

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

Decision notice

Date: 16 October 2017

Public Authority: Bridgend County Borough Council
Address: Civic Offices
Angel Street
Bridgend
CF31 4WP

Decision (including any steps ordered)

1. The complainant has requested information from Bridgend County Borough Council ("the Council") relating to the Porthcawl Regeneration Area.
2. The Council provided the complainant with some of the information requested but refused to provide the remainder, citing sections 43(2) (commercial interests) and s42(1) (legal professional privilege) of the FOIA as the basis for its refusal. During the course of the Commissioner's investigation it was agreed that the request should be handled under the EIR and the corresponding provisions under EIR applied - regulation 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(b) (course of justice).
3. The Commissioner's decision is that the Council has failed to demonstrate that regulations 12(5)(e) and 12(5)(b) are engaged and so was not entitled to rely upon these exceptions to withhold the information redacted from the disclosed documents.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with an unredacted copy of the Owners Agreement.
5. 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.

Background to the request

6. In 2007 Cabinet authorised the Council to enter into a Collaboration Agreement with other landowners to set out the parameters on which the owners would work to deliver regeneration and development and to maximise capital receipts on land at various phases within the Seven Bays project: Porthcawl Regeneration Area. Prior to entering into contractual commitments with a developer Cabinet noted it would be necessary to enter into a formal Owners Agreement (OA) with the other land owners.
7. Outline terms for the OA were reported to Cabinet in July 2008 which expanded on the terms of the Collaboration Agreement entered into between the owners in 2007. The OA was signed on 11 March 2011 at which point the Collaboration Agreement ceased to have effect. The OA is between the Council and various companies and a trust owned by the Evans families and its purpose is to achieve a coordinated development and disposal of the land.
8. The OA is for a period of 20 years due to the long term nature of this regeneration and development project.
9. At the time of the request, none of the land had been sold, which was the primary objective of the OA. This was due to the recession in the property market and the withdrawal of large scale food store operators from the market, which has had a dramatic impact on the site. The owners are undertaking further master planning of the site to determine the most attractive land values and tourism/regeneration attractors. This is complex given the size of the sites, and the complicated infrastructure requirements, to enable development.

Request and response

10. On 20 July 2016 the complainant wrote to the Council and requested information in the following terms:

"... I formally request under the FOI act 1974 and Environmental Information Regulations that I am provided with copies of all

agreements entered into with the land owners which in any way relate to the owners agreement and the development of the Regeneration area, also any AD Hoc, collaborative agreements and any S106 documentation.

I also request a full copy of the lease agreement for Salt Lake Carpark.

In requesting this information I understand that some financial data may be redacted, however as the contracts are now in force then I would not expect the redaction to be excessive."

11. The Council responded on 15 August 2016. It provided a copy of the s106 agreement and the lease agreement for Salt Lake Carpark, however refused to provide the OA on the basis that "it contains financial information that is commercially sensitive".
12. The complainant requested an internal review of the Council's decision to refuse to provide the OA on 30 August 2016. Following its review the Council wrote to the complainant on 16 September 2016. It informed him that the request had been properly dealt with under the FOIA, as the OA does not constitute 'environmental information' as defined by the Environmental Information Regulations 2004 (EIR). It upheld the Council's decision to refuse the request for the OA, citing the exemption under section 43(2) of the FOIA (prejudice to commercial interests) as the basis for its refusal.

Scope of the case

13. The complainant contacted the Commissioner on 5 October 2016 to complain about the way his request for information has been handled. He was concerned that the Council refused to provide him with the OA on the basis of commercial sensitivity, and in particular that the Council had applied the exemption to the OA in its entirety.
14. On 10 May 2017 the Council contacted the Commissioner to advise that in addition to section 43(2) of the FOIA it also wished to apply section 42(1) – legal professional privilege – to some of the clauses of the OA.
15. During the course of the Commissioner's investigation, on 18 May 2017, the Council provided the complainant with a redacted version of the OA. As the complainant had indicated to the Commissioner that he had a particular interest in viewing any termination/'get out' clauses, the Council further wrote to him on 21 June 2017 providing information relating to the termination of the OA. On 21 September

2017 the Council provided the complainant with a further copy of the OA with fewer redactions. The complainant has informed the Commissioner that he remains concerned about the current level of redaction.

16. Furthermore, the Commissioner considered that the Council was incorrect to process the request under the FOIA on the basis that, in her view, the information is environmental as defined by the EIR. Having discussed the matter with the Council, it agreed with the Commissioner that it is appropriate to consider this case under the provisions of the EIR, and in particular the corresponding exceptions which it had previously applied under the FOIA.
17. The Commissioner considers that the scope of this case is whether the Council was correct to apply EIR regulations 12(5)(e) (confidentiality of commercial information) and 12(5)(b) (course of justice) in respect of the remaining redactions to the OA.

Reasons for decision

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

18. The Council has relied upon EIR regulation 12(5)(e) to redact information within the OA (with the exception of clauses 8, 11.3 and 11.4 to which the Council has applied EIR regulation 12(5)(b)).
19. EIR regulation 12(5)(e) 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.”
20. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

21. The withheld information consists of redacted material contained within the OA, the purpose of which is to achieve a coordinated and profitable disposal and development of the land.
22. 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.
23. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity with a commercial gain for the development partners.

Is the information subject to confidentiality provided by law?

24. With regard 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. 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 the information.
25. The Council has explained that there is a confidentiality clause in the OA (clause 26). The Council also points to clause 26.1.2.4 which states that it cannot contract out of its obligations under the FOIA.
26. The Commissioner is of the opinion that the Council is relying on the information being subject to a common law of confidence. As it points out, clause 26.1.2.4 states that any confidentiality clauses do not prevent information from still being considered under information access regimes. That being said, the inclusion of a confidentiality clause does demonstrate the information in the OA carries an implied duty of confidence with it. The Commissioner has also taken into account the commercial nature of the information between the Council and its development partners as well as the fact the information is not trivial in nature, as it relates to a significant development project both in terms of the size and value of land involved.
27. The Commissioner notes the withheld information has not previously been made available and information provided that fed into the agreement was done with an implied duty of confidence due to the

nature of the agreement. The Council explained that at the time of reporting to Cabinet, in addition to the open Cabinet report, a confidential report was also submitted seeking approval to the detailed terms of the OA. This demonstrates that the Council and its development partners were mindful of the commercial sensitivities and the damage that disclosure of the full agreement could result in to all parties to the OA. The terms which were agreed and approved in confidence were subsequently transported into the OA.

28. The complainant has referred the Commissioner to a newspaper article reported on 14 October 2010 by Wales Online, which detailed the proposals for the Porthcawl Regeneration Scheme. The complainant's position was that the information within the public domain could not therefore attract the quality of confidentiality. The Council explained to the Commissioner that this article contained only information which was provided within the open Cabinet report, which contained an outline of the key terms within the OA. Having viewed the withheld information the Commissioner considers that it has not been made publicly available and so has not lost the quality of confidence.
29. Taking this into account the Commissioner is satisfied that the remaining withheld information was imparted in circumstances importing an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

30. 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.
31. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probable than not". In support of this approach the Commissioner notes that the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based, 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."

32. The Council has argued that disclosure of the information would adversely affect its own legitimate economic interests and those of the other parties to the agreement.
33. In relation to the adverse effects to its own legitimate economic interests, the Council has argued that release of the OA would provide future bidders/purchasers of the site insight into the make-up and relationship of the landowners and the way in which they are financially rewarded. This insight will be detrimental in any subsequent negotiations the landowners will undertake with prospective purchasers, not only now, but in the future given that the OA is a 20 year agreement. The OA objective is to dispose of land in one or more phases. The way in which this will be delivered is currently unknown. Whilst a number of years have elapsed since the report, the information remains commercially sensitive. This is because none of the site has yet been developed due to the changing nature of the property market and the withdrawal of food retailers on a number of occasions. Based on the potential planning uses which would be permitted on the site, the land is extremely valuable (potential receipts exceeding any other site held by the Council), so any detriment suffered would be high.
34. In relation to the adverse effects to third parties, the Council has provided the Commissioner with copies of correspondence from the legal team representing the land owners who are also parties to the OA. The strongly held position of the third parties is that disclosure of the redacted information "would prejudice our ability to participate competitively in a commercial activity" and "would result in the financial model of the project being disclosed". Other than these generic arguments, the third parties have not advanced any arguments specific to the redacted material. Accordingly the Commissioner has paid regard to arguments advanced by the Council on behalf of the third party to the extent to which the Council has sufficient knowledge of such matters, being a party to the OA, or information in relation to which the Council has also advanced submissions on its own behalf.
35. The Commissioner notes that the OA comprises 63 pages and contains approximately 296 separate reductions of which 8 are for a whole page. Accordingly she asked the Council to explain, in relation to specific elements of the withheld information, how its disclosure would cause the specific effects claimed.
36. Essentially, the Council's response was that disclosure would:

- reveal information, including the financial model, to future purchasers of the land and so would place the Council (and the third party) in an unfair negotiating position;
 - reveal information relating to financial affairs of a particular party to the agreement and their relationship with a financial institution;
 - reveal historic information regarding a previously agreed sale contract with a potential purchaser which was subsequently withdrawn;
 - reveal information regarding potential ransom strips; and
 - reveal information regarding potential compulsory purchase orders (CPO) not yet processed which could be prejudicial in negotiations with purchasers.
37. Of relevance both to the Council's arguments regarding its own legitimate interests, and those of the third parties, the Commissioner considers that the Council has not sufficiently identified specific elements of the withheld information and causally linked disclosure to specific effects. Whilst the Commissioner accepts that the Council has applied what appears to be categories of arguments to specific paragraphs, in order to be convinced that such effects would ensue, she considers that the commercial significance of information to be withheld needs to be identified. Simply identifying information as "sensitive commercial information" or "prejudicial to the Council's/landowner's negotiating position" begs the question *why* and *how* sensitivity is attached to *that* particular information. In the absence of specific arguments about how these effects would come about or what specific form they would take, the Commissioner is left with the impression that the exception has been applied on a general basis.
38. The Commissioner has consistently maintained in her investigations that she will not generally accept speculation by public authorities as to the potential effects of disclosure on third parties. The absence of any detailed input from the third parties in this instance further confirms the Commissioner's view that the Council's submissions are speculative and not founded on accurate assumptions about the effects of disclosure.
39. The Commissioner considers that the threshold for engagement of EIR 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 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.

40. The Commissioner has been left with the impression that the Council has adopted a "blanket" and non-specific categorised approach to the application of the exception and has not had sufficient regard to the nature of the actual information. Furthermore the rationale is limited and lacks detail and reference to the information itself.
41. The Commissioner considers that the Council has had ample opportunities to present a detailed rationale for withholding the information. In cases where an authority does not provide sufficient arguments to demonstrate that an exception is engaged the Commissioner does not consider it her role to demonstrate arguments on its behalf.
42. 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 presented do not warrant the conclusion reached that adverse effects to the Council's and third party's economic interests would be more probable than not.
43. For the reason described above, the Commissioner has concluded that the Council has not demonstrated to the Commissioner to the required standard that it has correctly engaged the exception under EIR regulation 12(5)(e). The Commissioner has, therefore, not considered the application of the public interest in this case.

Regulation 12(5)(b) – Course of justice

44. The Council confirmed that it was withholding three clauses of the OA (clauses 8, 11.3 & 11.4) under EIR regulation 12(5)(b).
45. EIR regulation 12(5)(b) requires that a public authority can refuse to disclose information if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
46. "Adversely affect" means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, i.e. a more than 50% chance that the adverse effect would occur if the

information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

47. The public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test.

Is the exception engaged?

48. The course of justice element of this exception is very wide in coverage. The Commissioner's own guidance does not attempt to provide a definitive list, but states that public authorities may wish to consider applying this exception to requests for the following types of information:

- material covered by legal professional privilege (LPP);
- information about law enforcement investigations or proceedings; and
- records of courts, tribunals and inquiries.

49. In reaching a decision as to whether the Council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

50. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, *"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."*
51. There are two types of privilege – legal advice privilege and litigation privilege.

52. The Council has stated that it considers the withheld information attracts litigation privilege, on the basis that there is a real prospect of litigation in respect of the matters contained within the redacted clauses, and that disclosure of the information is likely to prejudice the proceedings.
53. Having regard to her own guidance, the Commissioner considers that litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
54. If a document existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply.
55. The Commissioner's view is that whilst the OA was likely to have been drafted by lawyers, or at the very least following legal advice, the primary intention of the OA is to set out the legal position of the respective parties; the dominant purpose is not contemplation of litigation.
56. As the OA was already in existence prior to the proposed litigation, the Commissioner does not agree that this is a situation where a lawyer has used their skill and judgment to select pre-existing documents that were not already held by their client. In this instance the proposed litigation involves parties to the OA who will already hold a copy of the OA, and have detailed knowledge of the matters in respect of which litigation is contemplated; thus the information cannot fall within the exception detailed in paragraph 54 above. In these circumstances the Commissioner would find it difficult to accept that disclosure of the information would prejudice those proceedings.
57. For the reasons explained above, the Commissioner does not accept that the OA, and in particular the clauses highlighted by the Council,

can attract litigation privilege, and so the Commissioner finds that EIR regulation 12(5)(b) is not engaged in this case.

Right of appeal

58. 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

59. 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.
60. 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

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