

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 October 2016

Public Authority: East Devon District Council
Address: Knowle
SIDMOUTH
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant has requested a copy of an agreement between East Devon District Council and a developer, Pegasus Life, in relation to a site at Knowle. East Devon District Council refused the request, citing section 43(2) of the FOIA and regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that East Devon District Council has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
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 24 September 2015, the complainant wrote to East Devon District Council (the "council") and requested information in the following terms:

"I would like the Council to disclose the details of the agreement it has entered into with Pegasus for the Knowle site.

I would like to see the full, unredacted version of the agreement.

I understand that the information at issue would not be exploited by a competitor and that disclosure would not place either party at a commercial disadvantage.

All parties, including Pegasus, will have known that they would be subject to the FOIA when the agreement was signed.

To reiterate, I would like the full publication of the commercial terms of the agreement.

I would like you to provide me with all of the documentation I have requested: in their original electronic versions and not in their scanned versions."

6. The council responded on 13 October 2015 and confirmed that it was withholding the information under section 43(2) of the FOIA (the exemption for prejudice to commercial interests) and regulation 12(5)(e) of the EIR (the exception for commercial confidentiality).
7. Following an internal review the council wrote to the complainant on 19 November 2015. It stated that it was maintaining its position.

Scope of the case

8. On 3 April 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.
10. During the course of the investigation the Commissioner advised the council that, in her view, the request fell to be considered under the EIR in its entirety. The council did not dispute this view and provided the

Commissioner with further submissions in support of its handling of the request under the EIR.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. The council has withheld a copy of the contractual agreement entered into between itself and Pegasus Life for the sale of land currently housing the council's main offices. The entire agreement has been withheld under regulation 12(5)(e) of the EIR.
12. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

14. The council has explained that the information constitutes a commercial contract for the sale of land.
15. Having considered the council's submissions and referred to the information, the Commissioner is satisfied that the information is commercial in nature and satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

16. 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.

17. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
18. 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.
19. The council has stated that it owes a duty of confidentiality to the developer, with whom it has entered into a contract which has "...not yet gone unconditional". The council directed the Commissioner to a clause in the contract which explicitly sets out the requirement for confidentiality.
20. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. Furthermore, he notes that the agreement itself explicitly states that the information should be considered to be confidential. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it relates to the sale of council land. The Commissioner is also satisfied that the information has not been placed in the public domain.
21. In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
22. The Commissioner considers that it is reasonable to assume that the information has been shared with the council in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, he is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

23. The Information Rights 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 a legitimate economic interest of the person the confidentiality is designed to protect.

24. In this case, the council has explicitly stated that the duty of confidentiality in this case is owed to the developer, Pegasus Life, however, it has only identified potential harm to its own legitimate economic interests. The council has not provided any submissions which argue that disclosure of the information would adversely affect the legitimate interests of Pegasus Life.
25. 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.
26. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".
27. In its initial response to the request the council stated that disclosure of the contractual information *"...would, or would be likely to, prejudice the commercial interests of the council in that it would present an advantage to other parties and / or a disadvantage to the council in terms of re-negotiating a deal for the Knowle should that circumstance arise."*
28. In its submissions to the Commissioner the council slightly expanded on its argument, stating that disclosure of the information would "seriously affect" its own economic interests and that:

"...There is a very clear likelihood of an adverse effect upon the council's commercial position (and our ability to comply with our legal duty to secure 'best value' when disposing of land) should the contract with the current proposed developer not proceed and re-negotiation / re-marketing would become necessary. In such a case it would be public knowledge the price and terms the council would be prepared to accept."
29. The Commissioner understands that the council's central argument is that disclosing the contract, specifically details of sums for land and

property, would harm its ability to re-negotiate a good deal should the contract with the current developer fall through. In essence, disclosure would give developers and potential partners knowledge of the sums the council is prepared to sell and an insight into its position, which would hinder its negotiation strategy.

30. However, the Commissioner notes that council has not directly linked its arguments to specific sections of the withheld information, aside from references to land and property pricing.
31. In relation to land and property information the Commissioner considers that, whilst exact current pricing is not publically available, the historic value of property and land is easily accessible. Furthermore, whilst knowledge of the sums the council is prepared to accept might be of interest to potential developers the Commissioner does not see that knowledge of this would necessarily result in harm to the legitimate economic interests of the council. Negotiations, by definition, will allow for manoeuvre on the side of both parties and a starting point for negotiations which, for example, is positioned at the values the council has indicated it would sell under the current contract do not necessarily bind it or hinder it in future negotiations. The Commissioner considers that other factors, such as fluctuations within the relevant markets are more likely to have an impact on the details of negotiations and the amounts a developer is prepared to pay. In the Commissioner's view the scale and depth of the arguments provided by the council do not sufficiently convince that disclosure would produce the damaging effects ascribed.
32. As noted above the Commissioner is mindful that the council has withheld the agreement in its entirety, whilst only providing arguments in relation to certain specific elements of the information. The Commissioner considers that threshold for the engagement of regulation 12(5)(e) is a high one and, in order for it to be applied, it must be shown that the disclosure of specific information will result in specific harm to the legitimate economic interests of one or more parties. In demonstrating harm, an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.
33. The Commissioner has been left with the impression that the council has adopted a "blanket" approach to the application of the exception and has not had sufficient regard to the nature of the actual information. Furthermore, the rationale presented is particularly limited and contain a striking lack of detail and absence of any reference to the information in itself.

34. The Commissioner notes that the council has had 2 opportunities to present a detailed rationale for withholding the information and a further chance during his investigation. In cases where an authority does not provide sufficient arguments to demonstrate that an exception is engaged the Commissioner does not consider it his role to demonstrate arguments on its behalf.
35. Having considered the available evidence the Commissioner does not find that she is able to support the council's application of the exception based on such limited rationale. The arguments provided do not warrant the conclusion reached that prejudice to the council's commercial interests would be more probable than not.
36. For the reasons described above, the Commissioner has concluded that the council has not demonstrated to the Commissioner to the required standard that it had correctly engaged the exception under regulation 12(5)(e). The Commissioner has, therefore, not considered the application of the public interest in this case.

Right of appeal

37. 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

38. 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.
39. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF