

Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 September 2017

Public Authority: Shepway District Council
Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information from Shepway District Council ("the Council") about a planning application for a proposed holiday lodge development on land at Little Densole Farm.
2. The Council provided some information but refused to provide the remainder citing EIR regulation 12(5)(e) – confidentiality of commercial or industrial information.
3. The Commissioner's decision is that the Council is entitled to rely on regulation 12(5)(e) for that information within the scope of the request which remains withheld
4. No steps are required.

Request and response

5. On 27 March 2017 the complainant wrote to the Council and requested the following information:
 - 1) A copy of the Business Plan submitted to the Council in respect of planning application Y16/0623/SH;

- 2) Details of which members of the Planning and Licencing Committee who were present at the meeting on Tuesday 28th February 2017 requested before the meeting at 7pm, to view the above-mentioned Business Plan which is held by the Shepway Planning Department in conjunction with the application.
6. The Council responded on 26 April 2017 in which it informed the complainant that it holds the information within the scope of part 1 of his request, however refused to provide it citing the exception under EIR regulation 12(5)(e) – confidentiality of commercial or industrial information. In respect of part 2 of the request the Council advised the complainant that the information is not held by the Council.
7. The complainant requested an internal review of the Council's decision in respect of part 1 of his request on 10 May 2017 and received the outcome on 11 May 2017. The Council upheld its decision to refuse this part of his request on the basis of EIR regulation 12(5)(e).

Scope of the case

8. The complainant contacted the Commissioner on 15 May 2017 to complain about the way part 1 of his request for information had been handled, and asked the Commissioner to encourage the Council to respond to his request fully.
9. During the course of the Commissioner's investigation the Council disclosed to the complainant a redacted copy of the requested Business Plan, and subsequently disclosed a further version with fewer redactions. It maintained reliance on EIR regulation 12(5)(e) in respect of the information which it continued to withhold.

The Commissioner considers that the scope of the case is whether the Council was correct in its decision to continue to withhold this information under EIR regulation 12(5)(e).

Reasons for decision

10. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the 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. For regulation 12(5)(e) to be appropriately applied the Commissioner considers that the following conditions, adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (appeal number EA/2010/0012), need to be met:

- The information must be commercial or industrial in nature;
- It must be subject to confidentiality which is provided by law;
- That confidentiality must protect a legitimate economic interest; and
- The confidentiality would be adversely affected by the disclosure of the information.

Is the information commercial or industrial in nature?

12. 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 or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods, usually for profit.

13. The Council contends that the withheld information is commercial in nature and falls into two categories:

- i. The capital costs of the works needed for the proposed development to proceed; and
- ii. Financial forecasts relating to the running of the development.

14. The Council submitted that that capital costs relate to the work that the applicants intend to carry out. They are estimates of the money they expect to pay. It is their intention to procure these works; the purpose of these works is to construct the development from which they intend to profit.

15. The financial forecasts are based on renting the lodges; renting out the lodges and operating the development would be a commercial activity.

16. The Commissioner has been provided with a copy of the withheld information and is satisfied that the withheld parts of the applicant's business plan are commercial in nature and therefore this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

17. In relation to this element of the exception the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
18. The Council has argued that the information is subject to the common law of confidence. Using the Commissioner's own guidance it explained that the information was not trivial; it concerns a development with a significant estimated capital cost and also sets out the assumptions made on the profitability of the proposal, which is again not trivial information. Whilst the report to the planning and licencing committee sets out the business plan in general terms and draws conclusions it does not place in the public domain this information.
19. The Council asserts that there is an expectation on behalf of the applicants that the information was shared in confidence and would not be disclosed. It considers that the obligation of confidence is explicit. The front page of the business plan contains the words "Strictly Confidential" and in addition paragraph 1.02 states "Due to the sensitive information within this document, we respectfully request that this document is not released into the public domain". Applying the test "*whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence*" the answer, in the council's view is "yes".
20. The Commissioner agrees that the information is not trivial and accepts that the capital costs of a proposed development and its associated operational costs and projected profits would be confidential. At the time of the request, procurement of the works necessary to develop the land had not commenced and so the Commissioner accepts that the information is subject to confidentiality which is provided by the common law of confidence.

Is the confidentiality protecting a legitimate economic interest?

21. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
22. The Council has referred to the Commissioner's own guidance which explains 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.

23. In this case the Council has said that the confidentiality is protecting the legitimate economic interests of the applicants. The Commissioner considers that if it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. The Council has consulted with the applicants and their solicitor in respect of the complainant's request for a copy of the business plan, and sought their views in relation to its disclosure. Having been provided with a copy of the relevant communications the Commissioner is satisfied that the Council's submissions reflect the views of the third party.
24. The Council considers that the legitimate interest is the protection of a commercial bargaining position in the context of future negotiations both in respect of the capital works and rental income. It asserts that there is a clear link between disclosure of the withheld information and protecting the commercial bargaining position of the applicants both in seeking tenders for the works and in marketing the land.
25. Having read the withheld information the Commissioner accepts this argument as wholly reasonable and so this element of the exception is satisfied.

Would the confidentiality be adversely affected by disclosure?

26. The complainant asserted that he does not see how revealing the business plan would prejudice the commercial interests of any applicants. This is because the plan is a proposal only, and therefore cannot contain price sensitive information, as any such information at this stage is hypothetical and speculative.
27. He stated that as presented, the business plan is incomplete as it contains no market research, no competition analysis and no 'SWOT' analysis, and therefore no strong evidence for reasons to withhold it. All the claimed facts and figures are given by the applicant's agent and are therefore 'self-serving and irrelevant', and cannot be regarded as unbiased. Consequently it cannot be claimed that disclosure would assist a business competitor or compromise the applicant's position in the marketplace, and therefore withholding information on this basis is irrational.
28. In the Council's view, the first three elements of the exception are established and hence, in accordance with the Commissioner's guidance this element is consequently satisfied.

29. The Council has explained that at the time of the request the applicants intended to invite tenders for the work (and have done so since the date of the request). The disclosure of the information would corrupt the tendering process in that those bidding for the work would know the price the applicants would expect to pay. This could lead to a higher price being paid; it would certainly ensure that any competitive bids would be based on knowledge of the applicant's expectations. This could lead to the applicants paying higher prices; certainly they would be different to ones received where the tender was put out normally.
30. As far as the information regarding rental income and financial viability is concerned, the council submitted that the applicants would be placed at a disadvantage with competitors and booking organisations. The business plan reveals the profit margin and so competitors would seek to undercut prices, or in the case of booking organisations, press down on the rental price.
31. In making her determination, the Commissioner is assisted by the Tribunal in determining how 'would' needs to be interpreted. She accepts that 'would' means 'more probable 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".

Having examined the withheld information, and in consideration of the Council's arguments, the Commissioner has decided that, on the balance of probabilities, the applicant's commercial interests 'would' be harmed by disclosure. Accordingly she has decided that EIR regulation 12(5)(e) is properly engaged in this case.

The public interest test

32. Having determined that EIR regulation 12(5)(e) is properly engaged, the Commissioner is now obliged, by virtue of Regulation 12(1), to consider whether it is in the public interest that the information is disclosed and whether the public interest in disclosure is greater than the public interest which favours its continued maintenance of the exception as its basis for withholding the requested information.

Factors favouring disclosure

33. The complainant considers, in light of the decision of the members of the planning and licencing committee to approve this application against

council officer advice, that for complete transparency the business plan, which is an integral part of the planning application, should be in the public domain for all to view.

34. The complainant's position is that if the information is connected to how the proposal will be financed he feels this should be available to the public so that it can be demonstrated that the proposal is a viable venture in such a sensitive location. He pointed out that this application is for developing and building on a protected landscape, designated as an Area of Outstanding Natural Beauty, and therefore there should be complete transparency for such an application to be approved by the Council, particularly as it went against the recommendation of an experienced, professional planning officer who represented a robust and clear report. As the business plan is referred to in the council officer's report he contends that it should be in the public domain so that it can be demonstrated that no bias has been applied in reaching the decision, and that the doubts within the business plan raised by the council officer have been properly addressed and considered.
35. The Council acknowledges the importance of transparency and that the public wish to know how decisions are made and on what basis.

Factors favouring maintenance of Regulation 12(5)(e)

36. The Council contends that there is a strong public interest in protecting commercially sensitive information and in preventing others from obtaining information which belongs to the applicants which would cause harm to those applicant's legitimate economic interests.
37. In addition, applicants who openly engage with public authorities should not be disadvantaged against their competitors who do not. If such information is released applicants will be less likely to engage openly with local authorities in relation to future development opportunities.
38. Details of the business plan sufficient for a decision to be made on the matter and for the public to know what was being considered were contained in the public report; it does not, in the Council's view, aid transparency of the decision for the withheld details to be made public.

The Commissioner's position

39. Regulation 12(2) of the EIR places great importance on transparency and expressly states that a public authority should apply a presumption in favour of disclosure.
40. The Commissioner recognises that there is public interest in disclosure to the extent that it would permit scrutiny of the Council's actions. In

particular she recognises that there is a public interest in transparency and accountability in relation to the Council's decision to approve the proposed development, contrary to the planning officer's recommendations. There is compelling public interest in disclosing as much information as possible to satisfy the legitimate concerns that the public have about such a proposal, particularly as the proposal involves development of land designated as an Area of Outstanding Natural Beauty.

41. However, the Commissioner accepts there is a strong public interest argument in maintaining commercial confidentiality and that applicants should have confidence that they can disclose confidential matters openly to the council. Release of such information may make applicants more reluctant to provide such information thus making it harder for the local planning authority to carry out its statutory duty of assessing planning applications. She further agrees that there is public interest in ensuring that competitive commercial negotiations are conducted fairly and on a 'level playing field'.
42. Having viewed the withheld information, the Commissioner agrees with the Council's submission that disclosure of the withheld information would not aid the public's understanding of the decision making process, nor would it allay any concern about bias on the part of the planning and licencing committee. In particular, the Commissioner notes that in correspondence she received from the complainant in respect of this case, the complainant stated that following enquiries with the Council, it appears none of the committee requested to view the business plan prior to making their decision and so cannot have considered its contents when coming to their decision. Accordingly the Commissioner does not agree with the complainant that disclosure of the report would assist the public in understanding the rationale behind the committee's decision.
43. Furthermore, an appraisal of the business plan is contained in the Council officer's report to the planning and licencing committee and as such the Commissioner feels that the public have sufficient information regarding the content of the plan which was considered, and that the withheld parts of the plan will not further enhance the public's understanding of the decision making process.
44. Having viewed the withheld information and balanced the public interest arguments the Commissioner's decision is that the factors in favour of maintaining the exception outweigh those in favour of disclosure, and accordingly the Council has applied EIR regulation 12(5)(e) appropriately to those parts of the business plan which remain withheld.

Right of appeal

45. 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

46. 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.
47. 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