

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 October 2021

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Herts
SG13 8DF

Decision (including any steps ordered)

1. The complainant requested information with regards to a development. Hertfordshire County Council (the council) provided information it held but refused some under regulation 12(5)(e) of the EIR - confidentiality of commercial or industrial information.
2. The Commissioner's decision is that regulation 12(5)(e) of the EIR is engaged.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 18 December 2020 the complainant made the following information request to the council:

"As our house is beside the projected access for this development it is in our public interest to have sight of the redacted documents. In the original planning application Highways Department refused permission. Then after a very small and insignificant alteration to the plans permission was then granted. It is therefore my request under FOI that we have access to these following documents:

Minutes of meeting at NHDC Project no. 5182 07.01.2020

Memo from [name redacted] to [name redacted] 08.06.2020

Memo from [name redacted] to [name redacted] and [name redacted] 09.06.2020

Memo from [name redacted] to [name redacted] 08.09.2020

Memo from [name redacted] to [name redacted] 08.09.2020

Memo from [name redacted] to [name redacted] 17.09.2020

Memo from [name redacted] to [name redacted] 18.09.2020

Memo from [name redacted] to [name redacted] 18.09.2020"

5. The council responded on 28 January 2021 disclosing some information but with redactions under regulation 12(5)(e) of the EIR – confidentiality of commercial or industrial information.
6. It also redacted the personal information of individuals working for external organisations under regulation 13 of the EIR.
7. The complainant requested an internal review on 1 February 2021 and the council responded on 10 March 2021 upholding its initial response. It also noted that one of the withheld documents was now in the public domain and so provided the complainant with a link to it on its website.

Scope of the case

8. The complainant contacted the Commissioner on 6 May 2021 disputing the council relying on regulation 12(5)(e) of the EIR to withhold the following two documents:
- One of the emails dated 8 September 2020
 - Minutes of the meeting dated 7 January 2020
9. The complainant has not disputed the personal data redactions. The scope of the case is therefore to determine if the council can rely on regulation 12(5)(e) of the EIR to withhold the two documents identified above.

Reasons for decision

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

10. Regulation 12(5)(e) of the EIR states:

"12(5) – 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 interest."

11. In considering the application of regulation 12(5)(e), the Commissioner's view it that the following four criteria have to be met for the exception to be engaged.
- a) The information has to be commercial or industrial in nature;
 - b) The information has to be subject to a duty of confidence provided by law
 - c) The confidentiality has to be required to protect an economic interest; and
 - d) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of the information.

12. The Commissioner has considered each of the above points to determine if the withheld information meets these criteria. The approach of the Commissioner is that, where the first three of these tests are met, the fourth test will also be satisfied.

Is the information commercial in nature?

13. The Commissioner's view is that for information to be commercial or industrial in nature, it needs to relate to a commercial activity being undertaken by the public authority or a third party. The essence of commerce is trade and a commercial activity will generally invoice the sale or purchase of goods or services for profit.
14. The council has told the Commissioner that the information being withheld relates to discussions between a planning consultancy company (working on behalf of the council's Property Department) and the council's Highway Department with regards to a piece of land in its property portfolio.
15. These discussions were around the details of the relationship between increased project costs and the impact that may have on the land value, as well as Section 106 negotiations¹ and works to be carried out under Section 278 of the Highways Act².
16. Having viewed the withheld information the Commissioner is satisfied that it is commercial in nature.

Is the information subject to a duty of confidence provided by law?

17. For this point, the Commissioner has focused on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
18. In the Commissioner's view, determining whether the information has the necessary quality of confidence involves confirming whether the information is not trivial and is not in the public domain.
19. The Commissioner considers that the subject matter of the withheld information - land development - indicates that it is not trivial in nature.

¹ Private agreements made between local authorities and developers with regards to a development.

² [Highways Act 1980 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

She is aware of no evidence suggesting that this information is already in the public domain.

20. As to whether the information was shared in circumstances creating an obligation of confidence, the council stated that the third party planning consultancy stated that "*the private negotiations associated with finalising this agreement are commercially sensitive and should not be disclosed*".
21. The council further states that although the eventual Section 106 document and the Heads of Terms³ will be publicly available at the required stages of planning permission being granted, the specific withheld information in question here would not be a matter of public record or be required as part of the consideration of the planning process. Therefore the planning consultancy company would have a reasonable expectation that these discussions would be treated in confidence.
22. Although there is no absolute test for what constitutes a circumstance giving rise to an obligation of confidence, the judge in *CoCO v Clark*⁴ suggested that the 'reasonable person' test may be a useful one stating:

"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."
23. Considering this 'reasonable person' test along with the non-trivial nature of the withheld information and its very limited distribution and access, the Commissioner has concluded that the withheld information is subject to the necessary duty of confidence to satisfy the criteria of this part of the exception.

³ An agreement in principle

⁴⁴ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

Is the confidentiality required to protect an economic interest?

24. In order for this part of the exception to be satisfied, disclosure of the withheld information would have to adversely affect the legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
25. The Commissioner's view is that it is not enough that harm *might* be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, harm *would* be caused by disclosure.
26. The Commissioner, assisted by the Tribunal in determining how "would" needs to be interpreted, accepts that "would" means "more probably than not". In support of this approach, the Commissioner has noted the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. It gives the following guidance on legitimate economic interests:

"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".
27. The council has argued, in this case, that confidentiality is required to protect the economic interests of the landowner and seller. That being the council itself.
28. It has stated that by disclosing the discussions that had been undertaken in assumed confidence, it could adversely affect the potential value of the land. Also, in future, businesses and developers may decline to work with the council on learning that it has previously disclosed information supplied to it in confidence.
29. These discussions were not intended for public consumption, but rather they were intended to be private discussions relating to planning permission.
30. The council also argues the importance of the degree of trust and ability to hold frank and free discussions when necessary about the best solution for the land. If this is not possible, it will have a direct impact on the site, and the goal of achieving the best price possible, which would in turn cause harm to the economic interests of council, the site owners.
31. The council believes that disclosure of the withheld information would place into the public domain a record of discussions that were intended to be confidential. This would put the council at a disadvantage

commercially and this would, in turn, harm its ability to achieve the best return possible for the land in question.

32. The Commissioner, on review of the information, accepts the arguments of the council that the release of this information, could have a detrimental impact on the value of the sale of the land as it would provide third parties with an insight and knowledge of the land that would not, otherwise from disclosure under the EIR, be available to potential purchasers. This would result in detriment to the commercial interests of the council.
33. Having found that the first three tests set out at paragraph 19 above are satisfied by the withheld information, the Commissioner finds that the fourth of these is also met. The Commissioner's conclusion is therefore that the exception provided by regulation 12(4)(e) is engaged in relation to the withheld information.

Public Interest Test

34. Even though it has been found that regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest.

35. Regulations 12(1) and 12(2) of the EIR states:

"(1)... a public authority may refuse to disclose environmental information requested if –

- (a) An exception to disclose applies under paragraphs (4) or (5); and*
- (b) In all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure."

36. The Commissioner is of the opinion that some weight must be given to the general principle of accountability and transparency by disclosure of information through the EIR as it would assist in the public's understanding of how public authorities make their decisions. This would help to increase trust in public authorities and may allow greater public participation in the decision making process.
37. The council has stated that it acknowledges that there is strong public interest in openness, transparency and accountability. It has also noted that members of the public having access to information enables them

to better understand why decisions have been made and how that will affect them.

38. The council has told the Commissioner that this planning matter has attracted a significant amount of public interest as it affects those living in the area.
39. However, the council also argues that whilst it is important that there is confidence that proper processes are being followed, this does not mean that all the information that is held should be released into the public domain to achieve this. The council has told the Commissioner that there is already a great deal of information in the public domain such as the Heads of Terms and more information will be released once the relative planning permission has been granted, which the council considers will provide all the information that will satisfy the public interest in this particular interest.

Conclusion

40. The Commissioner has considered the arguments for and against the release of the information. She considers that the council would have been aware that this case would attract some public interest.
41. The planning process does provide mechanisms for engagement and scrutiny and, whilst knowing all the discussions taking place might be of public interest, it has to be considered against the wider public interest, which includes allowing commercial endeavours to proceed on a level playing field.
42. The Commissioner notes that the majority of the information requested by the complainant was disclosed, although this does not necessarily lessen the public interest in the specific withheld information in question here. .
43. Having considered all of the above, the Commissioner, in reaching her decision, is mindful of the general presumption in favour of disclosure. In this case, given that the nature and content of the withheld information, which is intended to allow the council obtain the best price for the land, the Commissioner is of the opinion that the public interest in maintaining the exception outweighs the public interest in disclosure.
44. Therefore the Commissioner finds that the council was correct to withhold the information in this case.

Right of appeal

45. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF