

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

Decision notice

Date: 16 November 2020

Public Authority: Great Waldingfield Parish Council

Address: parishclerk.gwpc@greatwaldingfield.uk

Decision (including any steps ordered)

1. The complainant has requested a copy of a report of local housing needs.
2. The Commissioner's decision is that Great Waldingfield Parish Council incorrectly withheld the sections named "*Executive Summary and Key Findings*" and "*Next Steps*" of the report on the basis of regulations 12(5)(e) and 12(5)(f); however it correctly engaged regulation 12(5)(e) to withhold the remainder of the withheld information. Furthermore, the council did not comply with the requirements of regulation 11(4) because it provided an internal review later than the statutory time period of 40 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the sections of the Great Waldingfield Housing Survey report which are named "*Executive Summary and Key Findings*" and "*Next Steps*"
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 9 April 2020, the complainant wrote to Great Waldingfield Parish Council ('the council') and requested information in the following terms:

"I write under the provisions on the Freedom of Information Act 2000 to request a copy of the local housing needs survey commissioned by the Parish Council last year."
6. The council responded on 22 April 2020. It refused to provide the requested information on the basis of section 41 – information provided in confidence, of the FOIA.
7. The complainant requested an internal review on 1 May 2020. The council refused to provide an internal review on 4 May 2020 stating that it does not have an internal review procedure in place for FOIA.
8. Following correspondence with the Commissioner, the council changed its position to rely upon the EIR. The council wrote to the complainant on 15 September 2020 to advise that it was withholding the requested information on the basis of regulations 12(5)(e) – commercial confidentiality and 12(5)(f) – the interests of the information provider.

Scope of the case

9. The complainant contacted the Commissioner on 25 June 2020 to complain that the council had refused to provide the requested information on the basis of section 41 of the FOIA, and had refused to provide a response to their internal review request.
10. The complainant remained dissatisfied with the updated refusal notice, issued by the council on 15 September 2020.
11. During the course of the investigation the complainant clarified further
"All we have ever wanted to establish is what is the level of existing and future need for housing in the Parish. Had GWPC been willing to engage in any form of constructive dialogue, it would have been clear that we are not interested in the design of the survey form or the commentary analysis."
12. The Commissioner considers the scope of the case is to establish whether the council has correctly relied upon regulations 12(5)(e) and 12(5)(f) to withhold the information. She will also consider whether the council has incurred any procedural breaches in its handling of the request.

Reasons for decision

Regulation 12(5)(e)

13. 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;"

14. The Commissioner's published guidance on this exception explains that in order for this exception to be applicable, there are a number of conditions that need to be met. These are:

- 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?

15. The information withheld under regulation 12(5)(e) is a document named "*Great Waldingfield Housing Survey Report*", ('the Report'). It contains details of a housing survey undertaken and, in combination with other contextual information, provides an analysis of existing and future housing needs. The report was written by Community Action Suffolk ('CAS').

16. The council advised that the cost of housing needs surveys ('HNS') generate income for CAS to employ a rural housing enabler to carry out the HNS work. In effect the role is self-funding.

Is the information commercial or industrial in nature?

17. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit.

18. The council advises that CAS designed the survey form, undertook the analysis of the data and wrote the Report on the basis of the data they collected and analysed. The council submits this demonstrates that CAS has intellectual property rights regarding the Report. Furthermore, it states that the HNS and Survey Report are subject to copyright which is owned by CAS.

19. The Commissioner considers that CAS provided a service to the council in carrying out activities and analysis which culminated in the production of the Report. The council commissioned and paid for the work to be undertaken, which was subject to agreed contract terms. The Report is based on a CAS analysis, undertaken according to their working processes.
20. The Commissioner therefore accepts that the information is commercial in nature, it has value and the disclosure of such work could potentially undermine the ability of CAS to profit from their analyses in the future.

Is the information subject to confidentiality provided by law?

21. The Commissioner considers this to include to confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
22. The council advise that CAS undertook the work after a jointly signed agreement was created. This contract makes reference to the information being the intellectual property of CAS and states that it cannot be shared without CAS providing written consent.
23. CAS confirmed to the council that it does not authorise the sharing of the information with any other third party.
24. The complainant submits that there is no weight attributable to the fact the material is marked as confidential. They argue that a confidentiality clause does not by itself protect information from disclosure to the public.
25. The Commissioner agrees that a confidentiality clause does not necessarily protect from disclosure but it is a factor indicating the obligation of confidence under which information was shared. Other factors are also considered in order to engage the exception, for example whether the information has the necessary quality of confidence such as not being trivial, nor being in the public domain.
26. The Commissioner notes that the Report contains the following statement "*It would be advisable for Great Waldingfield Parish Council to inform parishioners with a copy of the summary and the next stages. The summary section can be used for local newsletters and press releases; but the body of the report should only be made available to other parties in consultation with the Community Action Suffolk Rural Housing Enabler team.*" The Executive Summary includes details of the number of surveys sent and completed and the number of households and people with future housing need.

27. The Commissioner considers, therefore, that the sections of the Report named "*Executive Summary and Key Findings*" and "*Next Steps*" are not subject to any duty of confidence. As such she has excluded them from the remaining analysis of the 12(5)(e) exception. She has further considered these sections later in terms of the regulation 12(5)(f).
28. The Commissioner is satisfied that the remainder of the withheld information was shared in circumstances creating an obligation of confidence and that it is not currently in the public domain. The information has a significant purpose, being to understand the existing and future housing needs for Great Waldingfield, and is the result of a detailed analysis. As such the information is not trivial.
29. The Commissioner therefore finds that the withheld information satisfies the criteria to be understood as subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

30. The council states that CAS is a charitable organisation. Release of the information to commercial developers would undermine public confidence in CAS and potentially impact the public's funding of such charities, ultimately resulting in a lower supply of rural affordable housing.
31. The council argues that CAS would suffer financial harm if the information were to be made public as it could be used by competing open market developers.
32. It states that CAS often works in partnership with district councils and another party which has commissioned a survey. The third party is almost always a housing association. The council contends that disclosure of the information would remove the whole purpose of CAS and have a harmful effect on its relationships with other councils and housing associations. Ultimately this would have a detrimental effect on the commercial viability and continuation of CAS.
33. The council advised that CAS get most of their business through word of mouth and neighbouring parishes who wish to progress with a HNS. This may be harmed if a developer uses the information to promote a site at the expense of a rural exception site development in the same community.
34. The council is concerned that disclosure of this request would set a precedent, making it highly likely to lead to similar requests for all future reports. The council advises that CAS is currently engaged with 20+ parishes in partnership with district councils and housing associations in Suffolk. It contends that the income from this work is

threatened if future surveys are not commissioned due to the fear of disclosure via the EIR.

35. The council advised that the cost of housing needs surveys generates income for CAS to employ a rural housing enabler to carry out the HNS work. They contend that the described threat to CAS income would put the rural housing enablers post at significant risk.
36. As well as losing income from HNS work, the council advise that CAS's income generated from subsequent developments is also at risk, being approximately 1-2% (up to £1,000) of each qualifying dwelling. This would significantly impact on CAS's income with the potential for this work and projects to become unsustainable and close. The council argues that any agreements between Parishes and CAS across Suffolk could be in jeopardy as a result.
37. The council states that local residents also have a legitimate economic interest. It argues that release of the information may harm the prospects of the local rural residents being able to get affordable housing provided in perpetuity as a rural exception site.
38. The council also advised that there would be reputational damage to the council if the information was released, and the council was in breach of the contract. It advised that it obtained funding for the HNS work from the district council, and that the information in the Report is commercially sensitive. This is because the information could be used to for commercial development, using the evidence in the report to satisfy district council and local planning authority planning requirements.
39. It is the complainant's position that it is purely speculative of the council to state that CAS would suffer harm. They state that there is no evidence that harm would be caused nor that the level of damage would be significant. Furthermore, they question whether the refusal by the council represents the genuine concerns of CAS. The Commissioner has confirmed this latter point with the council.
40. The complainant argues that CAS is a charitable organisation and does not accept work from private companies, therefore it is unlikely that disclosure of the level of housing need would result in any economic harm to CAS.
41. The complainant disputes that the disclosure of the information would put CAS at risk. They state that inspection of CAS accounts shows that

the majority of income is from grants and therefore one HNS is inconsequential to the overall financial status of the organisation.

42. In the Commissioner's guidance¹ on the exemption, it states that legitimate economic interests can relate to avoiding commercially significant reputational damage or avoiding disclosures which would otherwise result in a loss of income. She considers these are key points to consider regarding this case.
43. The complainant raises valid arguments regarding the potential level of impact on CAS' financial status as a result of releasing a single HNS, or the level of income received from one report.
44. However, the Commissioner has considered the matter in terms of the wider economic harms identified. Particularly regarding reputational damage to CAS as a charitable organisation; and the future loss of income either from grants or contracts with other councils and housing associations. The Commissioner notes that the CAS strategic plan outlines that:
 - CAS lobby and advocate on behalf of Suffolk's rural communities.
 - CAS collate evidence and intelligence on rural matters in order to influence local and national policy in regard to housing.
 - CAS provide help and support to rural communities to enable them to plan and develop, by identifying what local people need and the issues that are important to them.
 - CAS states it *"has a principal role to identify local housing need within rural parishes by carrying out housing needs surveys and act as an independent "honest broker" working with parish councils, housing associations, local authorities and land owners to progress opportunities for affordable housing for local people in rural areas."*
45. The Commissioner therefore is swayed by the council's argument that the purpose of CAS, in relation to the withheld information, is to serve local rural communities, charities and councils.

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

46. She agrees that that the Report contains information that could be used for commercial development, and therefore it follows that release of the information is contrary to purpose for which it was commissioned. The Commissioner is therefore persuaded that release of the information would impact CAS's reputation and thus jeopardise future contracts and grants. It would also impact upon its ability to exploit the value of its process and the outcomes from its subsequent analyses.

Would the confidentiality be adversely affected by disclosure?

47. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available and would also harm the legitimate economic interests that have already been identified.
48. The Commissioner has thus concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information for all sections except those named "*Executive Summary and Key Findings*" and "*Next Steps*".
49. She has therefore gone on to consider the balance of the public interest regarding the disclosure of the information.

The public interest

50. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

The public interest in the information being disclosed

51. The complainant submitted the following public interest arguments in favour of disclosure:
- To further public understanding and participation in debate regarding what is the level of housing need and what type of housing is most needed in the Parish.
 - To enable the public to understand and challenge if necessary the decisions made by the council in respect of the emerging Neighbourhood Plan.

- So that local residents are not subjected to repeated housing needs surveys if one has already been carried out. The integrity and quality of the survey response may diminish if residents become fatigued through repeat surveys.
- To provide transparency of information for planning purposes.
- To facility accountability and transparency in the spending of public money.

The public interest in the exception being maintained

52. The council provided the following public interest arguments in favour of maintaining the exception:

- Release to a third party would infringe the copyright of the charitable organisation who financially rely on the fees from rural exception scheme.
- Disclosure would damage the safeguarding of openness between local charitable organisations and the council when these organisations share information and wish to retain control of their intellectual property rights.
- If the Report is shared it would severely jeopardise the proposed rural housing project and reduce the opportunity for local residents in rural locations to obtain affordable housing.
- The viability and future of CAS in regard to HNS' would be at stake which would have a detrimental effect on councils and housing associations in Suffolk.
- Breaching a contract could lead to legal action against the council and claims for damages which would have an adverse financial effect on the local electorate and Village Council tax payers.

The balance of the public interest

53. In determining where the balance of the public interest lies, the Commissioner has given due weighting to the general presumption in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions having a significant community impact.

54. The Commissioner notes that the Great Waldingfield Neighbourhood plan will be subject to public consultation, thereby providing opportunity for public debate and input to decision making.

55. The Commissioner considers that the public interest arguments in favour of disclosure are met to some degree by the release of the *Executive Summary* section, discussed earlier in this decision notice.
56. The Commissioner has already accepted that full disclosure would cause harm to the legitimate economic interests of CAS. She is persuaded that that this will impact their ability to support rural housing projects.
57. The Commissioner is swayed by the council's position that in producing HNS's, CAS is supporting the local rural communities. She accepts that release of the withheld information would make it available for competitive commercial purposes which is not the primary intention of the work and may undermine future relationships and reputation.
58. The Commissioner has weighed the competing public interest factors associated with the information which the council is withholding from the complainant. In doing this she has decided that greater weight must be given to those factors which currently favour maintaining the exception.
59. Therefore, apart from the sections of the Report named "*Executive Summary and Key Findings*" and "*Next Steps*", the Commissioner's decision is that the council is entitled to withhold the information requested by the complainant in reliance on regulation 12(5)(e) of the EIR.
60. The effect of the Commissioner's decision is that she is only required to consider the council's additional reliance on regulation 12(5)(f) for the sections named "*Executive Summary and Key Findings*" and "*Next Steps*"

Regulation 12(5)(f) – interests of the person who provided information to the public authority

61. Regulation 12(5)(f) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these regulations to disclose it; and
 - (iii) has not consented to its disclosure.

62. The Commissioner notes that the withheld information, being the Report, contains the following statement *"It would be advisable for Great Waldingfield Parish Council to inform parishioners with a copy of the summary and the next stages. The summary section can be used for local newsletters and press releases; but the body of the report should only be made available to other parties in consultation with the Community Action Suffolk Rural Housing Enabler team"*
63. The Commissioner considers that this statement indicates that CAS consent to the disclosure of the sections named *"Executive Summary and Key Findings"* and *"Next Steps"*.
64. The Commissioner therefore finds that the exemption at regulation 12(5)(f) is not engaged.
65. The Commissioner requires that the sections named *"Executive Summary and Key Findings"* and *"Next Steps"* be disclosed to the complainant.

Regulation 11 – internal review

66. Regulation 11(1) provides that an applicant may make representations to a public authority, if they consider that the public authority has failed to comply with the requirements of the EIR in relation to their request.
67. Regulation 11(3) requires the public authority to consider these representations, along with any supporting evidence provided by the applicant, and to decide whether it has complied with the requirements of the EIR. Finally, regulation 11(4) requires that the public authority notify the applicant of its decision in relation to the applicant's representations no later than forty working days after receipt of those representations.
68. The complainant requested an internal review of the handling of the request on 1 May 2020, the council refused to provide a review. The council therefore did not comply with the statutory requirements of regulation 11(3) initially.
69. However, during the course of the investigation, the council reviewed its position and issued an updated refusal notice to the complainant. This was provided on 15 September 2020, outside of the 40 working day time period specified by regulation 11(4).
70. The Commissioner therefore finds that the council did not comply with the requirements of regulation 11(4). However, as the review is completed, no steps are required.

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@justice.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

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