

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 October 2016

Public Authority: Wealden District Council
Address: Council Offices
Vicarage Lane
Halisham
BN27 2AX

Decision (including any steps ordered)

1. The complainant has requested correspondence between the Council and consultants commissioned to produce its Strategic Housing Market Assessment (SHMA). The Council provided some information, but withheld other information under regulation 12(4)(d) of the EIR on the basis that it related to information still in the course of completion and unfinished documents.
2. The Commissioner's decision is that all the withheld information engages the exception; however in respect of a limited amount of that information the public interest favours its disclosure. This information has been identified in the confidential annex which accompanies this notice.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in the confidential annexe.
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 25 November 2015 the complainant requested information in the following terms:

“The Council has commissioned GVA to produce a Strategic Housing Market Assessment to inform the ongoing issues, Options and Recommendations consultation. Please provide a copy of the correspondence between the Council and GVA concerning this commission. (Correspondence to include letters, e-mails, faxes, orders, notes or minutes of meetings, notes of phone calls etc.)

If the Council considers that any information of a commercial nature dealing with the terms of the commission are sensitive, then these commercial terms may be redacted.”

6. On 27 November 2015 the Council responded. It refused the request under section 12 of the Freedom of Information Act 2000 (FOIA) on the basis that the cost of dealing with the request would exceed the appropriate limit. The Council provided the complainant with the choice of two options for narrowing the scope of his request so that it could be handled within the appropriate limit.
7. Option 1 was to review all e-mails, but not the attachments to the e-mails which contain the Council’s comments regarding the draft documents; provision of correspondence relating to the commissioning of consultants; review of attachments not including draft documents.
8. Option 2 was to review e-mails relating to the draft documents, including attachments which contain the Council’s comments on the draft document.
9. On 2 December 2015 the complainant informed the Council that he was prepared to narrow his request in line with the second option. It is the Council’s response to this new, narrowed request that is the subject of this notice.
10. Having received this new request the Council recognised that the information captured by it constituted environmental information and therefore dealt with the request under the EIR. On 8 December 2015 the Council informed the complainant that it was refusing to comply with this, refined, request under regulation 12(4)(d) of the EIR which relates to material still in the course of completion and unfinished documents.
11. The complainant asked to Council to carry out an internal review of that decision. On 26 January 2016 the Council provided the complainant with

the outcome of that review. It maintained its position that the information was exempt from disclosure under regulation 12(4)(d).

12. During the course of the Commissioner's investigation the Council reviewed its position again and disclosed some of the requested information to the complainant.

Background

13. In broad terms the SHMA is an assessment of the current and future housing demands for the District of Wealden. Ultimately it will identify the number and size of properties, together with what proportion of these should be provided as affordable housing. It is an integral part of the Local Plan. It is understood from the Council that the Local Plan goes through a two stage consultation process, it then has to be considered by a planning inspector before being formally adopted by the Council.
14. In October 2015 the Local Plan was at the initial consultation stage. On 13 October 2015, a version of the SHMA was also published in order to inform that consultation process. That document was titled 'Strategic Housing Market Assessment – October 2015', but a covering sheet to the report read,

"Wealden SHMA

This SHMA is a draft final document and some detailed elements are still subject to clarification and possible amendment. However, the overall fundamental aspects which provide the basis of our preferred options for testing are considered robust."

15. Residents were invited to comment on the Local Plan, including the SHMA. The second stage of the consultation process, the representation stage, will commence later this year with the intention of the revised plan going to a planning inspector in late Spring 2017 and being formally adopted in 2018.

Scope of the case

16. The complainant contacted the Commissioner on 26 February 2016 to complain about the way his request for information had been handled. He argued that the potential for the SHMA to be amended in the future

was not relevant, as the document to which his request relates had already been published.

17. The Commissioner considers that matter to be decided is whether regulation 12(4)(d) applies to the withheld correspondence and, if so whether the public interest favours maintaining the exception.

Reasons for decision

Regulation 12(4)(d) – unfinished documents

18. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
19. It is not necessary for the disclosure of the information to cause any harm for the exception to apply; the information simply has to relate to, in broad terms, unfinished documents.
20. The request was prompted by the publication of a version of the SHMA which was described as a “draft final document” in October 2015. It is clear that the Council anticipated that this document would be amended in light of comments received as part of the consultation process, any new demographic data that became available, or even as a consequence of changes to government policy.
21. The creation of the draft final SHMA and its publication in October 2015 forms part of the process by which a final version of the SHMA is produced. That final version will then form part of Wealden’s Local Plan following its consideration by the planning inspector and adoption by the Council. Although it may be argued that the draft final version of the SHMA which was published forms a discrete stage in the development process, and therefore should be considered a finished document in its own right, the Commissioner is satisfied that this is not the case. This is because the draft final document has to be seen in the broader context of the ongoing development of the SHMA that will ultimately form part of the adopted Local Plan.
22. Furthermore the Commissioner has taken account of the information actually captured by the request. It consists of correspondence between council officers and the consultants, together with attachments to those emails. In broad terms the emails chart the progress of the SHMA’s development, discussing such things as the most appropriate methodology to adopt, queries and requests from either side for

clarification of particular issues, or statistics, together with some more administrative issues such as the organisation of meetings. These emails are accompanied by earlier drafts of the SHMA and extracts from those drafts, together with comments on the various draft versions. Therefore the correspondence can be seen as relating to these earlier unfinished documents. The majority of this information relates to the development of the SHMA up to the 'draft final document' version published in October 2015. However, as explained at paragraph 9, the request was not narrowed down and accepted by the Council until 2 December 2015 and was not responded to until 8 December 2015. Therefore the information also captures some exchanges that took place after the publication of draft final version of the SHMA in October 2015 and which therefore can be viewed as relating to a future iteration of the SHMA.

23. In summary, individual emails relate to particular draft versions of the SHMA. Collectively they can all be seen as relating to what will ultimately be the final SHMA which will form part of the Local Plan once adopted. The Commissioner is satisfied that this final version of the SHMA is yet to be completed. Therefore she finds that the exemption is engaged in respect of all the information captured by the request.

Public interest test

24. Regulation 12(4)(d) is subject to the public interest test as set out in regulation 12(1). This provides that even where an exception is engaged the information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in its disclosure.
25. Although it is not necessary to show that disclosing the information would cause some harm when engaging the exception, the effect of the public interest is that any harm that would be caused has to be considered and weighed against the value in releasing the information.
26. When raising its public interest arguments in favour of withholding the information the Council emphasised the timing of the request and the nature of the information itself. It pointed out that the SHMA remains an uncompleted document which has continued to be amended. It describes the information captured by the request as identifying strengths and weaknesses in the current and previous versions of the SHMA.
27. The Council has argued disclosing the correspondence relating to the drafting of the SHMA before it was finalised would erode the safe thinking space it requires to develop policy in confidence. There will be local residents who have concerns over the prospect of more houses

being built and there are also likely to be builders interested in development opportunities. Therefore the Council recognises that, like many SHMAs, its contents are contentious. The Council argues that it needs to be able to challenge the robustness of the SHMA away from public scrutiny until such time as the document is complete in order to ensure the final document represents a fully considered view based on the most accurate data available.

28. It further considers that to disclose the correspondence would distract the public debate. It argues that releasing the information would switch the public's attention away from the most recent version of the SHMA to previous drafts which have since been dismissed or altered. It may also lead to the Council having to spend time defending its approach on issues which may not necessarily represent its final views or may in the end prove to have little relevance to the finished document. This would lead to the Council having to divert resources away from the development of the SHMA and ultimately the preparation of the Local Plan which is a key part of local planning policy.
29. The Council also argues that disclosing the information would have a profound negative effect on its ability to formulate sensitive policy documents in the future as officers would be less frank and candid when preparing or analysing policy documents with external consultants. This is often referred to as the 'chilling effect'. This in turn would undermine the quality and reliability of future policy documents.
30. Another argument raised by the Council is that disclosing the correspondence could expose the Council to legal challenge on the SHMA if it opted to pursue a different approach than one suggested by the consultants. Such legal action could again delay the implementation and adoption of key planning policies.
31. The Commissioner will now consider the validity and strength of these arguments. She accepts that as a rule public authorities require safe space in which to discuss issues and reach decisions, particularly policy decisions. This need for safe space continues so long as the decision making process in question is ongoing. It is clear that the SHMA was at an advanced stage in its production by the statement on the covering sheet to the draft final SHMA published in October 2015. Nevertheless the Commissioner accepts that at the time of the request both the SHMA and the Local Plan which it forms part of were still being developed. However she has also had regard for the nature of the SHMA. Although it relates to broader policy issues tackled by the Local Plan, it is questionable whether it is itself a policy document. Instead of setting out actual policies representing the Council's preferred approach to a particular issue, it presents the evidence on which such policies are

based. Its purpose is to provide an objective estimate of the level of growth in Wealden and the consequent housing needs, including the level of affordable housing that will be required. This estimate is based on the analysis of the available data on, for example, economic growth, the interpretation of census data relating where people work and the like. This information is therefore not subject to the same sort of policy debate that might arise when producing other documents. Although this reduces the need for safe space in the production of the SHMA itself, the Commissioner recognises that the correspondence does capture discussions on the best methodology to adopt. This is part of a decision making process and, given the implications of getting this wrong and ending up with an unreliable assessment, one that requires careful consideration. The correspondence also includes exchanges on how the findings of the analysis should be reported. This in turn reflects how the Council wishes to present issues to the public, some of which may relate to sensitive policy areas. This again involves judgements and decision making. Furthermore, sight should not be lost of the fact that the SHMA provides a significant part of the evidence on which the wider planning policies of the Local Plan are based and that there is a need to protect the development of those policies too.

32. The Commissioner also gives some weight to the Council's arguments that to disclose the correspondence would distract the public debate and divert the Council from its work.
33. The Commissioner understands that following the publication of the draft final version of the SHMA in October 2015 further updated versions were subsequently published, one not long after the complainant's requested was rejected. However it is important to focus on the situation that existed at the time of the request ie up until the Council provided its response on 8 December 2015 at which time the Commissioner understands that the draft final version of the SHMA published on October 2015 was the most recent one available. That version had been published to inform the initial stage of the consultation process. The Commissioner accepts that had the correspondence been disclosed at the time requested, it could have been used to refocus the public's attention onto previous versions, some of which may have contained weaknesses which were rectified in later drafts. This would have undermined the purpose of the consultation process which forms an important part of the overall policy development process for the Local Plan.
34. In terms of the distraction of the Councils resources the Commissioner considers it likely that despite the size of the Council, the work on producing the SHMA would fall to a relatively small team. This is evident from the withheld information itself which identifies one member of the

planning department as being lead officer. Therefore if the Council had found it necessary to respond to queries, or defend its approach over the last two years as a consequence of the information being disclosed, this would have impacted on the team's ability to deal with both consultation process and the ongoing development of the SHMA and Local Plan. Bearing in mind the Council's timetable for adopting the Local Plan, the Commissioner accepts this could lead to delays in implementing a key element of the Council's planning policy.

35. The Council has argued that disclosing the information would have a chilling effect on the future discussion of sensitive policy issues. However regard has to be had for the actual information captured by the request and the decision making process to which it relates. Although she readily accepts that the SHMA informs the Local Plan, which is a policy document, and that as such the SHMA is an integral part of that document, the Commissioner is sceptical that the SHMA could, in isolation, be described as a policy document. It is far more to do with collecting facts, interpreting data and analysing trends. This is an objective process which offers less scope for debate of policy issues. Some of the withheld information simply asks for further explanations of how certain figures have been calculated. Other pieces of correspondence discuss the most appropriate methodology to adopt. Such discussions appear to be of a factual nature. Similarly, challenges to the robustness of the analysis need to be made in a straight forward, matter of fact manner. The chilling effect appears less relevant to discussions of this nature. The Council is faced with the choice of either seeking the required clarifications and challenging the proposed approaches, or not. The Commissioner considers it unlikely that any public authority would simply accept such reports without tackling these issues as and when they arose and on the whole it is difficult to see how it could do so in any other manner than that recorded in the requested information. In other words, the correspondence simply records the sort of exchanges any public authority would have with its consultants in these circumstances in order to ensure the project is on course and producing something fit for purpose.
36. Although this reduces the weight attached to the public interest in preventing any chilling effect, it does not extinguish it altogether. This is because at the time of the request there would have been and still are, ongoing policy debates around the Local Plan which the SHMA feeds in to. It is difficult to rule out the possibility that disclosing information on one integral strand of the Local Plan would have a detrimental impact on the candour and quality of the discussions on other elements of the Local Plan's development. Therefore some weight is given to the chilling effect.

37. The final public interest point raised in favour of maintaining the exception is that disclosing the information could leave the Council exposed to legal challenge. The Commissioner understands its argument to be that the correspondence includes exchanges over the best approach to adopt when analysing data and trends when producing the SHMA. If the Council ultimately opted to pursue a different option than one suggested by the consultants then this could be used to support a legal challenge to Local Plan. The Commissioner understands that such challenges can be mounted during a six week period following the Local Plan's formal adoption. The Commissioner considers that at such a late stage in the process ie after the actual policy has been formulated, fully considered by the Council, challenged and tested by the planning inspector, the Council should be in a strong position to explain its approach and defend any legal challenge. The Commissioner therefore does not give this argument any weight.
38. In summary, the Commissioner accepts there are valid public interest arguments in favour of maintaining the exception. The argument which carries most weight is that the disclosure would distract the public debate and disrupt the Council's work on the Local Plan. The other argument which carries weight is the need to preserve the safe space in which decisions are continuing to be made on the approaches taken in the SHMA and for the development of policies relating to the Local Plan. Some limited weight is given to the argument that disclosing the information would have a chilling effect on the candour with which officers were prepared to discuss policy issues.
39. However the Commissioner has gone onto consider whether these arguments apply equally to all the information captured by the request. As previously discussed, some of the correspondence simply captures requests for clarifications as to how figures were arrived at. As such they do not question the robustness of the figures or the approach adopted. Similarly, some exchanges, or amendments to various draft versions simply deal with minor changes to the text that does not alter it in any meaningful way. The Commissioner considers that disclosing such information would cause only minimal distraction to the public debate, cause little disruption to the Council and would not have any significant impact on safe space.
40. However there is a far greater value in protecting other information from these effects. This includes information on the most appropriate methodology to adopt, challenges to the robustness of the analysis and the manner in which the analysis is presented. This includes the information captured in the comment boxes used to annotate the various drafts of the SHMA captured by the request.

41. In terms of the public interest in disclosing the information the Council has acknowledged that there is a public interest in openness and transparency. The Commissioner agrees with the Council that there will always be some value in disclosing information that will promote transparency, accountability, public understanding and involvement in the democratic process. These factors must always be given some weight.
42. The complainant has raised the point that the draft final SHMA was published in October 2015 as part of a public consultation on the Local Plan and the Commissioner has considered the relevance of this to the public interest test. The SHMA provides the evidence of growth that underpins the Local Plan's policies on housing development for the next fifteen or so years. There is a public interest therefore in people having access to information which would explain how that evidence was produced so that they could fully understand the statistics and projections presented and the degree of confidence that one could have in these figures. This would allow people to form views on the robustness of the SHMA and to challenge any weaknesses they perceived in it. This would allow for a more informed consultation processes.
43. Having looked at the draft final SHM that was published however the Commissioner notes that document itself explains the methodologies used and references its sources. It is therefore a comprehensive document with good explanations of how the evidences it feeds into the Local Plan was produced. What the request seeks in a sense is evidence of how that evidence was produced.
44. Certainly if the requested information revealed that the Council knew of significant weaknesses in the SHMA's conclusions there would be a very weighty public interest in disclosing that information. However having discussed this issue with the Council the Commissioner is satisfied that the Council considered the draft final document to be sound and fit for the purpose of informing the initial stage in the consultation process. This is also supported by the Council's statement on the covering sheet to the SHMA (see paragraph 14) which states that the Council considers the report to be "robust".
45. Although the factors discussed in the preceding two paragraphs reduce the public interest in disclosure, sight should not be lost of the fact that Local Plan will be a key planning policy document, effecting the lives and prosperity of a population of around 150,000, people for a considerable period. Therefore there still remains some public interest in providing as full a picture as possible of how the SHMA was produced.

46. The information also reveals how the Council managed the external consultants commissioned to produce the SHMA. Its disclosure would allow scrutiny of how this commercial relationship was managed in order to ensure the Council obtained value for the money, and more generally how it managed this element of the Local Plan's development.
47. These competing public interest factors now have to be weighed against each other to see whether the public interest in maintaining the exception outweighs those in favour of disclosure.
48. The Commissioner considers that the consultation process for the Local Plan is a very important part of the democratic process through which local people can express their views on a document that will have a significant impact on the future of Wealden. There are public interest arguments in favour of disclosing the information so that the consultation process can proceed based on the fullest set of information as possible. However this would be at the cost of distracting the public debate and refocussing it onto earlier drafts and issues that the Council has subsequently resolved. Rather than supporting the consultation process, this would undermine it. In respect of the majority of the information, this, together with the closely related arguments that the disclosure would lead to a diversion of limited resources and erode the safe space required for decision making, outweighs the arguments in favour of disclosure even after account is taken of the public interest in knowing how the commercial relationship with the consultants was managed.
49. In respect of the majority information therefore the Commissioner finds that the public interest in favour of maintaining the exception outweighs the public interest in favour of disclosure. The Council is therefore entitled to withhold this information under the exception provided by regulation 12(4)(d).
50. As discussed however, there is some information which simply seeks or provides clarification on particular calculations, or deals with minor amendments to the text. As it would not be detrimental to disclose this information the public interest favours its disclosure. This information is limited and the Commissioner appreciates that it may not be the detailed information the complainant was seeking.
51. The Commissioner has produced a confidential annex which will be provided to the Council setting out the limited information that she requires the Council to now disclose.
52. In his request the complainant comments that the Council need not provide any information of a commercial nature that may be sensitive.

Having gone through the requested correspondence, the Commissioner considers that although some of the information that has been redacted on this basis refers to commercial aspects of the commission; it is not itself commercially sensitive. Therefore the Commissioner finds that this information is captured by the request and should be disclosed. This information will also be identified in the confidential annex.

Regulation 12(3) and Regulation 13 – personal information

53. Contained within the requested information is some personal data relating to officers of the Council and the consultant's staff. Typically this information relates to those sending or receiving the emails in question. It consists of the names of individuals, their direct phone numbers and email addresses. The Commissioner has briefly considered whether this information can be withheld under regulation 12(3) by virtue of regulation 13.
54. Regulation 12(3) states that personal data shall not be disclosed otherwise than in accordance with regulation 13. So far as is relevant, regulation 13 provides that personal data relating to someone other than the person making the request is exempt if its disclosure would breach any of the data protection principles as set out in the Data Protection 1998 (DPA).
55. The first data protection principle states that the processing of personal data, which includes its disclosure, shall be fair and lawful. The Commissioner considers that the members of staff referred to in the email exchanges would not expect their names to be disclosed to the world at large. Nor is there any apparent reason or legitimate interest in making these names available. Therefore, despite the fact that a number of those identified will be senior figures within the firm of consultants, the Commissioner finds that the names and contact details of staff referred to in the information to be disclosed can be redacted.

Right of appeal

56. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

57. 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.
58. 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

Rob Mehan
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