

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

Decision notice

Date: 26 March 2013

Public Authority: Amber Valley Borough Council

Address: Town Hall
Market Place
Ripley
Derbyshire
DE5 3XE

Decision (including any steps ordered)

1. The complainant requested 4 reports and confidential background papers regarding the 'Ripley Gateway Development' The council claimed that the information is exempt under Regulations 12(4)(e) (internal communications), 12(5)(d) (confidentiality of proceedings), 12(5)(e) (commercial confidentiality) and 12(5)(f) (voluntary supply). On review it provided the majority of the information to the complainant however it continued to redact figures and a small number of paragraphs from the information it disclosed. It also applied Regulation 13 (personal data of a third party).
2. The Commissioner's decision is that Amber Valley Borough Council was correct to apply the exception in 12(4)(e) to some information and 12(5)(e) to the remaining information. As such he has not considered the application the other exceptions claimed.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 17 April 2012 the complainant wrote to Amber Valley Borough Council and requested information in the following terms:

"Further to this FoI request for the release of confidential papers regarding the 'Ripley Gateway Project', I wish to extend the request to those papers marked "confidential" (on the same subject matter) dated 29 February 2012 and 28 March 2012."

5. The council responded on 1 May 2012. It stated that the information was exempt under Regulations 12(4)(e)(internal communications), 12(5)(d) (confidentiality of proceedings), 12(5)(e) (commercial confidentiality) and 12(5)(f) (voluntary supply).
6. Following an internal review the council wrote to the complainant on 28 June 2012. It upheld its original findings for the same reasons.
7. However during the course of the Commissioner's investigation the council reconsidered its position and decided to disclose the majority of the information to the complainant. It still redacted small sections from some documents, (relying upon the same exceptions). It also added a further exception, applying Regulation 13 to two sections of information.

Scope of the case

8. The complainant contacted the Commissioner on 4 July 2012 to complain about the way his request for information had been handled.
9. The Commissioner considers that the complainant wishes to know whether the exceptions have been applied correctly to the remaining withheld information.

Reasons for decision

Regulation 12(4)(e)

10. The council applied Regulation 12(4)(e). This provides that information will be exempt from disclosure where the information is internal communications.
11. The information is sections of confidential reports to cabinet from the chief executive of the council. Although some of the information contained within the report is known outside of the council (by the proposed developer of the land) the reports themselves are internal reports that have only been shared within the council. The Commissioner is therefore satisfied that the information qualifies as internal communications. He has therefore gone on to consider the public interest test required by Regulation 12.

12. The test, provided in Regulation 12(1)(b) is whether the public interest in the information being disclosed is outweighed by the public interest in the exception being maintained. Regulation 12(2) provides a specific presumption in favour of the disclosure of the information.

The public interest in exception being maintained

13. Broadly, there are 2 different types of information which have been redacted from the reports under Regulation 12(4)(e). These are
 - a. figures relating to the financial aspects of the contract, and
 - b. background issues which have been reported to cabinet so that they are fully informed when making decisions. Regulation 13 has also been applied to some of this information by the council
14. Part of the underlying rationale behind Regulation 12(4)(e) is that public authorities should have the necessary space to think in private. The purpose is to create space for officers within public authorities to think and discuss policies in a full and frank manner away from external pressures, comment or interference. Whilst matters are still 'live' and decisions are still to be taken the public interest in maintaining this safe space will usually be high. Where matters are no longer live the public interest in the exception being maintained can be significantly weakened or extinguished.
15. Part of the process of project development will be to provide full and frank reports to councillors to keep them informed and updated on the project as it develops. This is so that they are fully informed when making any decisions and can have input during the course of the project if they consider there is need.
16. In addition to the need to discuss policies away from external involvement, if sensitive information is disclosed, particularly whilst discussions are ongoing, there could also be a chilling effect upon the willingness of officers to provide full and frank information to councillors in the future. This would ultimately have a detrimental effect upon the quality of future decision making.
17. The complainant argues that at the time of his request an agreement had already been signed between the parties involved and there was therefore no longer a requirement for safe space; the necessary decisions had already been taken and announcements made about the proposals. The council however argues that negotiations were still ongoing with third parties at the time that the request was received.
18. The Commissioner accepts the complainant's argument that, as at the date of the request, a key decision (to proceed with development option

B) had already been taken and announced. He therefore considers that there was no longer any need for a safe space, away from external involvement, in which to discuss and reach a decision on this matter.

19. However he also recognises that other agreements were still in negotiation at the time that the request was received. He therefore accepts that for these, related negotiations, a safe space was still needed for the council to discuss and agree how best to proceed.
20. In relation to the chilling effect mentioned above the Commissioner accepts that this would be likely to occur in this case primarily because council officers would think that if some information were to be disclosed at too early a point in time, it would result in an adverse effect upon the project itself because of the disclosure of sensitive commercial information. The officers would therefore be less frank in how they expressed their views, for fear of compromising the project. The Commissioner considers that this argument carries significant weight in this case because there were still some aspects of the project which remained live as at the date of the request.
21. This chilling effect would in turn be detrimental to the records maintained about the council decisions. If the advice given was less full and frank then it follows that the record of that advice would reflect this.
22. There is therefore a strong public interest in both the protection of the council's safe space in which to make decisions, and in protecting against a chilling effect. This is in order for public authorities to be able to carry out their work efficiently and effectively.

The public interest in the information being disclosed

23. As noted above, the vast majority of the information within the reports has now been disclosed to the complainant. There is however still a public interest in the remaining information being disclosed in order to increase transparency and accountability for the decisions that have been taken and are still to be taken.
24. The public interest arguments in favour of the information being disclosed are considered in more detail in the relevant section of the analysis of Regulation 12(5)(e) below. In essence there is a strong public interest in the disclosure of the information in order to inform interested parties and allow them to make representations to the council. This will allow them to make better, more informed comments as regards the planning consultations and the development in general.
25. A disclosure of the information would also be in accordance with the aspirations of the Aarhus agreement, from which the EIR are derived.

One of the aims of this agreement is to enhance the ability of individuals to have a greater say in environmental decisions which affect them.

Conclusion as regards the information related to the ongoing negotiations

26. As stated above there are broadly two types of information that have withheld in this case; figures related to the financial aspects of the negotiations and background information provided to assist in decision making.
27. The Commissioner considers that for the background information related to the ongoing negotiations there is both a strong safe space argument and a strong chilling effect argument. He concludes that the public interest in maintaining the exception for this information outweighs the public interest in disclosure.
28. For the figures related to the financial aspects of the ongoing negotiations, the Commissioner also considers that there is a strong safe space argument. He accepts that the council needs a safe space, away from external involvement, in which to consider these figures and decide how best to proceed with the ongoing negotiations.
29. He does not, however, give weight to the chilling effect argument for this information. The Commissioner considers that council officers must provide elected members with updates on the projects they are working on, and as part of that it would be necessary to provide the necessary financial information in order for members to fully understand the project. He does not accept that council officers would be likely or even able to provide less free and frank figures in the same way as they might provide less free and frank advice.
30. The Commissioner concludes that the public interest in maintaining a safe space in which to discuss the figures and decide how best to proceed, even in the absence of a valid chilling effect argument, outweighs the public interest in disclosure of this information.
31. The Commissioner therefore considers that, for all the information related to the ongoing negotiations, the council was correct to maintain the exception in Regulation 12(4)(e).

Conclusion as regards the information related to the decision to proceed with option B

32. Again there are broadly two types of information related to the decision to proceed with option B that have been withheld, figures and background information.

33. As regards both the figures and the background information, the Commissioner does not accept that any safe space to reach a decision away from external involvement was required as at the date of the request.
34. As regards the figures the Commissioner does not give any weight to the chilling effect argument either. This is for the same reasons as set out in paragraph 29 above.
35. For the background information the Commissioner does give some weight to the chilling effect argument. This because he accepts that if background information about the decision to proceed with option B were to be disclosed, this would affect the willingness of council officers to be free and frank in their discussions and advice about the ongoing negotiations.
36. For the background information the Commissioner concludes that the public interest in maintaining the exception outweighs the public interest in disclosure. For the figures, he concludes that the public interest in maintaining the exception is not sufficient to outweigh the public interest in disclosure.
37. As the Commissioner has found that the figures related to the decision to proceed with option B should not have been withheld under regulation 12(4)(e), he has gone to consider whether this information should be withheld under regulation 12(5)(e).

Regulation 12(5)(e)

38. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
39. The Commissioner has not considered information where he decided that Regulation 12(4)(e) was applicable. This essentially leaves the financial figures related to the decision to proceed with option B, which were redacted from the reports.
40. The Commissioner notes that the withheld information relates to the commercial agreements which the council was considering with the developer. It provides, to an extent, the core financial details of the package to councillors for their consideration.
41. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares*

Association (EA/2010/0012). All four elements are required in order for the exception to be engaged:

- A. The information is commercial or industrial in nature.
 - B. Confidentiality is provided by law.
 - C. The confidentiality is protecting a legitimate economic interest.
 - D. The confidentiality would be adversely affected by disclosure.
- A. The information is commercial or industrial in nature
42. The Commissioner is satisfied that the information relates to commercial information. It is financial information relating to the sale of land for the development of a supermarket .It relates to the financial and commercial deals which the council has entered into with the developer. The criterion in A is therefore met.
- B. Confidentiality is provided by law
43. As regards whether the financial information is held under an obligation of confidence, the council has not provided any details of any contractual confidentiality to the Commissioner. However it is relatively normal in circumstances such as this for information of this sort to be considered confidential by both parties given its commercial sensitivity. If asked, both parties would be likely to confirm that their understanding was that their negotiations were being carried out in confidence. In effect an implied duty of confidence is created and so an obligation of confidence exists between the parties.
44. The information is not trivial and is not otherwise publicly available. The Commissioner is therefore satisfied that the information also has the necessary quality of confidence.
45. The Commissioner is therefore satisfied that the information is held under a duty of confidence by both parties, and that that duty is provided by the common law.
- C. The confidentiality is protecting a legitimate economic interest
46. The legitimate economic interests of the council are to ensure that it achieves the best value for money from the sale of the land and any deals associated with that. The developer also has a legitimate economic interest in protecting the information so that details of its agreements are not disclosed, thereby potentially affecting its future contractual negotiations or tenders. In this case the Commissioner notes the ongoing negotiations which the council is undertaking with third parties.

47. The Commissioner notes that a disclosure of the information would provide details of the financial agreements between the parties. The figures themselves provide an overview of the financial deal agreed between the developer and the council.
48. The council provided arguments in support of its application of the exception. It stated that a disclosure of the information *"is necessary to safeguard legitimate economic interest including ensuring that competitors do not obtain such commercially valuable information, to protect the commercial bargaining position of the council and those third parties who provided the information to the council in relation to the current and future negotiations.*
49. The council further added that a disclosure of the information would risk adversely affecting the council's ability to deal with the land in question. In particular it considered that disclosure could result in negotiations breaking down and risking the council and council tax payers from being able to secure the best value for money from the proposed development. This would have an adverse effect on the funds available to the council in order to carry out its services and functions. It argues that it would also adversely affect the potential benefits the proposed development and the sale of land would have on the local community. It said that it would also adversely affect the council's relationship with third parties to whom the information relates and would also adversely affect these third parties and risk damaging their business affairs.
50. The council did not provide any arguments from the developer in respect of the information other than this. The Commissioner, following the Information in tribunal in the case of Derry City Council v ICO (EA/2006/0014) has therefore not considered any arguments on behalf of the developer.
51. The Ripley Gateway website at <http://www.ripleygateway.co.uk/news.html> states that agreements had been signed between the developer, the supermarket and the council by 18 January 2012. The complainant questions the redactions which have been made given that agreements have already been reached between the parties. It appears from the Ripley Gateway website that the main part of the deal was, at time of the request agreed. The council however said that it was still in negotiations with third parties and that negotiations would continue to occur in the future.
52. The Commissioner considers that as the agreement to proceed with option B had already been made the commercial sensitivity of the figures is somewhat reduced. However he does accept that the confidentiality is still required to protect the council's legitimate economic interests.

53. Although agreements have been signed the development remains subject to planning permission. Although it is possible that planning permission could be granted without any variations to the current plans, the Commissioner accepts that it is more probable than not that there will be at least some variations to the current plans as a result of planning requirements. He therefore considers that the figures remain commercially sensitive as they may be subject to some renegotiation. .
 54. The Commissioner also notes that agreements were still being negotiated with third parties at the time that the request was received. A disclosure of the financial information related to the decision to proceed with option B during those negotiations could provide valuable information to the third parties which would have an adverse effect upon the ability of the council to negotiate the best deals it can in the circumstances.
 55. The complainant has stated that figures such as market value of the land will generally be well known amongst other commercial organisations and so the sensitivity of such information is questionable. The Commissioner accepts this argument. However such figures will revolve around an average, with different valuers providing different values for the same piece of land. The councils consideration of the market value of the land can also affect the outcome of the negotiations should they be reopened at any time. As an internal report, figures which a chief executive has provided to cabinet may not in all cases reflect the figures which the developer agrees with and which have been used between the parties during negotiations.
- D. The confidentiality would be adversely affected by disclosure.
56. As the Commissioner has found that the confidentiality of the figures is still required to protect the council's legitimate economic interests, he also accepts that the confidentiality would be adversely affected by the disclosure of this information.
 57. The Commissioner therefore finds that regulation 12(5)(e) is engaged and has gone on to consider the public interest test required by Regulation 12 to the information withheld under this exception.

The public interest in the information being disclosed

58. The Commissioner has considered the presumption of disclosure provided by Regulation 12(2), and the aspirations behind the Aarhus agreement of allowing greater public participation in decision making where matters of the environment are concerned. Knowledge of the financial aspects of the deal is essential to fully understand the nature of the decision taken by the council.

59. The complainant provided arguments in respect of the application of exceptions to the whole report. The subsequent disclosure of much of the report has negated some of these arguments, however some remain relevant to the redaction of the financial figures related to the decision to proceed with option B.
60. The complainant considers that the council has breached many of its own policies when considering the project. The council argues however that the plan will still be subject to planning approval, albeit by this council.
61. The complainant also argues that the council has set itself in a position where it is both partial developer and also the planning authority set to approve the development. The Commissioner does understand this argument, however in his experience this does not appear to be unusual. The Planning Authority is set within the council but is required to act independently of it when considering planning applications. This does not deal entirely to the complainant's concerns; however it occurs in many, if not all councils who hold an interest in developments of this kind. A council's actions insofar as the disposal of assets and management of the community infrastructure is concerned may inevitably lead it to having to make planning decisions on land it once, or still partially owns, or developments which it retains an interest in.
62. Land with planning permission already approved will generally be worth much more than land which does not have planning permission. It may therefore be in the interests of the council to seek planning permission prior to negotiations with any third party developer. However the council may also chose not to take forward the planning application and leave this to the developer as part of its negotiations. It may for instance chose to do this where it believes that the planning approval may prove to be difficult or resource intensive to obtain.
63. The complainant suggests that the councils own analysis demonstrates that there is no requirement for a further supermarket in the area.
64. The complainant has also submitted arguments relating to the affect upon the environment which the development will have. He points out that the development will:
 - i. on one part of the site, 'Employment Land' is converted to housing;
 - ii. outside the Development site, greenbelt is assigned for another 430+ houses;
 - iii. the Development site is currently a Recreation Ground and Open Space; and
 - iv. on another part of the site, greenbelt is converted to Employment Land.

65. The Commissioner notes that the matters raised by the complainant are generally planning considerations. Information on the agreements has been disclosed other than the financial details and the other information as outlined above. Some of the arguments are therefore not as strong when considering the financial aspects of the agreement alone.
66. The Commissioner recognises however that there is a public interest in financial information on the development being disclosed. The costs or benefits of the decision to take forward this proposal cannot fully be known by the community without the associated financial information being disclosed to provide a full overview of the deal which has been reached..
67. There is therefore a public interest in this information being disclosed in order to provide transparency, greater public awareness of the proposals impact on the community and to create confidence in the council's decision making. A disclosure of this information would further inform public debate on the issues involved.

The balance of the public interest

68. In *UK Coal v Information Commissioner & Others (EA/2010/0142)* the First Tier tribunal and the Upper Tribunal addressed itself to financial information which had been excluded from a contract which had been requested from the council. The tribunal recognised commercially sensitive financial information which it considered should not be disclosed in that case, whilst deciding that the surrounding information should be disclosed.
69. In this case the council has divulged the majority of the surrounding information whilst withholding the sensitive financial information and details of its negotiations with third parties.
70. In effect, interested parties will understand the major part of the proposals albeit that they will not know the exact figures which have been agreed. The Commissioner considers that this is an appropriate way of approaching transparency in this case.
71. The Commissioner understands that the agreement may require further negotiation, albeit that the Ripley Gateway website states that agreement has already been reached. The requirement for planning permission effectively means that the deal is unlikely to go through on exactly the same terms as originally envisaged. The Commissioner recognises that the potential for changes to be made or requirements to be added to the development by the planning authority when providing planning permission is more than likely in a development of this size and

nature. A disclosure of the financial figures prior to this therefore would have adverse effect upon the commercial interests of the parties. Details of the third party negotiations are included within para 6:24 of the report dated 17.11.10 confidential item 16(b) and the council argues that these are still ongoing.

72. If for instance planning permissions requires that the number of houses to be developed is lowered or their value altered to create further affordable houses, or alternatively the size of the intended supermarket needs to be amended this may affect the overall viability of the project for the developer. The agreement may then need to be varied or may simply not go ahead. A renegotiation may then need to take place between the parties or the council and other parties. Therefore the figures within the documents are still relevant and negotiations may still potentially be ongoing even if the terms of this agreement have been reached.
73. The Commissioner recognises the value of providing all of the information to the community in order that it can have a greater say in council decisions which will affect the area and the environment around it. Although the financial figures would help to formulate and inform individuals opinions about the proposal it is not absolutely necessary in order to understand the central aspects of what the proposal is, what damage to the environment may occur and what the benefits of the proposals are. That information has already been disclosed other than details of the ongoing negotiations with third parties.
74. The Commissioner therefore considers that at this time, the public interest in the exception being maintained outweighs the public interest in the information being disclosed. The council was therefore correct to apply Regulation 12(5)(e).
75. Given the Commissioner's decision on the above he has not gone on to consider the council's application of Regulations 12(5)(f) and 12(5)(d) further.

Right of appeal

76. 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

77. 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.
78. 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

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