

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 June 2013

Public Authority: Braintree District Council
Address: Causeway House
Bocking End
Braintree
Essex
CM7 9HB

Decision (including any steps ordered)

1. The complainant has requested information relating to plans for the re-development of a site in Braintree. Braintree District Council (the "council") refused the request, citing the exception for the confidentiality of commercial information.
2. The Commissioner's decision is that council has failed to demonstrate that the exception for the confidentiality of commercial information is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to the complainant.
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 17 September 2012, the complainant wrote to the council and requested information in the following terms:

"My attention has been brought to future plans of development by James Development Company. Owners of the Morrisons site, car park and adjacent multi story car park, on Rayne Road, Braintree. As first recorded by Braintree Council in 2009. I therefore ask under the power of the freedom of information act, that any information, proposed ideas or drawings related to the site and its re-development are made viewable to me."

6. The council responded on 19 October 2012. It stated that the request was being refused and confirmed that the information was being withheld under the Freedom of Information Act 2000 (FOIA), specifically the exemption for information provided in confidence (section 41)
7. Following an internal review the council wrote to the complainant on 27 November 2012. It stated that it was upholding its original decision to refuse the request and added that the information was also being withheld under the EIR exception for confidentiality of commercial or industrial information (regulation 12(5)(e)).

Scope of the case

8. On 28 November 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that he would investigate whether the council had correctly withheld the requested information.
10. During the course of the Commissioner's investigation the council revised its position and confirmed that it wished to withhold all the requested information under regulation 12(5)(e) of the EIR.
11. In seeking a potential informal resolution to this complaint, the council invited the complainant to attend its premises to view the withheld information. The complainant declined this offer and asked the Commissioner to pursue a formal investigation of the council's refusal of the request.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

12. 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”.

13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:

- 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?

14. In dealing with the complaint, the council consulted with James Development Company (JDL) and sought its views as the interested party. The council provided the Commissioner with information submitted by JDL to the council which, clarifies why it considers the information should not be disclosed. Whilst the Commissioner has considered the submission provided by JDL in evaluating the application of exceptions, he is mindful of the recommendations of the code of practice issued under regulation 16 of the EIR (the “EIR code”), particularly, paragraph 45 which states:

“In all cases, it is for the public authority that received the request, not the third party (or representative of the third party) to weigh the public interest and to determine whether or not information should be disclosed under the EIR. A refusal to consent to disclosure by a third party does not in itself mean information should be withheld, although it may indicate interests involved.”¹

Is the information commercial or industrial in nature?

15. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

¹ <http://archive.defra.gov.uk/corporate/policy/opengov/eir/pdf/cop-eir.pdf>

16. The council has confirmed that the information relates to its plans to redevelop Braintree town centre and consists of discussions and negotiations with JDL who own some of the land which forms part of the proposed redevelopment site. The remainder of the land is owned by the council and the council considers that disclosure of the requested information would have an impact on both the council's and JDL's commercial interests in taking forward this venture.
17. Having viewed the withheld information the Commissioner considers that it is clearly commercial in nature, and has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

18. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
19. On the basis of the council's submissions, the Commissioner is satisfied that distribution of the withheld information has been limited and that it is not otherwise accessible.
20. Having viewed the withheld information, it clearly relates to a development which will have an effect on the local area. The Commissioner therefore considers that the information in question is not trivial. He is satisfied that the information does have the necessary quality of confidence and, as a result has gone on to consider whether the information was shared in circumstances importing an obligation of confidence.
21. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark* suggested that the 'reasonable person' test may be a useful one. He explained:

"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".

22. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012), the Tribunal accepted evidence that it was "usual practice" for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in this case as part of the public planning process.

23. In applying the "reasonable person" test in this instance the Tribunal stated:

*"in view of our findings ... that at the relevant time the usual practice of the council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided) ... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing."*²

24. On the basis of the explanations provided by the council, the content of the withheld information and the above criteria, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence. From the arguments supplied by the council, the Commissioner considers that the circumstances gave rise to an obligation of confidence. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law and considers that this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

25. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
26. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to

² Published online here:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

environmental information and ultimately the EIR were based) 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 Commissioner considers that this interpretation is also more consistent with the general scheme of the EIR 12(5) exceptions, which require that "disclosure would adversely affect" the relevant interests identified in each exception. Unlike FOIA, there is no lesser test of "would be likely to adversely affect".
28. The council has argued that disclosure would cause harm to both its own legitimate economic interests and to those of JDL.

Harm to the council's legitimate economic interests

29. The council has argued that it is committed to delivering its Town Hall scheme and that it has invested considerable time and resources to this end. It considers that disclosure of the information would threaten its ability to deliver the scheme.
30. The council has suggested that, should information about its discussions and negotiations with JDL be disclosed it may result in parties withdrawing their support for the scheme, resulting in financial losses to the council and the loss of economic and employment benefits for local council tax payers.
31. The council considers that disclosure of the information would be likely to affect its bargaining position in developing sustainable growth and prosperity in the district which would result in the less effective use of public money.
32. The council has also argued that disclosure of the information would make it less likely in the future that third parties would provide it with information which is commercially sensitive, undermining its ability to promote sustainable growth and prosperity in this district.

Harm to JDL's legitimate economic interests

33. In relation to the alleged harm to JDL's economic interests, the Commissioner has considered JDL's submissions.
34. JDL has argued that, should information relating to its discussions with the council be disclosed, it would prejudice its commercial position and destroy its opportunity to develop the site. It confirmed that it considered that all discussions with the council are absolutely private

because the content is commercially sensitive and disclosure could be injurious to its ability to complete a deal.

35. The council has not provided the Commissioner with any specific arguments regarding the harm which would be caused to JDL's legitimate economic interests.

The Commissioner's conclusions

36. In evaluating the council's arguments, the Commissioner has applied the criteria identified above, namely, that in order for the exception to be engaged it must be demonstrated that, on the balance of probabilities, some harm would be caused by disclosure.
37. The Commissioner accepts the general principal that disclosure of information which relates to commercial activities which are incomplete and subject to discussion is likely to have an impact on these activities. However, for the exception to be engaged, the impact must be shown to be harmful to parties' economic interests and the likelihood of the harm occurring must be shown to be more likely than not.
38. Having considered the council's arguments in this regard, the Commissioner notes that they are highly speculative in nature, making reference to the general, potential effects of disclosure of commercial information on projects of this nature. The Commissioner further notes that the potential effects of disclosure sketched by the council are not explicitly linked to the specific information which is being withheld and, having viewed the information, it is not apparent that the information is relevant to the supposed effects of disclosure.
39. In relation to the council's suggestion that disclosure would result in third parties being less likely to provide it with commercially sensitive information in future, the Commissioner is sceptical of this argument. Public sector contracts and re-development schemes can provide lucrative opportunities for private companies and the Commissioner considers it unlikely that third parties would opt to exclude themselves from such openings.
40. In relation to the alleged harm which disclosure would cause to JDL's legitimate economic interests the council has not provided any specific arguments which explain the nature of the harm or demonstrate the likelihood of the harm occurring.
41. Having considered the arguments provided by JDL the Commissioner notes that these are generic and simply define the information as being "commercially sensitive" with no explanation which links the content of the information to any specific harm.

42. In cases where an authority has failed to provide arguments which demonstrate that an exception relied upon is engaged the Commissioner considers that he is not obliged to generate arguments on the authority's behalf. Regulation 12(2) of the EIR advises that, in handling requests for information, authorities should apply a presumption in favour of disclosure. The Commissioner considers, therefore, that when taking a decision to refuse a request, there is a burden on authorities to demonstrate that there are sufficient grounds for overturning the presumption in favour of disclosure.
43. In order for this exception to be engaged, it has to be shown that disclosure of the confidential information would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner has concluded that the council has not demonstrated that disclosure would harm its own or JDL's economic interests and he has, therefore, decided that the exception is not engaged. He has not gone on to consider the public interest arguments.

Right of appeal

44. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF