

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 June 2015

Public Authority: Basingstoke and Deane Borough Council

Address: Civic Offices
London Road
Basingstoke
RG21 4AH

Decision (including any steps ordered)

1. The complainant has requested information relating to a prospective housing development. Basingstoke and Deane Borough Council refused the request citing the exception for adverse affect to the confidentiality of commercial information (regulation 12(5)(e) of the EIR).
2. The Commissioner's decision is that Basingstoke and Deane Borough Council has failed to demonstrate that regulation 12(5)(e) of the EIR is engaged.
3. The Commissioner requires the public authority to disclose the requested 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 28 January 2015, the complainant wrote to Basingstoke and Deane Borough Council (the "council") and requested information in the following terms:

"I would like to make a request...for all information held on your data files on a submission made relating to Sherfield-on-Loddon. Plans for up to 114 homes in Goddards Farm have been unveiled. A request for a

screening opinion was sent to BDBC on December 10. It asks for council advice on whether the plans are likely to need an Environmental Impact Assessment.

I would therefore request that such information relating to the Environmental Impact Assessment and the consultant involved in the application for Goddards Farm is made available."

6. The council responded on 9 March 2015 and confirmed that the information was held. It refused to provide the information, citing the exception for adverse affect to the confidentiality of commercial information (regulation 12(5)(e) of the EIR).
7. Following an internal review the council wrote to the complainant on 30 March 2015. It stated that it was maintaining its original position.

Scope of the case

8. On 11 May 2015 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 consider whether the council had correctly withheld the information under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

10. 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".
11. The council has applied regulation 12(5)(e) to all the information specified in the request, namely a request made by a developer (to the council) for a screening opinion in relation to an Environmental Impact Assessment and limited associated correspondence.
12. 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?

Is the information commercial or industrial in nature?

13. 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.
14. The information in question relates to a proposed development of dwellings.
15. Having considered the council's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information relates to a commercial transaction, namely the development of land for sale of housing. This element of the exception is, therefore, satisfied.

Is the information subject to confidentiality provided by law?

16. 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.
17. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
18. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, Megarry J, 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."¹

19. In applying the 'reasonable person' test 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 approved)... 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 realised that that was what the developer was doing."*²

20. The Commissioner notes that the information in question was provided to the council within the broad context of pre-application planning discussions. In relation to the 'reasonable person' test, a relevant question is whether the information was shared in circumstances creating an obligation of confidence. The Commissioner considers that this 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.

21. The Commissioner considers that, where information relates to the development of land, particularly where such processes are incomplete and where other contingent factors would be affected by such disclosure, it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence. The Commissioner accepts that there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, the Commissioner is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

22. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate

¹ Coco v A N Clark (Engineers) Ltd [1969] RPC 41.

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[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)

economic interest of the person (or persons) the confidentiality is designed to protect.

23. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
24. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probable than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This 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".
25. The council has argued that disclosure of the information would result in harm to the developer's legitimate economic interests. The specific arguments in support of this position were made in the council's initial response, at the internal review stage and in its submission to the Commissioner. The Commissioner has considered whether these arguments are sufficient to engage the exception.
26. The council confirmed that it consulted with the developer and that the developer has stated that it has an "on-going process to secure their legal position which requires professional integrity". The developer has confirmed to the council that there is an "...agreed non-disclosure within the discussions and the disclosure of information at this stage will lead to a breach of duty and a non-compliance issue for failure to communication (*sic*) with other affected parties at the most appropriate time."
27. The council has submitted that confidentiality in the above negotiations is required to protect all parties' economic interests until such time that the legal agreement is completed and all parties can comply with their statutory duties.
28. Having considered the council's submissions the Commissioner notes that the council has not identified any specific harm which would result from disclosure of the information. Whilst he acknowledges that the developer is involved in a legal process this is not a relevant factor in the context of this specific exception. In any event, the Commissioner considers that it is not enough for an authority to define an economic interest to engage the exception – it must also be shown that there is a causal link between disclosure of withheld information and specific harm

to an identified economic interest. In this instance, the Commissioner can find no evidence within the council's submissions which meet this requirement.

29. The Commissioner understands the general principle that information relating to negotiations will carry some sensitivity whilst such negotiations are ongoing; however, he considers that it is for authorities to fully explain the relevant causes and effects in any given instantiation of this principle. In this case, the Commissioner considers that the council has failed to do this.
30. 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.
31. 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

32. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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