

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

Decision notice

Date: 8 January 2014

Public Authority: St Albans City and District Council

Address: Civic Centre
St Peters Street
St Albans
Hertfordshire
AL1 3JE

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed housing development at Oaklands College. St Albans City and District Council refused to provide the requested information citing the EIR exceptions for adverse affect to commercial confidentiality (regulation 12(5)(e)) and adverse affect to the interests of the person who provided the information (regulation12(5)(f)).
2. The Commissioner's decision is that has failed to demonstrate that regulation 12(5)(e) and regulation 12(5)(f) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
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 June 2013, the complainant wrote to St Albans City and District Council (the "council") and requested information in the following terms:

"Please provide copies via email of all minutes/notes of meetings, formal or informal, between Taylor Wimpey and SADC Planning department, regarding proposals to build 350 homes on Oaklands College land on Sandpit Lane. The dates required are from 1 Jan 2012 – 13 June 2013.

Please also provide copies via email, of any email, written correspondence, formal or informal, between SADC Planning Department and Taylor Wimpey or Oaklands College regarding the above proposed development. The dates required are 1 Jan 2012 – 13 June 2013."

6. The council responded on 16 July 2013 and refused to provide the requested information citing the exception for adverse affect to commercial confidentiality (regulation 12(5)(e) of the EIR).
7. Following an internal review the council wrote to the complainant on 6 August 2013. It stated that it was maintaining its decision to rely on regulation 12(5)(e) in withholding the requested information.

Scope of the case

8. On 13 August 2013 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 his investigation would determine whether the council was entitled to withhold the requested information under regulation 12(5)(e).
10. During the course of the Commissioner's investigation, the council disclosed some of the formerly withheld information to the complainant. In addition to maintaining its reliance on regulation 12(5)(e) in relation to the remaining withheld information, the council confirmed that it also considered the information should be withheld under the exception for adverse affect to the interests of the person who provided the information (regulation 12(5)(f)).
11. The Commissioner has considered whether the council has correctly applied exceptions to withhold the outstanding requested information.

Reasons for decision

Regulation 12(5)(f) – interests of the person who provided the information

12. Regulation 12(5)(f) of the EIR states that information can be withheld where its disclosure would have an adverse affect upon:

"...the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure"

13. The Commissioner considers that the question of whether the exception is engaged can be determined by a five-stage test:

- Would disclosure adversely affect the interests of the person who provided the information?
- Was the person under, or could they have been put under, any legal obligation to supply the information?
- Did the person supply the information in circumstances where the recipient public authority, or any other authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?
- Does the public interest in maintaining the exception outweigh that in disclosure?

Would disclosure adversely affect the interests of the person who provided the information?

14. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse affect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

15. In considering whether there would be an adverse affect in the context of this exception, a public authority needs to identify harm to the third

party's interests which is real, actual and of substance (i.e., more than trivial). An authority also needs to explain why disclosure *would*, on the balance of probabilities, directly cause the harm.

16. There is no requirement for the adverse effect to be significant, however, authorities applying the exception will need to explain why it is more probable than not that specific harm will occur and identify a causal link between disclosure and the identified effect(s).
17. In providing evidence in support of the ascribed harm public authorities may consult with the third party whose interests are at stake. In this case, the council consulted with third party (the "developer") and sought its views on the disclosure of the information.
18. The Commissioner has been provided with a copy of the developer's response. This states that the disclosure of the information would erode its trust in the council's ability to protect the confidence of information. As a result of this, the developer (and no doubt other parties) approach towards the pre-application process would substantially alter, the result being harm to the council's ability to run the planning system and operate a pre-application advice service.
19. The developer has explained that it engaged with the council's pre-application service on the understanding that all dialogue and exchange of material would be treated with confidence and not made publically available. It has argued that, should the information be disclosed, it would be more cautious about engaging with the council's pre-application advice process, something which would not reflect the full, helpful and positive process of engagement envisaged within the National Planning Policy Framework (NPPF)¹.
20. The Commissioner notes that the harm identified by the developer does not relate to its own interests but rather to the alleged impact of disclosure on the council's pre-planning advice process and its attendant ability to satisfy the NPPF. The Commissioner cannot identify any argument submitted by the developer which explains what specific harm will occur to its interests or identifies a causal link between disclosure and the identified effect(s). However, as ultimate responsibility for

¹ The NPPF sets out the Government's planning policies for England and how they are expected to be applied:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf

responding to requests rests with public authorities, the Commissioner has also referred to the council's submissions in this regard.

21. Having considered the council's arguments, the Commissioner notes that, again, these are focussed on the potential damage of disclosure to the pre-application advice process. It has not been explained to the Commissioner how the speculated future reluctance of developers to provide information to the council as part of this process represents a specific adverse affect to the interests of the developer in this instance.
22. The exception at 12(5)(f) requires there to be an adverse affect to the interests of the information provider. Having considered the council's and the developer's submissions, the Commissioner considers that the council has failed to demonstrate that any interests of the developer would be affected should the information be disclosed. The Commissioner therefore finds that the exception at 12(5)(f) is not engaged.
23. As regulation 12(5)(f) is not engaged the Commissioner has not gone on to consider the public interest test in respect of this exception.

Regulation 12(5)(e) – commercial confidentiality

24. 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".
25. 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?
26. The Commissioner has considered each of these factors as they relate to each element of the withheld information.

Is the information commercial or industrial in nature?

27. 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.

28. The council has stated that the information relates to a development of land by a commercial developer with a view to making profit from the sale of houses.
29. Having viewed the information in question the Commissioner is satisfied that it is commercial in nature and that this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

30. 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.

Whose interests?

31. In this case, the withheld information was provided by the developer to the council and the council has confirmed that it considers that it owes a duty of confidence to the developer. The council has argued, and the Commissioner accepts, that confidentiality in this case is provided to protect the legitimate economic interest of the council and the developer.

Legitimate economic interests

32. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
33. The council has argued that the developer provided it with the information which is being withheld in order to obtain advice and engage in discussion prior to a planning application. The council has argued that the information relates to both its own economic interests and those of the developer.

Disclosure would cause harm

34. The Commissioner considers that in assessing whether disclosure of information would cause harm, public authorities need to consider the

sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure.

35. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
36. The council has explained that, as part of its pre-planning submission, the developer provided details of its proposed development, including information about what would be built, how it would be viable and what contributions it would make as part of the application.
37. According to the council, the information was provided by the developer for the sole purpose of obtaining advice on whether the proposed scheme would be likely to obtain planning permission. Disclosure of the information, the council argues, would affect negotiations between the developer and the council (as the Local Planning Authority (LPA)) because these negotiations rely on trust between the parties. Should the information, which was shared in confidence, be disclosed, this trust would be damaged.
38. The council has gone on to argue that, were the information to be disclosed, other developers would be unlikely to share information about commercially viable building proposals for fear of these being shared with the public.
39. The Commissioner considers that the argument used by the council shares some characteristics with "chilling effect" arguments often used in support of the exception for internal communications (regulation 12(4)(f)).
40. The chilling effect argument as constructed by the council states that, should pre-application information provided by a developer be disclosed, this would have an impact on negotiations between the developer and the council. This effect would produce a further effect, namely, that the developer and developers in general, would be less likely in future to provide the council with pre-planning information.
41. The Commissioner considers that chilling effect arguments may, depending on the sensitivity of the information in question and the likelihood of adverse effects arising, may have some validity. However, in this case, the council's arguments are insubstantial and, in any event, the Commissioner considers that they would be more relevant in relation to the exemption provided by section 36(2) of the FOIA, namely the prejudicial effects of disclosure on the council's ability to conduct its affairs.

42. Whilst the Commissioner can follow the chain of consequences identified in the council's argument, in order for regulation 12(5)(e) to be engaged, it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests. The Commissioner considers that the council's argument, whilst identifying possible effects, fails to address the specific criteria required for the exception to be engaged.
43. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner does not consider that he has a duty to generate arguments on its behalf.
44. In this case, the Commissioner has decided that the council has failed to show how disclosure of the information would result in harm being caused to the developer's or its own commercial interests. Whilst the Commissioner is mindful that pre-application advice is provided within a confidential context, since the introduction of the EIR, authorities should be aware that no information can be subject to a blanket restriction on disclosure. It is the duty of authorities to show in each specific instance that information is being withheld for the reasons identified in the exception being applied.
45. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

46. 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: GRC@hmcts.gsi.gov.uk

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

47. 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.
48. 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
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