. Arguably this may mean that future bidders would only offer the same or less if the property was remarketed which would undermine the Council's ability to obtain best value.
30. With regards to the longstop date the Council has argued that if this is disclosed it would adversely affect its own interests as this, along with the planning contribution figures, could be used by opponents to stall the planning process so that agreed terms cannot be met. Whilst the Commissioner considers this to be a somewhat speculative argument he does not consider this can be dismissed as if there is a possibility, no matter how slight, of this occurring then he accepts there would be an adverse effect on the Council's interests.
31. In respect of any prejudice caused to a third party, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In this case, the public authority did not provide any evidence to suggest that McCarthy & Stone had submitted its concerns to the Council and that the prejudice argued reflected the genuine concerns of McCarthy & Stone. For this reason the Commissioner has not taken into account the arguments related to the argued prejudice to McCarthy & Stone.
32. That being said, after considering the arguments put forward by the Council with regards to the adverse effect of disclosure on its own interests, the Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact the Council's ability to negotiate the best possible sale price in the event of remarketing the property or lead to a disruption in the process. This would harm the legitimate interests of the Council. As such the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of the Council.

Would confidentiality be adversely affected by disclosure?

33. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the Council. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest test

Public interest arguments in favour of disclosing the information

34. The Council has recognised there is a public interest in transparency of the process of selling of a public asset in order for the public to be confident that the process has been conducted fairly and the Council has received the best return.
35. The complainant argues that there is a strong public interest in knowing the agreed sale price for the property so that the public can be assured that the best possible return has been achieved by the Council. The complainant has concerns that not all prospective buyers were made aware of the opportunity to enter an option agreement as McCarthy & Stone did, rather than a direct sale. The release of the withheld information will, in the view of the complainant, help the public to ensure that proper processes have been followed.
36. In terms of the sale price, the complainant contests that the release of this information would not have any impact on the ability of the Council to get the best offer in the event of the property being remarketed. The complainant argues that as the property was marketed over a year ago its value is likely to have changed in the last year anyway so releasing this information would not be disadvantageous.

Public interest arguments in favour of withholding the information

37. The Council strongly argues that there are legitimate reasons in the public interest why the information should not be disclosed whilst there is still a potential that the sale could not proceed. The Council believes the public interest in transparency in relation to ensuring an appropriate process has been followed and the sale is being conducted fairly has been met by the disclosure of the approximately 360 pages of information which the Council provided in response to the request. The Council has also committed to disclosing the agreed sale price on confirmation that the sale will go ahead.

38. In terms of the longstop and planning dates the Council has not acknowledged any public interest in this information being disclosed and considers that the disclosure of this information, with the potential for this to disrupt the planning process, would not be in the public interest. This is because the Council considers it is in the public interest for the established planning process to be followed and for the potential sale of the property to not be unfairly compromised.

Balance of the public interest arguments

39. The Commissioner has considered the above arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
40. There is a particular public interest in the subject of the request in this case because the sale and redevelopment of this property has generated interest and opposition amongst local residents and has garnered attention in the local media. The Commissioner is aware that the redevelopment plans have met strong opposition and normally the Commissioner would attach weight to the argument that disclosure of the withheld information will help to engage the public and ensure transparency. However, in this case because the withheld information amounts to a sale price and some dates he is not minded to accept that the release of this information would add to the debate about the proposed sale and redevelopment of the property. The Commissioner cannot see how knowing the agreed sale price would assist in assuring the public that appropriate processes have been and are being followed and that the process has been fair.
41. Conversely, the Commissioner does accept that disclosing this information could have a detrimental effect on the interests identified in the exception. He considers the argument that disclosing the sale price and longstop dates whilst the offer is still conditional could impact on the Council's ability to successfully negotiate the best return in the event of the sale falling through. The Commissioner does not consider that it would be in the public interest to disclose information which could undermine the Council's negotiating position in this or any other sale of this nature.
42. In terms of the longstop and planning dates, the Commissioner recognises there is weight to the argument that disclosure of this information prior to the agreement becoming unconditional could prejudice the success of the sale.

43. The Commissioner does accept that there is always a public interest in ensuring that public authorities are transparent and able to demonstrate they are acting appropriately in the best interests of the public. It is important that public authorities are accountable for the decisions they make and the money then spend and generate. However, in this case the Commissioner notes that the public interest in disclosure has been lessened to a certain extent through the disclosure of the majority of the information held by the Council about the offer, amounting to some 360 pages of information.
44. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching this decision he has placed considerable weight on the conditional nature of the sale and the timing of the request, noting the Council's commitment to make all information public once the sale becomes unconditional. Therefore the Commissioner is satisfied that the Council correctly withheld the information under regulation 12(5)(e) of the EIR.

Regulation 13(1) – personal data

45. The Council provide some arguments in relation to its use of regulation 13(1) in relation to the majority of the redacted information from the information provided to the complainant. The redactions consisted of names of third parties, direct telephone numbers and email addresses. Whilst the Council did not provide substantive arguments for withholding this information the Commissioner considers that in his role as a responsible regulator he should consider the application of regulation 13(1) to this information.
46. 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 ("DPA").

Is the withheld information personal data?

47. The Council has redacted information where a specific third party individual, working for either McCarthy & Stone or external parties such as law firms, are named or their contact details are listed. The Commissioner therefore accepts that this information would constitute personal data.

Would disclosure breach any of the data protection principles?

48. The first data protection principle is likely to be most relevant in this case. This principle states that personal data should be processed fairly and lawfully. The Commissioner will first consider whether the

information can be disclosed 'fairly' and in doing so he will consider the balance between the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosure.

49. The Council has explained that the named staff in this case were all employees of third parties. The Council has disclosed the names and email addresses of its own employees but it considered that third party employees, particularly those who worked for private companies, would have no expectation that their names and contact information would be made publicly available.
50. The Council did not refer to any particular consequences of disclosing this personal information but the Commissioner does acknowledge that some of the individuals would be likely to be unhappy about their contact information being released into the public domain. He also accepts that disclosure of this information may have an impact on how employees of the third party companies engage with the Council in the future if there were concerns that their information would be routinely disclosed.
51. In terms of the legitimate interests in information being disclosed in this case, the Commissioner has already acknowledged that there is an interest in the public being able to see that correct processes have been followed and have been fairly applied. However, he does not consider that identifying individuals who worked for third parties would assist in the public's understanding. The Commissioner has therefore concluded that the rights and freedoms of the data subjects outweigh the public's legitimate interests in disclosure of this information.
52. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, regulation 13(1) is engaged and the names and contact information withheld from the correspondence is exempt from disclosure.

Right of appeal

53. 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

54. 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.
55. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF