

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

Decision notice

Date: 22 May 2017

Public Authority: North Hertfordshire District Council

Address: Town Lodge
Gernon Road
Letchworth Garden City
Hertfordshire
SG6 3JF

Decision (including any steps ordered)

1. The complainant has asked North Hertfordshire District Council to provide him with copies of a viability assessment report commissioned by the owner of The Cabinet Public House in Reed, Hertfordshire, together with an independent verification report commissioned by the Council. The Council has refused the complainant's request in reliance on section 43(2) of the FOIA and Regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that North Hertfordshire District Council has correctly applied Regulation 12(5)(e) to the two reports and the Council is therefore entitled to withhold them from the complainant.
3. The Commissioner requires no further action to be taken by the Council in this matter.

Request and response

4. The Commissioner understands that the complainant spoke with a representative of North Hertfordshire District Council's Planning Department on 4 January 2017. During this conversation the complainant asked to be given two documents:
 - 1) The viability assessment carried out by the applicant for planning permission – [name redacted] (the 'Culverhouse Report'); and,

- 2) The independent verification carried out by surveyors acting for the Council (the 'Trinity Solutions Report').
5. The complainant informed the Commissioner that during his conversation the Council's representative advised him that the information was being withheld on the grounds that it is commercially confidential.
6. On 31 January 2017, the complainant's colleague spoke with the Council and was informed that the complainant's request was with the departments collating the information and that there was no reason why a response would not be made within the compliance period.
7. The complainant submitted a formal representation to the Council under Regulation 11 of the EIR.
8. On 10 February, the Council wrote to the complainant to advise him that his request had been considered and that his appeal was successful in part: The Council accepted that it had not responded to the complainant's request within the statutory compliance period and it apologised for this.
9. The Council confirmed that it holds the information which the complainant had requested and it advised him that it was refusing to supply the two reports in reliance on section 43(2) of the FOIA and Regulation 12(5)(e) of the EIR.
10. The Council stated that the information, "...is commercially confidential information", and that, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

Scope of the case

11. The complainant contacted the Commissioner on 14 February 2017 to complain about the way his request for information had been handled.
12. The Commissioner determined that she should investigate how the Council has handled the complainant's request and specifically, whether the Council is entitled to withhold the two reports in reliance on Regulation 12(5)(e) of the EIR.

Background information

13. The information which the complainant has requested relates to a public house called The Cabinet.
14. The Cabinet has been listed as an Asset of Community Value since 2014 under the provisions of the Localism Act 2011, although it has not operated as a public house for approximately six years.
15. It was bought by its current owner in 2015 but has remained closed and unoccupied.
16. The 'Culverhouse Report' was commissioned by the owner of The Cabinet to support two planning permission applications¹.
17. In line with the Council's normal practice in such circumstances, The Council commissioned its own Independent Viability Verification report in order to ensure that the conclusions of the 'Culverhouse Report' are reasonable. In this case, the relevant report is referred to as the 'Trinity Solutions Report'.
18. Neither the Culverhouse nor the Trinity Solutions Report is made available to Councillors before they make their decision in respect of the planning applications. However, the reports are used by Planning Officers for the purpose of compiling their own recommendations and in making their report for consideration by the Council's Planning Control Committee.
19. To date, The Council has made no decisions in respect of the two planning applications.

Reasons for decision

20. The Council has confirmed to the Commissioner that it is relying on section 43(2) of the FOIA and Regulation 12(5)(e) of the EIR to withhold both the Culverhouse Report and the Trinity Solutions Report. It has supplied copies of each report for the Commissioner's examination and consideration.

¹ Application 16/02113/1 Change of use from A4 (Public house) to C3 (single dwelling)

Application 16/02129/1LB Retention of internal and external alterations, in association with conversion from Public House to single residence

21. In order to determine whether the reports should be dealt with under the FOIA or the EIR, the Commissioner has considered why the reports were initially commissioned.
22. Given that the Culverhouse Report was commissioned to support two associated planning applications, and the Trinity Solutions Report was produced for the purpose of making recommendations to the Planning Control Committee, the Commissioner has decided that both reports should be considered under the provisions of the EIR. In making this decision, the Commissioner has adopted her usual broad interpretation of Regulation 2 of the EIR which provides how the environmental information is to be interpreted.
23. The Commissioner considers that the two reports constitute environmental information insofar as the information they contain will be used by the Council to make decisions which will have some impact on the local landscape; namely the potential change of use of a prominent local building.
24. 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".
25. 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 be adversely affected by the disclosure of the information.
26. Having examined the withheld information, the Commissioner readily accepts that the information contained in the two reports is commercial in nature. She finds that the Culverhouse Report and the Trinity Solutions Report each contain detailed financial information and viability analysis of the property as a public house. Each reports details – to differing extent, the commercial value and potential commercial value of The Cabinet as a public house.
27. It is clear to the Commissioner that, should the owner's applications be unsuccessful, his commercial interests would undoubtedly suffer adversely, especially if he decides to sell his property in the future.

28. The author of the Culverhouse Report explicitly refers to the confidential nature of the report, stating that its contents are “confidential to [the property’s owner] for the specific purpose to which they refer and are for his use only”, and the report “may only be referred to by other parties with prior permission...”
29. The Trinity Solutions Report is copyright protected under licence 284681222 and there is a clear intention that this report should not be disclosed to any third party. Likewise there is an intention that a common law duty of confidentiality applies to it.
30. To support its application of Regulation 12(5)(e), the Council has sought the views of the owner of The Cabinet via his agent.
31. The agent responded to the Council’s enquiry by advising that, “We can confirm that the report contains data of a commercial nature, the publication of which would be prejudicial to my client’s interest in The Cabinet in the event that planning permission is refused. We expect the Authority to respect our client’s express instructions with regard to disclosure and to vigorously contend the assertion that fuller disclosure is necessary in the public interest”.
32. The Council argues that it must be mindful of the owner’s expectations of confidentiality, particularly where its loss may adversely affect his ability to participate competitively in a commercial activity.
33. In the event that the owner’s applications are unsuccessful, the Council asserts that disclosure of the two reports would be prejudicial to his commercial interests and particularly his ability to negotiate a future sale of his property/business.
34. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
35. In consideration of the Council’s submissions, the Commissioner is satisfied that the two reports constitute information which is not otherwise accessible and she is content that the information is not trivial in nature.
36. Whilst there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*²,

² *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

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."

37. 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 contained in the two reports has the necessary quality of confidence.
38. The Commissioner is also satisfied that the confidentiality owed to the owner of The Cabinet is necessary to protect his legitimate economic interests and that disclosure of the reports would adversely affect those interests.
39. In the Commissioner's view, and on the balance of probabilities, the owner of the Cabinet commercial interests 'would' be harmed by disclosure.
40. 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".

The Commissioner's conclusions

41. The Commissioner considers that disclosure of the withheld two reports would provide third parties with information which neither the Council nor the owner of the Cabinet have envisaged would be made public.
42. Having examined the withheld reports, and in consideration of the Council's detailed representations, the Commissioner has decided that the Regulation 12(5)(e) is properly engaged: The information contained in the reports is clearly commercial in nature and it is subject to common law confidentiality.
43. The Commissioner is satisfied that the confidentiality protects the commercial interest of the owner of The Cabinet and that this

confidentiality would be adversely affected by disclosure of the two reports.

44. Having determined that Regulation 12(5)(e) is properly engaged, the Commissioner is now obliged to consider whether it is in the public interest that the reports are disclosed and whether the public interest in disclosure is greater than the public interest which favours their continued withholding.

The Public Interest test

Factors favouring the disclosure of the two reports requested by the complainant

45. The Commissioner recognises the importance of public houses to communities and particularly to small communities and this is emphasised by The Cabinet's listing as an asset of community value under the Localism Act.
46. The potential loss of a public house may have significant and wide-ranging effects on a community and consequently the Commissioner will give necessary weight to the disclosure of information which makes clear why the owner of a public house seeks permission for a change of use from his local planning authority.
47. Here, disclosure of the requested reports would provide the public with information which lies behind and supports the two planning permissions submitted by The Cabinet's owner. It will provide the public with commercial information which can be used by members of the public to dispute or verify the owner's position and to mount an informed challenge to his two applications.
48. Disclosure would also provide a degree of transparency in respect of the decisions which the Council is yet to make and would assist in the public's understanding of those decisions when they are made.

Factors favouring the continued withholding of the two reports

49. The 'Culverhouse Report' was provided to the Council with the expressed expectation that it would not be disclosed to any third party without the permission of The Cabinet's owner.
50. The Trinity Solutions Report is an internal consideration of the Culverhouse Report, which necessarily needs to comment on the commercially sensitive information which the author of the Culverhouse Report has advanced in support of the change of use application.

51. The two planning applications concern a single property which is owned by a particular individual. Whilst the applications are significant to the local community, the potential impact of the applications being granted is not as great as would be if the applications had involved a large-scale commercial development.
52. Here, the withheld information concerns commercially sensitive information which, if made public, would be likely to have significant adverse effects on The Cabinet's owner's ability to sell his property should the applications be unsuccessful. This, together with the owner's expectation that his information would be treated in confidence and his refusal to consent to its disclosure, must be afforded significant weight.
53. To support its position, the Council asserts that disclosure of viability reports is not automatic under current planning procedures. This is also the case where applications have been called-in by the Secretary of State or where the case is subject to a court challenge.
54. The Council has drawn the Commissioners attention to two cases - *R (Perry) v London Borough of Hackney [2014] EWHC 3499 (Admin)*, and *Turner v SSCLG [2015] EWHC 375 (Admin) (Collins J, 26 February 2015)*. Both of these cases relate to claims for the disclosure of viability reports.
55. In dismissing these claims, the Court took a broad view of the confidentiality of viability reports and pointed out that developers might be reluctant to disclose relevant information in the future if the reports be disclosed.
56. Treating viability reports as confidential is an approach which has been endorsed in the case of *R (Luton BC) v Central Bedfordshire Council (19 December 2014)*, where the Judge made clear that:

"It is well-established that (a) [viability reports are] to be confidential in the process for determining a planning application, (b) the court is most unlikely to order disclosure of such material in a judicial review and (c) non-disclosure does not afford a ground for challenging a grant of planning permission, whether because of procedural unfairness, irrationality, or otherwise."
57. The Council has also drawn the Commissioner's attention to the First Tier Tribunal's own decision in *Royal Borough of Greenwich v The Information Commissioner EA/2014/0122*. In that case, the Tribunal observed the public interest in the prevention of harm to economic interests, protecting commercially sensitive decisions and in preventing other from obtaining for free any expertise which belongs to a developer. The Tribunal determined that disclosing confidential

commercially sensitive information would adversely affect the ability of a developer to compete fairly in the market place and to secure the best deal possible.

58. Likewise, the Council has directed the Commissioner to her own decision in case FS50538429. In that case, the Commissioner accepted that the disclosure of viability information would adversely affect the developer's ability to compete fairly in the market place and secure the best deal and terms it possibly can. Furthermore, that disclosing truly commercial information is not in the public interest in that it damages the commercial interests of third parties and would lead to negative consequences for the public authority.

The Commissioner's decision

59. In making his complaint to the Commissioner, the complainant has drawn the Commissioner's attention to the First Tier Tribunal case *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010)*, which he considers is relevant to his own request.
60. The Commissioner has considered the Bristol City Case: She finds that it is distinguishable from the facts of this case.
61. Here, it is accepted that The Cabinet Public House is a listed building. However, the case referred to by the complainant is substantially different to the facts of this case.
62. Firstly, the Bristol case concerned an application for a large-scale development which was to refurbish a former Coroner's Court and to convert it into flats, together with the demolition of a building known as the 'Lakota' building to be replaced by a new mixed-use building. Both buildings are in a conservation area.
63. It was noted that the Coroner's Court was owned by the Council and that there was a conditional contract for the sale of the building between the Council and the developer.
64. In this case, the applications concerning The Cabinet are made by the owner who is a private individual. He has not proposed to demolish his property and has made no application to build additional dwellings.
65. The Council has no interest in The Cabinet Public House and there is no conditional contract for its sale. The building will be retained and, should the planning permissions be granted, it will remain a listed building in planning terms.

66. In the Bristol case, the First Tier Tribunal considered that, *"...it is very significant that the information requested in this case was directly relevant to (and, as it turned out, a "major factor" in) a specific environmental decision about the demolition of a protected building which was imminent and controversial."*
67. The Tribunal also emphasised that its decision, *"arises from the circumstances of this particular case and is not designed to set a precedent"*. It also made clear that, *"the result may have been different... if the Council had not owned the Coroner's Court Building"*.
68. The Tribunal's decision in the Bristol case is clearly not intended to mean that every piece of commercially sensitive information, provided to a local planning authority in support of planning applications, must be disclosed to the public on request. In the Commissioner's opinion, the Tribunal's decision confirms that each request must be considered on its own merits and in the particular circumstances which are associated with the requested information.
69. Having weighted the public interest factors presented by this case and having read the two reports which the complainant has requested, the Commissioner has determined that, on balance, the public interest is best served by the continued withholding of the reports and therefore that the Council has correctly applied Regulation 12(5)(e) of the EIR.
70. Foremost in the Commissioner's mind are the adverse effects which would flow from disclosure of The Cabinet owners commercially sensitive information: She fully accepts that the owners ability to sell his property would be significantly reduced if his confidential information was to be disclosed to the world and accordingly she has decided that this alone provides sufficient weight for her decision.

Right of appeal

71. 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

72. 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.
73. 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
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