

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

Date: 16 November 2017

Public Authority: Wokingham Borough Council
Address: Shute End
Wokingham
Berkshire
RG40 1BN

Decision (including any steps ordered)

1. The complainant has requested recorded information from Wokingham Borough Council which concerns the Council's intended acquisition of land at Broken Brow, close to the Thames Valley Park. At the time the complainant submitted his request negotiations to buy the land at Broken Brow were still on-going. The Council determined that the information it holds, and which falls within the scope of the complainant's request, should be withheld in reliance on Regulation 12(5)(e) of the EIR on the grounds that it is commercially sensitive and confidential.
2. The Commissioner's decision is that Wokingham Borough Council correctly applied Regulation 12(5)(e) to the information it has withheld from the complainant.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. The complainant initially wrote to Wokingham Borough Council and requested information in the following terms:

"1. Hereby I make an application under the Freedom of Information Act for all documentation relating to the intended acquisition by the Council of Broken Brow, whether from Oracle or another person or corporation, including all communications between the Council's officers and Oracle."

5. The Council responded to the complainant's request on 25 November 2016 to advise him that it was refusing his request in reliance on section 43 of the FOIA. The Council informed the complainant that "the land is to be used for a Park and Ride scheme and negotiations are ongoing with Oracle".
6. On 7 December 2016, the complainant wrote to the Council to ask for an internal review. The complainant asserted that, under the 2009 House of Commons Guidance on Regulation 3 applications, where a planning authority applies to itself for planning permission [section 43] does not apply. The complainant's email referred to an additional request for information which he had submitted to the Council on 25 November 2016. The terms of the complainant's additional request are:

"In the meantime I would like to make a more specific FOI request for any information which has been exchanged between the planning department and the department which is responsible for negotiating with Oracle for the purchase of the land at Broken Brow, concerning those negotiations."
7. The Council completed its internal review and wrote to the complainant on 3 February 2017. The Council informed the complainant that his request should have been considered under the Environmental Information Regulations 2004 rather than under the FOIA. Notwithstanding this, the Council determined that the outcome would have been the same since the relevant exception under Regulation 12(5)(e) would have been applied.
8. Confusingly, the Council appeared to have introduced additional exemptions under sections 36(b) and 36(c) of the FOIA, which it would also seek to rely on in order to withhold the requested information.
9. The Council's final decision was that the information should not be released.

Scope of the case

10. The complainant contacted the Commissioner on 15 February 2017 to complain about the way his request for information had been handled.
11. The complainant asserts that the Council has applied a Section 43 to information which should not apply to Regulation 3 planning applications, where the authority is the applicant. The complainant disputes the Council's response that, "The guidance provided does not prevent the relevant exemptions from being correctly applied to the original request. Firstly, the guidance is not primary legislation and as such does not override the provisions of the Freedom of Information Act

2000 or the Environmental Information Regulations 2004. Secondly, the guidance refers to a procedure which has since been substantially amended and changed since publication”.

12. The complainant also asserts that the Council has failed to explain how the 2009 House of Commons Guidance has been amended or changed, in order to apply the Section 43 exemption, which he believes did not originally apply before 2009.
13. The Commissioner has investigated the Council’s withholding of information in reliance on Regulation 12(5)(e).
14. During the course of her investigation, the Council advised the Commissioner that it now considers its application of sections 36(b) and 36(c) to be an error. The commissioner has therefore not considered these exemptions.

Is the withheld information ‘Environmental Information’?

15. Initially the Council considered the complainant’s request concerned negotiations and financial aspects associated with the proposed Park and Ride scheme at the Broken Brow site. Following its internal review the Council accepted that the negotiations relate to the plans of how this land will be used. Having reviewed its position, the Council now accepts that it should have considered the complainant’s request under the Environmental Information Regulations 2004.
16. The Council has drawn the Commissioner’s attention to publicly available environmental reports which were carried out to survey the habitat, flood risk and air quality. The Council acknowledges that this information concerns the state of the elements of the environment, factors affecting or likely to affect those elements, and measures or activities affecting or likely to affect those factors or elements.
17. The Commissioner agrees with the Council that the complainant’s request falls to be considered under the EIR.

Reasons for decision

Regulation 12(5)(e)

18. The Council has confirmed to the Commissioner that it relies on Regulation 12(5)(e) of the EIR to withhold information within the scope of the complainant’s request.

19. Regulation 12(5)(e) provides an exception to the duty to disclose environmental information if disclosure would adversely affect –

"the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
20. To support its application of Regulation 12(5)(e), the Council has advised the Commissioner that the Thames Valley Park and Ride scheme will improve the infrastructure in the area covered by Wokingham Borough Council and Reading Borough Council as the land at Broken Brow will be used for traffic schemes to help reduce traffic congestion and thereby benefit the public.
21. The Council has identified its own commercial interests as being those that would be adversely affected if the requested information was to be disclosed at this time. The Council argues that it needs to be in a position to negotiate and gain the best value for its tax payer's money.
22. The Council has informed the Commissioner that its negotiations to buy the land for the intended Park and Ride scheme are on-going, and to release the details of the negotiations at this stage would create the opportunity for other potential bidders for the land to join the process. In the Council's opinion, this would likely raise the price of the land to the detriment of the Council and its Council Tax paying residents.
23. Should the Council be required to disclose the requested information, it would be at a time when the Council needs to make considerable savings, approximately in the region of £20 million over the next few years.
24. The Council argues that it has to ensure that public money is put to the best use in running and improving services and in the provision of the facilities it offers to its residents and visitors.
25. The Council considers that releasing the withheld information during the on-going negotiations would not be in the Council's best interests for achieving best value for money in terms of its contracts and procurements.
26. The Council has advised the Commissioner that it has not liaised with any third parties in respect of its negotiations. It says,

"There is a degree of common sense to this and in how negotiations are carried out between two, or more, parties for the buying and selling of an item. If a seller knows the amount of money that a buyer has available to them then they would be able to work to the top figure and get the best deal for them, and this also applies to other information

that may form part of the negotiating strategy, not just the financial figure(s)."

27. The Commissioner asked the Council about the likelihood of its commercial interests being adversely affected through the disclosure of the requested information.

28. The Council was unable to quantify how its identified commercial interests would be affected, instead it stated:

"We cannot take the risk in releasing information during on-going negotiations, which will then increase the price of purchasing the land. If other parties become interested, this would increase the amount the Council would have to pay, much like if multiple parties were interested in buying a house, it will sell for above the asking price".

29. The Council summed up its position as:

"We are of the view that releasing the information would more likely than not be detrimental to the Council's negotiating position and increase the amount of money that has to be paid to purchase this land".

30. For the Regulation 12(5)(e) exception to be properly applied, the Commissioner considers that the following conditions need to be met:

- 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 of the information?

31. For the withheld information to engage the exception provided by regulation 12(5)(e) it must relate to commercial activity or be industrial by its nature. The information must relate to the commercial activity of either the public authority concerned or to that of a third party.

32. The Commissioner considers that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

33. The Commissioner has considered the representations made by the Council and she has no difficulty in finding that the withheld information is commercial in nature.

34. For the second element to be met the information must be subject to confidentiality which is provided by law. This may include confidentiality imposed under a common law duty of confidence, a contractual obligation or be provided by statute.
35. The Council considers that the withheld information is of a commercial nature as concerns the purchase of land. The Council asserts that, at the time the request was made, the withheld information was considered to be confidential and this is attested by some of the withheld information being marked as confidential.
36. The Council advised the Commissioner that the negotiations to buy the land in question are on-going and therefore confidentiality is still relevant to this commercially sensitive material and the Council's commercial interests.
37. 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.
38. In consideration of the Council's submissions, the Commissioner is satisfied that the withheld information is not accessible to parties outside of the Council. She is content that the information contained in the withheld documents is not trivial in nature.
39. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*¹, 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."
40. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and the very limited distribution of the withheld information, the Commissioner has concluded that the withheld information has the necessary quality of confidence.
41. In the Commissioner's view, on the balance of probabilities, the Council's commercial interests 'would' be harmed by disclosure of the

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

withheld information. In making this determination, she is assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that 'would' means 'more probably than not' and she notes the interpretation guide for the Aarhus Convention which gives the following guidance on legitimate economic interests:

"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".

The Commissioner's conclusions

42. The Commissioner acknowledges that the withheld information contains information which is of commercial value. She considers that disclosure of that information would adversely affect the Council's legitimate economic interests.
43. The Commissioner considers that disclosure of the withheld information would provide third parties with information which the Council has not made public in the context of a competitive market. She therefore finds that disclosure of the withheld information would be detrimental to the Council's commercial interests and in consequence of this she has decided that the exception provided by regulation 12(5)(e) is engaged.

The public interest

Arguments which favour disclosure of the information

44. Reliance on regulation 12(5)(e) is subject to consideration of the public interest.
45. The Commissioner will always give significant weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities and where the decisions concern large amounts of public expenditure.
46. In this case disclosure of the withheld information would promote transparency in respect of the Park and Ride Scheme at the Broken Brow site and would allow the public to judge whether the Council was achieving value for money.
47. Should the withheld information be disclosed, the Council's residents would be able to engage in more informed debate and gain greater understanding of how the Council's decisions which affect them.

Arguments which favour withholding the information

48. In this case, the Council's emphasis is placed squarely on its on-going negotiations to buy land at Broken Brow and why, at the time of the

complainant's request, disclosure of the withheld information would have a significant detrimental effect on its ability to achieve best value for money.

49. It is clear to the Commissioner that the Park and Ride Scheme and the acquisition of the land at Broken Brow requires the significant expenditure of public money. The Council is the guardian of this money and it is charged with achieving best value. Should the withheld information have been disclosed at the time the complainant made his request, achieving best value is less likely to have been achieved.
50. All the parties involved need to be confident that they are engaged in a process which is truly confidential in order to provide commercial benefit to the Council and its constituents.

The Commissioner conclusions

51. The Commissioner has given weight to the arguments relating to the promotion of transparency and accountability of the Council through the disclosure of publicly held information. This is especially the case where large amounts of money are involved and where the expenditure concerns a significant development as in this case.
52. Ultimately the Commissioner has decided that the greatest weight has to be given to the confidential nature of the withheld information. She cannot dismiss the obvious need for the Council to operate with a necessary degree of commercial confidentiality.
53. The Commissioner must recognise that the Council is operating in a competitive market where candour is often not in the public interest.
54. In the Commissioner's opinion the Council must be able to conduct business such as the purchase of land within a confidential environment. Disclosure of the withheld information would likely jeopardise the Council's ability to achieve its plans in respect of the proposed park and ride scheme and also to achieve best value for money.
55. The Commissioner's decision is that the Council is entitled to withhold the information requested by the complainant in reliance of Regulation 12(5)(e).

Other matters

56. The Council has provided the Commissioner with clarification concerning the assertion made by the complainant at paragraph 12 above. The Council has advised the Commissioner that the House of Commons guidance refers to negotiations between a local authority as landowner

and the local authority as a Local Planning Authority. In this case, the negotiations for the acquisition of land is with a third party – Oracle and therefore they are not covered.

57. The information that would be covered, would be any information concerning the Council's Highways department's negotiation with itself as the Local Planning Authority.
58. The Planning department has had no involvement with any negotiations between the Council and Oracle in respect of the site at Broken Brow.
59. Planning permission can be sought and granted before the Council becomes the owner of the site.
60. The Council has advised the Commissioner that, "...negotiations are on-going with a third party for the acquisition of land [...] once the land has been acquired we would be looking to release the information if requested."

Right of appeal

61. 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

62. 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.
63. 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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