

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

Decision notice

Date: 13 July 2017

Public Authority: Shepway District Council

Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information about the Otterpool development from Shepway District Council (the "Council"). It provided some information but refused to provide the remainder citing EIR regulation 12(5)(e) - confidentiality of commercial or industrial information. After internal review, it revised its position and released further information. However, it continued to rely on regulation 12(5)(e) for that information which remained withheld.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(5)(e) for that information within the scope of the request which remains withheld.
3. No steps are required.

Request and response

4. On 15 September 2016, the complainant requested information of the following description from the Council:

"It was legally necessary for the Head of Paid Services - CEO Alistair Stewart to get 'written permission' from the Chair of the Overview & Scrutiny Committee (Cllr Peter Gane) to purchase land known as Otterpool Manor Farm.

Please could you provide me with

The 'Written Permission' and all the detailed notes of the actions taken.

I would expect this to include emails, background documents and of course the detailed notes.

As there is already a legal right for me to request and have these documents I see no reason why any exemptions should apply as other legislation allows me to have this information.

Therefore I request the document/s enabling the Head of Paid Services (CEO Alistair Stewart) to buy the land known as Otterpool Manor Farm."

5. On 12 October 2016, the Council responded. It said the information it held within the scope of the request was valuation advice from Savills plc and "The agreement of the chairman of the overview and scrutiny committee". It supplied some information within the scope of the request, namely the agreement referred to. However, it withheld the remainder. It cited EIR regulation 12(5)(e) - confidentiality of commercial or industrial information – as its basis for doing so.
6. The complainant requested an internal review on 17 October 2016 and received the outcome on 10 November 2016. The Council said the valuation advice was in two parts: the first concerns the making of an offer that would persuade the agents of the sellers to take the land off the market, the second is advice on the potential residential land value of the site. It revised its position and sent the complainant the first part of the valuation advice. It said it was not obliged to disclose the remainder of the withheld information (including the rest of the valuation advice) and maintained reliance on regulation 12(5)(e) as its basis for doing so.

Scope of the case

7. After initial exchanges with the Commissioner commencing 2 December 2016 on this matter, the complainant supplied the Commissioner with all the evidence necessary to take his complaint forward on 24 January 2017. He disagreed with the Council's use of regulation 12(5)(e) as its basis for not disclosing the information within the scope of this request which remains withheld.
8. The Commissioner has considered whether the Council is entitled to rely on regulation 12(5)(e) in respect of this information.

Reasons for decision

9. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
10. The Commissioner will deal first with the complainant's contention that Regulation 12(5)(e) cannot apply in this case. He said that information could not be excepted from the duty to disclose it under EIR on this basis. He referred to a document of 2009 which is publically available at the Library of the House of Commons which, in his view, suggested that a public authority could not apply an FOIA commercial interests exemption (or EIR equivalent) to information where the public authority itself was seeking planning permission.¹
11. The penultimate paragraph of this document states:

"For normal planning applications, negotiations between the developer and planning authority, for example over section 106 agreements, are exempt from freedom of information requests on the grounds that they are commercially confidential. However, when a local planning authority applies to itself for planning permission, that exemption does not apply. In other words, a freedom of information request could obtain information about any written negotiations between the local authority officers involved in development and those involved in planning."
12. The Commissioner would make a number of points about this overview. Its focus is purely on the application of the FOIA which is not relevant to this case. FOIA applies only to non-environmental information. Where any planning information is environmental information, as is the case here, the EIR apply. The Commissioner is satisfied that the information in this case is environmental and has had regard for her own guidance in reaching this view.² It is information on a measure and activity (namely, planning and proposed development) likely to affect the state of the land.

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<http://opengov.ambervalley.gov.uk/docarc/docviewer.aspx?docguid=0c079196c92d442cbce6fe9ac9f9e4be>

² https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

13. It is now widely accepted that planning information is environmental in the overwhelming majority of cases although the Commissioner acknowledges this might not have been as clear in 2009 when the overview referred to above was written.
14. The key point raised by the complainant is whether environmental information can attract an EIR exception for commercial confidentiality at all if the information in question relates to a planning application that a public authority has made to itself. In short, the Commissioner believes that it can.
15. To explain: in the above overview, the description alludes to a criterion of FOIA section 41. This is a specific FOIA exemption for confidential non-environmental information, regardless of whether it is commercial information or not. This exemption can only be relied upon where it can be shown that the non-environmental information was passed *from one party to another* [the Commissioner's emphasis] in the expectation of confidentiality. While the expectation of confidentiality may play a part in the application of other FOIA exemptions, FOIA section 41 has a criterion which refers specifically to the passing of information from one person to another.³
16. Crucially, in FOIA section 43 – the prejudice to commercial interest exemption – there is no requirement to satisfy this criterion. It is irrelevant for application of FOIA section 43 whether information has been passed from one party to another.⁴ The question of confidentiality may play a part in consideration of this exemption but it can apply to information generated internally at a public authority as well as information received from a third party. In other words, FOIA section 41 may not apply to non-environmental information because the criterion referred to (whether information has been passed from one party to another) is not satisfied. However, FOIA section 43 may apply to that same information because disclosure would or would be likely to

³ Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

⁴ Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

prejudice to a person's commercial interests and the public interest in avoiding that prejudice outweighs the public interest in disclosure.

17. For the reasons outlined above, this case relates to environmental information and so the requirements of FOIA do not apply in any event.
18. The nearest EIR equivalent to FOIA section 43 is Regulation 12(5)(e), the EIR exception relied upon in this case. It includes the words "confidentiality" and "commercial" specifically in its description. However, the unique criterion of FOIA section 41 – that information must be passed from one party to another – does not form part of the requirements of Regulation 12(5)(e).
19. In summary, the overview that the complainant refers to is not a detailed analysis of how EIR exceptions apply. It alludes to a criterion in the FOIA exemption for confidentiality (section 41) which may, in certain cases be applicable in disputes over access to non-environmental planning information. In 2009, when the document was written, it may not have been as clear as it is now that disputes over access to planning information are generally caught by the EIR and not FOIA.
20. The Commissioner is therefore satisfied that Regulation 12(5)(e) can, in principle, apply to this case.
21. For the 12(5)(e) exception to be appropriately applied, the Commissioner considers that the following conditions need to be met:
 - The information must be commercial or industrial in nature;
 - It must be subject to confidentiality which is provided by law;
 - That confidentiality must protect a legitimate economic interest; and;
 - The confidentiality would be adversely affected by the disclosure of the information.

Is the information commercial or industrial in nature?

22. Having examined the withheld information, the Commissioner accepts that the information is commercial in nature. It is detailed valuation information relating to a proposed land purchase for a proposed development of that land.

Is the information subject to confidentiality which is provided by law?

23. The Council argued that the information is subject to the common law of confidence. Using the Commissioner's own guidance it explained that the information was not trivial and it was imparted in circumstances creating an obligation of confidence. It also asserted, following the

Commissioner's suggested test in her guidance, that a reasonable person in the place of the recipient would have considered that the information had been provided to them or created by them in confidence.

24. The Commissioner agrees that the information is not trivial and accepts that negotiations regarding the sale of land are generally understood by both parties to those negotiations to be confidential. The negotiations were ongoing at the time of the request. The Commissioner accepts therefore that the information is subject to confidentiality which is provided by the common law of confidence.

Is the confidentiality protecting a legitimate economic interest?

25. The Council explained that disclosing the information at the time of the request would prejudice its ability to negotiate competitively. This would undermine its legitimate economic interest in achieving best value for public money.
26. The Commissioner accepts this argument as wholly reasonable having read the withheld information.

Would the confidentiality be adversely affected by disclosure?

27. The Council explained how its future relationships with current and future property development partners would be adversely affected if it disclosed the information in question. It asserted that disclosure would lead to a reluctance on the part of third parties to share confidential information with it if there was a likelihood that such information would be disclosed.
28. The Commissioner observes that the stage at which the information is requested is a crucial factor here. Disclosure of information of this nature once a deal is completed may not necessarily be as prejudicial. Those who engage commercially with public authorities must expect a greater degree of openness about their commercial information than would be expected in the private sector. However, if negotiations are ongoing, as is the case here, there would be an adverse effect on the confidential space in which negotiations are conducted. If the confidential space is undermined, this can impact negatively on the Council's ability to conduct commercial negotiations in a confidential space.

29. Whilst there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*⁵, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."

30. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and the very limited distribution of the withheld information, the Commissioner has concluded that the information in question has the necessary quality of confidence.
31. The Commissioner is also satisfied that the confidentiality owed to the party generating the information in question or commissioning it is necessary to protect their legitimate economic interests and that disclosure of the reports would adversely affect those interests.
32. In the Commissioner's view, and on the balance of probabilities, the Council's own commercial interests 'would' be harmed by disclosure as would the commercial interests of the parties who created the withheld information.
33. In making this determination, the Commissioner is assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that 'would' means 'more probably than not' and she notes the interpretation guide for the Aarhus Convention which gives the following guidance on legitimate economic interests:
- "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". In this case, disclosure would be of assistance to owners of land with whom the Council may seek to negotiate.
34. Having examined the withheld information, and in consideration of the Council's detailed representations, the Commissioner has decided that the Regulation 12(5)(e) is properly engaged: the withheld information is

⁵ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

clearly commercial in nature and it is subject to common law confidentiality.

The public interest test

35. Having determined that Regulation 12(5)(e) is properly engaged, the Commissioner is now obliged, by virtue of Regulation 12(1)⁶, to consider whether it is in the public interest that the information is disclosed and whether the public interest in disclosure is greater than the public interest which favours its continued maintenance of the exception as its basis for withholding the requested information.

Factors favouring disclosure

36. The complainant submitted the following arguments in favour of disclosure:
- Strong local opposition to the development of a new "garden town" on this property;
 - Compelling public interest in transparency and accountability supported by numerous decisions of the Commissioner on cases involving land valuation information;
 - Complainant asserts that the Council paid too much from the public purse of the first parcel of land it has already acquired;
 - Disclosure is necessary to assuage concerns about alleged financial mismanagement or even alleged irregularities
37. The Council said that it "recognises that there is a significant interest in the major development of a new town and also a significant interest in the council's decision to buy the land initially and whether this represented value for money. In regard to this latter point the council, as a public authority has a fiduciary duty to the community it serves and therefore the public will want to know that the council has not spent public money unwisely and is maximising value for money".
38. There was, it explained, already a considerable amount of information on its website about the proposed development.

Factors favouring maintenance of Regulation 12(5)(e)

⁶ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

39. The Council stressed the public interest in allowing it to function effectively "in the commercial sphere". Disclosure, it argued, would undermine this.
40. It also argued a strong public interest in ensuring it obtains best value for the public purse which disclosure would undermine.
41. Further, it argued that it would undermine its relationship with its development partner.

The Commissioner's position

42. The Commissioner recognises that the proposed development of swathes of land into a new town is controversial. When local services and utilities are already under pressure, it is entirely reasonable that current local residents would be extremely concerned about the additional pressure on those services and utilities that extensive new housing would bring.
43. The Council has a duty to be as open and transparent as possible about its decision making on this topic and about how it proposes to spend public money.
44. There is a compelling public interest in disclosing as much information as possible to satisfy the legitimate concerns that local residents have about such a proposal.
45. However, the Commissioner accepts that there is a strong public interest argument in ensuring that the Council is able to conduct its commercial activities on a level playing field for the benefit of the public purse.
46. While the matter in question is still live, the Commissioner considers that the public interest in avoiding the harm envisaged in the exception outweighs the public interest in transparency. However, the Commissioner has reached the view by a narrow margin and recognises the compelling public interest in the Council ensuring it is as transparent as possible about such a major change to the area in question.

Conclusion

In light of the above, the Commissioner has concluded that the Council is entitled to rely on Regulation 12(5)(e) as its basis for withholding the information within the scope of the request which remains withheld.

Right of appeal

47. 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

48. 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.
49. 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

Elizabeth Hogan
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