

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

Date: 19 April 2024

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

Decision (including any steps ordered)

1. The complainant requested a report relating to 3 Rivers Developments Ltd. Mid Devon District Council (the "Council") initially handled the request under the FOIA and withheld the information under the exemption for commercial interests (section 43). At the Commissioner's direction it subsequently reconsidered the request under the EIR, disclosed some information and withheld other information under the exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that the Council failed to respond in accordance with the EIR and breached regulation 5(1), 5(2) and 14, and that it failed to demonstrate that the exception in regulation 12(5)(e) is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(e).
4. The Council must take these steps within 30 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

5. Mid Devon District Council's (the "Council") website provides the following background information about 3 Rivers Developments Ltd ("3 Rivers"):

"Back in 2017 the Council decided to set up a wholly-owned, commercial, property development company, called 3 Rivers which aimed to deliver high quality homes in Mid Devon, while providing a financial return to the Council."¹

6. In March 2023 the council commissioned an external consultant to produce a report appraising options relating to the future of 3 Rivers.
7. On 16 August 2023, at a Cabinet meeting, it was confirmed that a report had been provided by Francis Clark LLP (the "Report") and that it was to be recommended that 3 Rivers was subjected to soft closure².
8. In September 2023 the council made a public statement that confirmed that a decision had been taken to soft close 3 Rivers, stating:

"In the regular updates to the Council, Members were informed that the investment in 3 Rivers was unlikely to yield the returns previously forecast, and after a decision not to support the company's revised business plans in February, and following further professional, external advice the Council decided to "soft close" the business. This process will enable 3 Rivers to finish its two ongoing projects in Tiverton and Bampton and will ensure that all contractors, suppliers and tradesmen are paid in full, and all associated company property warranties will be honoured."³

9. In October 2023 the complainant subsequently submitted their request for a copy of the Report.

¹ <https://www.middevon.gov.uk/closure-of-3-rivers-housing-firm/>

² <https://democracy.middevon.gov.uk/documents/q1842/Printed%20minutes%2016th-Aug-2023%2017.15%20Cabinet.pdf?T=1>

³ Ibid.

Request and response

10. On 23 October 2023, the complainant wrote to the Council and requested information in the following terms:

"I ask that Mid Devon District Council sends me a copy of the full report prepared by Francis Clark LLP on 3 Rivers Developments Ltd. This is the report circulated to the Cabinet on 16 August 2023, which recommended the Soft Closure of 3 Rivers Developments Ltd.

Please take into consideration that Torbay Council and Exeter City Council have both published, in full, the reports recommending the proposed closures of their property development companies, and the fact that the Cabinet Member for Finance stated verbally, during that Cabinet meeting, each of the various options put forward by Francis Clark LLP.

I would also ask for a copy of the full Terms of Reference given to Francis Clark LLP prior to the commencement of their work."

11. The Council responded on 20 November 2023. It confirmed that it was withholding the information under the exemption for commercial interests (section 43 of the FOIA).
12. On 27 November 2023 the complainant asked the Council to review its handling of the request. Following an internal review Council wrote to the complainant on 20 December 2023. It stated that it was maintaining its position.

Scope of the case

13. On 31 December 2023 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
14. The complainant raised concerns that the council had failed to provide a copy of the requested full Terms of Reference and that it had wrongly withheld the full report.
15. Due to the nature of the request, which relates to the operation of a property development company, it occurred to the Commissioner that the request fell to be considered under the EIR rather than the FOIA. He, therefore, directed the council to reconsider its position under the EIR.
16. The council issued a new response to the complainant on 3 April 2024 and provided them with a copy of the full Terms of Reference. It

subsequently confirmed to the Commissioner that it was now relying on the EIR exception for commercial confidentiality (regulation 12(5)(e)) to withhold the full report.

17. The Commissioner has considered whether the council correctly withheld the report.

Reasons for decision

Is the requested information environmental?

18. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
19. The Commissioner notes that the requested information relates to decisions regarding a property development company and he considers

that it, therefore, constitutes information on a measure as defined in regulation 2(1)(c).

20. Regulation 5(1) of the EIR states:

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.”

21. Regulation 5(2) states:

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

22. In view of the above, the Commissioner has concluded that the Council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. In failing to provide the requested full Terms of Reference until the Commissioner’s investigation, the Commissioner also finds that the council failed to provide information within the statutory time limit and breached regulation 5(2).

Regulation 14 – refusal to disclose information

23. In the circumstances of this case the Commissioner has found that although the Council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the Council will have failed to comply with the provisions of the EIR.

24. In these circumstances the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and its internal review) failed to cite any exception contained within the EIR as the Council actually dealt with the request under FOIA.

Regulation 12(5)(e) – commercial confidentiality

25. The council withheld the entirety of the “full report prepared by Francis Clark LLP on 3 Rivers Developments Ltd” (the “Report”) under the exception in regulation 12(5)(e).

26. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would affect the

confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

27. The Commissioner considers that, in order for this exception to be applicable, there are four conditions that must be met. These are:
- (i) Is the information commercial or industrial in nature?
 - (ii) Is the information subject to confidentiality provided by law?
 - (iii) Is the confidentiality provided to protect a legitimate economic interest?
 - (iv) Would the confidentiality be adversely affected by disclosure?

(i) Is the information commercial or industrial in nature?

28. The Commissioner notes that the council did not provide submissions in relation to this element of the exception. However, he notes that the withheld information relates to the operation of a property development business in the commercial market so he is satisfied that it is commercial in nature.

(ii) Is the information subject to confidentiality provided by law?

29. In the Commissioner's view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
30. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
31. 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 information
32. Again, the Commissioner notes that the council has not provided submissions regarding this specific element of the exception.
33. He also notes that reference is made to specific recommendations of the Report in published minutes of council meetings (see paragraph 8 above) which, in the Commissioner's view, calls into question the soundness of any confidentiality being claimed in this case.

34. Having referred to the Report, though, the Commissioner notes that the content is not trivial and that much of it has not been placed in the public domain.
35. The Commissioner is, therefore, satisfied that the information is subject to confidentiality provided by law, and that the second condition has been met.

(iii) Is the confidentiality provided to protect a legitimate economic interest?

36. For this test, it is necessary to consider how sensitive the information is at the date of the request and the nature of harm that would be caused by disclosure. The timing of the request, and whether any commercial information is still current, are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.
37. It is not enough that disclosure might cause some harm to an economic interest. It needs to be established that disclosure would cause harm (on the balance of probabilities – i.e., more probable than not).
38. The council has provided no specific submissions relating to the engagement of the exception in this regard. Its arguments regarding the public interest in maintaining the exception state:

“The interest in financial status of a publicly owned company would be in itself countered by the tangible impact on the finances and in turn the council. Disclosure of the document would damage the assets owned by the company, these would in itself have a direct and negative impact on the taxpayer. This would negate the benefit to the wider public from disclosure significantly and weakens the argument in favour of disclosure.”
39. In its original response under the FOIA the council provided the following grounds for engaging the exemption under section 43(2):

“Both Three Rivers and Mid Devon District Council Have a commercial interest in the details of this document. This is due to the impact that the specific details in the document, having the potential to financial impact (sic) both the Company in question and the Local Authority as legal persons. The details held in the report includes financial details that could impact ongoing sales of properties owned by the said company and hinder any negotiations ongoing in relation to the sites in development by 3 rivers. This information in the public domain could lead to third parties pressuring the company into unfavourable

agreements, which would in turn damage the Finances of Mid Devon District Council. Considering the document it is deemed that this would occur and that there is a causal link between the disclosure of the document and the harm that would occur.”

40. Whilst these arguments have not been submitted in support of the council's application of the exception in regulation 12(5)(e), the Commissioner, in any event, notes that the council's arguments are highly speculative, generic and do not directly link any specific elements of the withheld information to tangible adverse effects. The council's suggestion that disclosure "could" result in prejudice does not meet the EIR test of likelihood, which requires it to be shown that disclosure would result in ascribed effects.
41. Having considered the available evidence the Commissioner considers that the Council has assumed it to be self-evident that disclosure of the information would result in adverse effects without explaining how and why this would happen.
42. The lack of detail and clarity in the council's submissions suggests to the Commissioner that it has not properly consider this matter and has sought to apply the exception on a general basis. The Commissioner emphasises that responsibility for demonstrating the correct application of an exception lies with the public authority. In the context of regulation 12(5)(e), it is not appropriate for the Commissioner to formulate arguments on behalf of the Council.
43. In this case, the Council has failed to explicitly demonstrate the causal link between the withheld information and the claimed adverse effects and failed to properly define the adverse effects. It has also failed to provide any evidence that it has consulted with 3 Rivers whose economic interests it contends would be adversely affected through disclosure.
44. In the absence of any clear explanation by the Council as to how disclosure of the withheld information would adversely affect the economic interests identified, the Commissioner cannot conclude that the third condition has been met. On this basis the Commissioner finds that regulation 12(5)(e) is not engaged.

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.

Christopher Williams
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