

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 31 January 2020

**Public Authority:** Darlington Borough Council  
**Address:** Town Hall  
Darlington  
DL1 5QT

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the disposal and acquisition of land in Darlington.
2. The Commissioner's decision is that Darlington Borough Council is not entitled to rely in regulation 12(5)e of the EIR – confidentiality of commercial information, with the exception of the percentage figure and value reference. She also finds that the Council was not entitled to rely on regulation 6(1)b – information already publicly available - for the Title Deed numbers requested.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the withheld information with the exception of that highlighted in the Confidential Appendix.
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

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5. On 9 May 2019 the complainant wrote to Darlington Borough Council and requested information relating to a Council Cabinet meeting in the following terms (the specific questions are shown in bold):

*'1) Particular references were made to the timescales for the bids and to possibility of obtaining funds for decontamination works on brownfield sites.*

**Q) A list of the brownfield sites that bids for possibility of obtaining funds for decontamination on works on Brownfield sites**

*2) including the use of the existing methodology for calculating housing need.*

**Q.) Please let me know the existing methodology DBC used to formulate the new dwelling numbers for their Draft Local Plan 2016-2036**

*3) Skerningham Garden Village to the Forward Funding strand, of the Housing Infrastructure Fund for up to £250m.*

**Q.)(a) Which fund Forward Funding Strand of the Housing infrastructure fund for up to £250m are DBC referring to and where can I find more information regarding the funding.**

**(b) Has an application been submitted via MHCLG's DELTA portal by 9th November 2018 by either Land developers or DBC & where can I get a copy of this submitted plan for Skerningham Garden Village/community showing access roads, Golf course, green open area's, new dwelling locations, school's, health centre, leisure and business units as mentioned by the land developers than Skerningham Garden Village would have within it.**

*4.) That the submission of applications, be agreed, to the Homes and Communities Agency to the Marginal Viability Funding strand of the Housing Infrastructure Fund and the final submission be delegated to the Director of Economic Growth having regard to the Homes and Communities Agency selection criteria.*

**Q.) Submission of what applications, for which infrastructure**

*5.)(c) The Council has an opportunity to secure grant funding for infrastructures in order to support the acceleration of delivery of new housing at strategic locations within the Borough*

**Q.) What Grants and what infrastructure to accelerate the delivery of what new housing at which Strategic locations with the Borough (would like a list of all locals the grants have been applied for as part of this requested information)**

6.) requesting that consideration be given to the terms for the sale of approximately 2.66 acres of land at Sparrow Hall Drive, Darlington, and the acquisition of 1.38 acres of land at Elm Tree Farm, to safeguard a potential future strategic access road to land to the north of Darlington

**Q.) (a) Please can DBC state which 2.66 of land at Sparrow Hall Drive (please supply me with the Title deeds No of this land as part of this question)**

**(b) Acquisition of what 1.38 acres of land Elm Tree Farm (please supply me with the Title deed No of this land as part of this question)**

**(c) Please can DBC confirm to me that this safeguard a potential future strategic access road to land to the north of Darlington is the access road DBC disclosed to me under my FOI request ref No DBC-2454-18 .i.e the two plans sent to me one dated May 2017 the other dated November (after this cabinet meeting) of the access road coming of the expanded roundabout at the bottom of Springfield park, going into and across the park that would make the park unsafe for Children to play in and football to be played in the recreational pitch in the Park.**

7.) RESOLVED - (a) That the sale of the freehold interest in approximately 2.66 acres of Council land, be authorised, on the terms as detailed in the submitted report.

(b) That the acquisition of 1.38 acres of land at Elm Tree Farm, be authorised, on the terms as detailed in the submitted report.

(c) That the Assistant Director - Law and Governance be authorised to document the sale of the property accordingly.

**Q.)(a) That the sale of the freehold interest in approximately 2.66 acres of Council land, be authorised, on the terms as detailed in the submitted report.: Sale of freehold to which 2.66 acres of Council land and the Title deed No of that piece of land please.**

**(b) acquisition of what 1.38 acres of land at Elm tree farm and the Title No of that piece of land please.' (sic)**

6. The Council responded on 19 June 2019. It provided some information within the scope of the request but refused to provide other parts, citing regulation 6 - information already available and accessible, and regulation 12(5)(e) - confidentiality of commercial information, of the EIR as its basis for doing so.
7. The complainant requested an internal review on 27 June 2019. He stated that the information he was seeking was the title deed numbers for the 2 pieces of land bought and sold by the Council. The Council responded on 25 July 2019. It stated that title deed numbers and associated information could be found on the land registry website, and continued to maintain its reliance on 12(5)(e) for information withheld other than under regulation 6.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 25 July 2019 to complain about the way his request for information had been handled. As the acquisition and disposal of the land affected his local environment he considered that the information should be made publicly available. He had also only asked for title deed numbers and not all the information available on the land registry website, for which there was a charge to access.
9. The Commissioner therefore considers the scope of the case to be whether the Council is entitled to rely on regulation 6 for the title deed numbers, and regulation 12(5)e for the remaining information withheld in response to questions 6 and 7 of the request.

### **Reasons for decision**

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#### **Regulation 6 – form and format**

10. Regulation 6 of the EIR states:

*'(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—*

*(a) it is reasonable for it to make the information available in another form or format; or*

*(b) the information is already publicly available and easily accessible to the applicant in another form or format'*

11. The Council cited regulation 6 for a significant amount of the information requested, signposting the complainant to several websites to locate it. The complainant challenged one specific aspect of the signposting, which related to the title deed numbers of the two land plots in question. The Council had directed the complainant to the Land Registry website for the information, which the complainant challenged as it did not provide the information he requested without a significant charge and resulting in additional information he didn't need.
12. The Commissioner reviewed the links sent by the Council and agreed that as the complainant had only requested the actual title deed numbers, the link to the Land Registry website requiring payment for significant amounts of information he had not requested was not 'easily accessible to the complainant' as required by the regulation.
13. The Commissioner therefore requested that the Council review its response to the title deed numbers, following which it duly supplied the number for the Sparrow Hill Drive Plot. It stated it did not hold the title deed number for the Elm Tree Road strategic access route.
14. The Commissioner finds that the Council was therefore not entitled to reply on regulation 6(1)b for question 6a and 6b of the complainant's request.

### **Regulation 12(5)e**

15. Regulation 12(5)e states:

*'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'*

16. If the exception is engaged, it is then subject to the public interest test.
17. In assessing whether the exception is engaged, the Commissioner applies a four stage test, of which all must be met:
  - The information is commercial or industrial in nature
  - Confidentiality is provided by law
  - The confidentiality is protecting a legitimate economic interest
  - The confidentiality would be adversely affected by disclosure

*Is the information commercial or industrial in nature?*

18. The Council has applied this exception to 3 documents – a summary report, main report and plan that was presented to the Cabinet on 12 September 2017. These documents concern the disposal and acquisition of land by the Council, and the Commissioner therefore accepts this is commercial in nature.

*Is the information confidential by law?*

19. The Commissioner considers information deemed confidential by law to include common law confidence, a contractual obligation, or statute.
20. The Council has argued that the disposal and acquisition of assets attracts an obligation of confidence imposed by common law. Additionally, the withheld information was contained in reports that were exempt information under paragraph 3, Part 1 of Schedule 12A of the Local Government Act 1972. This allows for the exemption to make information available to the public if it relates to the financial or business affairs of any particular person (including the authority holding that information). The Commissioner notes that the information makes reference to third parties involved in the disposal and acquisition of the land, along with percentage costs. The Council also states that the information includes prices, percentages and acreage. However, the Commissioner cannot see any prices in the documents, and the acreage is already publicly available in the Cabinet minutes which gave rise to the request itself.
21. Nonetheless, the Commissioner accepts that the documents in their entirety attract a common law duty of confidence as they contain commercial information that relates to the disposal and acquisition of land involving third parties.

*Is the information protecting a legitimate economic interest? Would disclosure harm that interest?*

22. To satisfy this element of the test, disclosure of the withheld information would have to adversely affect the legitimate economic interest of the Council, third parties, or both. This means that the Council would need to consider the sensitivity of the information at the time of the request and whether the confidentiality that was agreed or expected still required protecting.
23. The information concerns the disposal of Council owned land known as Sparrow Hall Drive, access to Elm Tree Farm and the acquisition of land at Elm Tree Farm. The Commissioner will consider these aspects separately.

24. *Disposal of Sparrow Hall Drive* – The request was submitted on 29 May 2019, and the withheld information was produced for a Cabinet meeting on 12 September 2017. The Commissioner notes from a simple website search using the term 'Sparrow Hall Drive development', the planning application concerning the development is returned in the results. This application was submitted on 23 October 2018 and provides Bellway Homes as the applicant. A further simple search of 'Sparrow Hall Drive development Bellway' returns this website: <https://www.elgplanning.co.uk/consultation/elm-tree-farm-darlington>, where it is clear that Bellway plans to secure the Sparrow Hall Drive land for housing development. References are made to public consultations to be held in August 2018. The Council has already disclosed the Land Registry number for the land in question to the complainant which confirms its ownership.
25. As information concerning the planned acquisition of the land by Bellway from the Council was already in the public domain at the time of the request, the Commissioner is not satisfied information about the disposal of Sparrow Hall Drive required protecting at the time of the request, and no harm could therefore be caused by its disclosure. Consequently regulation 12(5)e is not engaged for this part of the withheld information.
26. *Access to, and acquisition of, land at Elm Tree Farm.* This information concerns the securing of a strategic access route to land north of Darlington (as detailed in the Cabinet minutes). The Council has stated that there are potentially 2 routes available for an access road, one owned by the Council and the other by another landowner. If the information about the access route it plans to acquire was made publicly available, it would enable the other landowner to provide an access route to the developer and undercut the Council. The Council argues that this would harm its commercial interests.
27. It is not enough that disclosure might cause some harm to an economic interest, a public authority needs to establish that on the balance of probabilities, disclosure would cause some harm. This is reinforced by the implementation guide on the Aarhus Convention (from which the EIR are derived) which states:
- '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'*
28. Although the Council has said that there is another potential access route owned by someone else, it has not provided any information on whether there is any interest from the landowner to sell the land. The fact that there is another 'potential' access route, without any further

information to indicate it could or would be sold for this purpose, is not in the Commissioner's view enough to demonstrate that disclosure of the planned access route would significantly damage the Council's commercial interests. Whilst theoretically this is a possibility, the Council has not provided any arguments to demonstrate it is any way likely. Additionally, the Cabinet minutes themselves refer to the acquisition of a strategic access route at Elm Tree Farm and therefore the Council's intention in this regard is already publicly available. She therefore does not accept that the disclosure of the information about the securing of the strategic access route at Elm Tree Farm **would** harm the Council's economic interest in this case.

29. In addition to its own position about harm caused by disclosure of the withheld information, the Council has also provided the Commissioner with arguments from Bellway homes about harm caused to its interests.
30. The Council has supplied the Commissioner with Bellway's representations for the application of 12(5)e. These representations were provided to the Council in response to another information request (Decision Notice FER0833818), and not specifically for the one that is subject to this decision notice. However, one of the documents withheld is the same in both requests, and the Council maintains that Bellway's arguments apply in both instances.
31. The Commissioner has reviewed these arguments, which also make reference to section 41 and 43 of the FOIA – information provided in confidence and commercial interests. Whilst there might be some commonality in the arguments provided in relation to 12(5)e of the EIR and sections 41 and 43 of the FOIA, they are not interchangeable. Additionally, sections 41 and 43 cannot be applied to the withheld information in this request as the Commissioner considers it to be wholly environmental in nature.
32. The main thrust of the Bellway's arguments centre on the confidential nature of the agreement between the owners of Elm Tree Farm, which is a private arrangement between the two parties. The developer has argued that the information includes reference to its own commercial activities, the disclosure of which would damage its reputation, prejudice opportunity to acquire land for house building in the area, jeopardise strategic development plans, make acquisitions more competitive and assist their competitors.
33. The Commissioner has already noted that information about the development is publicly available on the ELG website shown above, including its physical siting. In addition, a planning application has already been submitted by Bellway which includes reference to the current owners of Elm Tree Farm. The Commissioner is therefore unable

to see how or why disclosure of the reference to the owners of the of Elm Tree Farm or the plan to acquire the site would cause the harm that Bellway alleges. Whilst the disposal and acquisition of the land in question has not been completed, the information contained in the withheld information relating to the proposal is already within the public domain, with the exception of a percentage figure and value reference, which the Commissioner now considers.

34. The Commissioner has considered the withheld information according to the specific nature of its content and the arguments put forward by the Council and Bellway Homes, and determined that is either already in the public domain or the harm envisaged by its disclosure does not meet the necessary threshold of 'would' under the EIR. However, there is a percentage figure and value reference in the withheld information that the Commissioner considers, based on the current status of the planning application and negotiations, is confidential and disclosure of this information would harm both the commercial interests of Bellway Homes and the Council. This is because it links the disposal and acquisition of Sparrow Hall Drive and Elm Tree Farm land, which at the current time is not a finalised agreement. The Commissioner therefore considers that this figure, if disclosed, would harm both the interests of the Council and Bellway Homes by revealing a negotiation that wasn't complete at the time of the request and still isn't yet complete. She therefore accepts that for this percentage figure and value reference only, the confidentiality of this information requires protecting and therefore regulation 12(5)e is engaged.
35. Regulation 12(5)e is subject to the public interest test. The application of the public interest to the EIR assumes a presumption in disclosure, and this is particularly the case in planning matters where decisions can have a significant effect on both individuals and communities. However, the negotiations regarding the development are not yet complete and the Commissioner has already determined that harm would result from the disclosure of the percentage figure in question. She considers that the disclosure of the withheld information, bar the percentage figure and value reference, provides for the transparency intended under the EIR and is therefore satisfied that the public interest in maintaining the exception outweighs the public interest in disclosure.

## Right of appeal

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36. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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**  
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