

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 October 2023

Public Authority: Mid Devon District Council
Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant submitted an information request to Mid Devon District Council (the Council) for a full copy of the 3 Rivers Development Haddon Heights Viability Assessment.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(e) to withhold the information and that the balance of the public interest test, lies in the exception being maintained. However, the Commissioner finds a breach of regulation 5(2) regarding the delay in fully responding to the request.
3. The Commissioner does not require further steps as a result of this decision notice.

Request and response

4. On 4 April 2023, the complainant wrote to the Council and requested information in the following terms:

“Could I please make a Freedom of information Request to receive a FULL COPY and not the Executive Copy of the 3 Rivers Development Haddon Heights VIABILITY ASSESSMENT.”
5. A response was provided on 10 May 2023 in which the Council confirmed that it held the requested information but that it was being withheld under regulations 12(5)(e) and 13(1) of the EIR.
6. Following an internal review on 7 July 2023, the Council disclosed the requested document, with redactions made under the above exceptions.

Scope of the case

7. The complainant contacted the Commissioner on 25 July 2023 to complain about the way their request for information had been handled.
8. As highlighted by the complainant, the Commissioner contacted the Council to inform it that the name it had withheld was already in the public domain.
9. After further consideration, the Council agreed to release the Viability Assessment with all information, bar the sales values, unredacted.
10. The Commissioner contacted the complainant to see if they were happy with this latest disclosure. The complainant confirmed that they did not accept the redaction of the sales values.
11. Therefore, the scope of the Commissioner’s investigation is to examine the Council’s application of Regulation 12(5)(e) to the withheld information.

Reasons for decision

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

12. Regulation 12(5)(e) applies to information where 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.
13. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the public authority must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
14. The Council's position is that the document is commercially confidential, and having viewed the withheld information, the Commissioner is satisfied that the information is commercial in nature.
15. The Council has explained that it considers the withheld information is subject to a duty of confidence as it contains "detailed costings" and that the document was not published in relation to the application and was only shared amongst those involved in the planning application.
16. The complainant has argued that the sales values are in the public domain. However in comparing the information the complainant has provided, to evidence this, and the withheld information, the Commissioner is satisfied that the information is not currently in the public domain.
17. The Commissioner has next considered whether a legitimate economic interest has been identified.
18. The Council explained that in its view, the confidentiality is provided to protect the following two legitimate economic interests:
 - The bargaining position of the company developing the site
 - The company's capacity to maximise profit.

19. In explaining how disclosure would cause harm to these interests, the Council explained that 3 Rivers (a company wholly owned by Mid Devon District Council) confirmed that the release of the now three-year-old assessment with original sales information, "may prejudice the ability of the company to achieve the currently advertised sales values" and therefore affect its ability to achieve its commercial objectives.
20. The Council and 3 Rivers have confirmed that it would be happy to release the requested information at the point in time when sales have completed and the project is complete, and without detriment to the developer or council taxpayers.
21. The Commissioner accepts that the Council has been able to demonstrate a causal link between disclosure of the withheld information and the specific adverse effects to the economic interests it has identified.
22. The Commissioner has therefore determined that the exception at regulation 12(5)(e) is engaged, in respect of the withheld information, and has gone on to consider the public interest test.

Public interest test

23. As with the other exceptions under EIR, when regulation 12(5)(e) is engaged, the public authority must carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.
24. The Council accepts that the public interest in disclosure would be to increase transparency regarding planning applications and affordable homes and that this "would be compatible with National Planning policy Framework (NPPF) guidance". However, it also believes that the factors against disclosure are largely based on "protecting the economic interests of the developer" and could damage its future position to provide developments if it is "undercut by competitors".
25. The complainant believes that "public access to the information used in the determination of Planning Applications is paramount", and they highlight a ruling passed down in the High Court regarding the requirement for Planning Viability Assessments (plus other documentation) to be made available in the public domain.

26. As highlighted to the complainant, by the Council in its internal review response, the above ruling was in relation to the Local Government Act 1972 and as such is not a binding decision on EIR.
27. However, the Commissioner did raise with the Council, the issue of its Statement of Community Involvement document, in which it states that "in accordance with the National Planning Policy Framework, the Council will make any viability assessments submitted to support an application publicly available".
28. The Council responded to this stating that this was not the assessment submitted in support of the application, but rather an "independent report used to assess the validity of the original Viability Assessment", and that the main Supporting Viability Assessment was made publicly accessible on the planning portal when the original application was made.
29. In balancing the public interest arguments, the Commissioner accepts that there is a public interest in transparency regarding public income and expenditure. However, he is satisfied that disclosure would likely prejudice the future sales of the properties, which may lead to either difficulty in obtaining value from the sale of the houses/and or reduced revenue to the public purse. Clearly this would not be in the public interest. Furthermore, the Council have confirmed it has happy to disclose the withheld information, once the properties have been sold.
30. The Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, and therefore the Council was entitled to rely on regulation 12(5)(e) of the EIR to refuse to provide the withheld information.

Procedural matters

31. Regulation 5(1) of the EIR states that "a public authority that holds environmental information shall make it available on request". This is subject to any exceptions that may apply.
32. The Council provided the complainant with environmental information to which they were entitled to outside the statutory time limits of the EIR. Therefore, the Commissioner has found a breach of regulation 5(2) of the EIR.

Right of appeal

33. 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

34. 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.
35. 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

Joanna Marshall
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