

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

Decision notice

Date: 13 September 2018

Public Authority: East Devon District Council

Address: Knowle
Sidmouth
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant has requested information regarding a viability assessment for a housing development scheme at the Knowle site in Sidmouth. East Devon District Council provided the relevant documents but redacted some information, under EIR Regulation 12(5)(e), confidentiality of commercial information. During the investigation and at the Commissioner's direction the council reconsidered the request under the EIR.
 2. The Commissioner's decision is that East Devon District Council has correctly applied Regulation 12(5)(e) and is entitled to withhold the information. By initially failing to respond to the request under the correct regime, the Commissioner finds the council breached regulations 5(1) and 14(2).
 3. The Commissioner does not require East Devon District Council to take any further steps.
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Request and response

4. On 17 December 2017 the complainant wrote to East Devon District Council ('the council') and requested information relating to a proposed housing scheme in the following terms:

"I would like you provide me with the following:

[1] The full un-redacted "viability evidence to demonstrate that the scheme would not be viable if it were to provide affordable housing."

[2] The full thread of paperwork which demonstrates that the "council has accepted" the viability evidence.

[3] The full, un-redacted assessment of this information from the "specialists" in development viability who have confirmed that the development cannot afford to meet the council's policy requirements for affordable housing"

The 106 agreement has been made available. Nevertheless I would like you to provide me with:

[4] The full thread of paperwork which demonstrates the precise mechanisms by which the section 106 agreement "will seek to obtain a contribution towards affordable housing in the event that the scheme is more profitable than currently envisaged"

5. The council responded on 17 January 2018. In relation to each question it:

[1] Provided a copy of the document "Viability Report: The Knowle, Sidmouth – Update" with "a small number of redactions made in the appendices to remove information which is commercially confidential. This information is withheld under s43(2) of the Freedom of Information Act 2000."

[2] Provided the "Viability Report: The Knowle, Sidmouth – Update – October 2017" written by Plymouth City Council; the "Response to Viability review – October 2017" from GL Hearn (property consultancy on behalf of the developer) and the "Response to Developers Comments – November 2017" from Plymouth City Council which also contains redactions.

[3] Referred the requester to the provided report from Plymouth City Council named ""Viability Report: The Knowle, Sidmouth – Update."

[4] Advised "*The s106 agreement can be accessed here <http://eastdevon.gov.uk/planning/view-planning-applications-enforcements-and-planning-appeals/> - enter the application reference in the search box 16/0872/MFUL.*"

6. The complainant requested an internal review on 22 February 2018 stating "*I would now like you to provide me with the following: The full, un-redacted viability evidence to demonstrate that the scheme would not be viable if it were to provide affordable housing*"
7. Following an internal review the council wrote to the complainant on 21 March 2018. It upheld its decision regarding the redactions citing the exemption at FOIA section 43(2) – prejudice to commercial interests.

Background

8. The request for information relates to a proposed housing scheme on land which is the site of the council's offices in Sidmouth. The request identified viability evidence, provided by the developer as part of the planning process, and the council's viability assessment.
9. The proposed development is on land formerly owned by the council, subsequently sold to PegasusLife. A related Decision Notice (FER0626901, dated 25 October 2016) required the disclosure in full of the contractual agreement between the council and the developer for the sale of the land housing the council's main offices.
10. The council reports that "*there has been some interest from the public in land sale and valuation issues but this request, and redacted information, consists purely of financial detail provided by a developer in relation to construction and does not relate to the spending of public funds.*"
11. The complainant submits that the requested information "*has clearly been central to determining the scope and value of the agreement between the parties*"; he also submits that "*the issue of affordable housing is indisputably a matter of public interest.*"
12. The viability assessment was undertaken independently of the council by Plymouth City Council, who in turn received independent advice.

Scope of the case

13. The complainant contacted the Commissioner on 22 March 2018 to complain about the way his request for information had been handled.

Specifically in terms of the redacted information, stating: *"they claim that the information I have requested with regard to the viability report affects a third party and as such should not be disclosed; however, as EDDC (East Devon District Council) will itself benefit directly from selling its own land to the planning applicant, I would claim that all the financial figures contained therein are therefore in the public interest"*

14. Furthermore the complainant stated: *"As both the council and the developer have insisted that the development would be 'unviable' if affordable housing were provided, it is therefore in the public interest that the full set of costs be made available – including any anticipated contingency, profit and construction costs."*
15. During the course of the investigation the Commissioner recommended that the council review the request in terms of the EIR rather than the FOIA. The council accepted this view and revised its position to rely on the exception at regulation 12(5)(e) - confidentiality of commercial or industrial information.
16. The redactions apply to the documents named *"Viability Report: The Knowle, Sidmouth – Update"* and the *"Response to Developers Comments."* The Commissioner has reviewed the redacted information, which, in summary, comprises of information relating to:
 - Build and construction costs
 - % risk assumptions and cost contingency
 - Proposed payment plans
 - Performance measure in terms of profit on cost %
17. The Commissioner considers that the scope of this case is to establish whether the council has correctly engaged the exception at regulation 12(5)(e) to the redacted information. If it has, then she will consider where the balance of public interest lies.

Reasons for decision

Regulation 2(1) - Environmental Information

18. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.

19. Regulation 2(1) of the EIR defines environmental information as information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste... emissions... and other releases into the environment, likely to affect the elements referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;...”.
20. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The information in this case relates to the development of land and offices, formally owned by the council, for a proposed housing scheme which will clearly result in the repurposing of the site for a different use.
21. The Commissioner therefore finds that the information is environmental and should be considered under the EIR.
22. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) the EIR. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.
23. If a public authority is refusing a request for information under regulation 12 or 13, then under regulation 14 it must issue a refusal notice within 20 working days. By virtue of failing to deal with the request under the correct regime, the council has also breached regulation 14 of the EIR.

Regulation 12(5)(e) – commercial confidentiality

24. Regulation 12(5)(e) states that:

'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

e) 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. She 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?

26. In her guidance on regulation 12(5)(e) the Commissioner considers that *"for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party.¹"* The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

27. To support this condition, the council states: *"the redacted information consists of proposed construction and contingency costs, fees and profit for a private company. This is commercial information."*

28. Having reviewed the withheld information the Commissioner is satisfied that it is commercial in nature and therefore the first condition has been met.

Is the information subject to confidentiality provided by law?

29. In the Commissioner's view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.

30. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

information was shared in circumstances creating an obligation of confidence.

31. The Commissioner considers that confidence 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.
32. The council stated that the withheld information *"was provided in respect of a planning appeal to evidence the viability position of the applicant and, although the developer was effectively obliged to supply the information, there is a reasonable assumption that detailed costs supplied as part of the planning process are supplied in confidence. The information has been viewed by an independent assessor and, as it didn't form part of the formal consideration of the appeal by the Inspector, has not been distributed any more widely."*
33. The Commissioner notes that the information relates to anticipated contingency, profit and construction costs of the developer. As such she agrees that it is not trivial in nature. Furthermore she acknowledges that the information was provided to the council with an expectation that it would be handled in confidence, and that it has not been shared widely.
34. The Commissioner is thus satisfied that the information is subject to confidentiality provided by law and that the second condition has been met.

Is the confidentiality provided to protect a legitimate economic interest?

35. In her guidance on regulation 12(5)(e), the Commissioner defines 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."*
36. The council has explained that the purpose of the redactions are to protect the economic interests of the developer. It states that *"The release of this information, in advance of contracts being awarded, would weaken the developer's economic position in a competitive market by disclosing publicly the amounts budgeted for construction and contingency. This would harm their negotiating position and their ability to maximise profit."*
37. The council confirmed, at the time of the investigation, that the developer had not awarded contracts for the construction work. As such the Commissioner is satisfied that the confidentiality is provided to

protect the developers commercial bargaining position and that this is a legitimate economic interest.

Would the confidentiality be adversely affected by disclosure?

38. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect the legitimate economic interest of the person the confidentiality is designed to protect.
39. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.
40. The Commissioner has been assisted by the Tribunal in determining how 'would' needs to be interpreted. She accepts that 'would' means 'more probably 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". (Emphasis added)*
41. It is therefore necessary for a public authority to demonstrate that disclosure would, on a balance of probabilities (ie more likely than not) harm the legitimate economic interests of the person the confidentiality is designed to protect in order to engage the exception. Unlike the Freedom of Information Act 2000 (the FOIA) there is no lesser test of 'would be likely to' adversely affect.
42. The council advised the Commissioner that *"the release of this information, in advance of contracts being awarded, would weaken the developer's economic position in a competitive market by disclosing publicly the amounts budgeted for construction and contingency. This would harm their negotiating position and their ability to maximise profit."*
43. *Furthermore the council stated "the key point here is that contracts for this construction work have not yet been awarded. We accept, and anticipate that the developer will accept, that, once contracts have been awarded, the sensitivity of these figures will reduce and, once that has happened, and with the agreement of the developer, we may at that point re-consider whether it is appropriate to publish fuller detail. Clearly*

the timescale for this is not something over which the council has any control though."

44. The council confirmed that it had consulted with the developer to understand its views in respect of providing a full version of the requested information. The developer stated that the redactions should be maintained because *"this information, if disclosed would put costs and other commercially sensitive information in the public domain in advance of a contract being let for the construction of the proposed development at the Knowle Sidmouth and would therefore prejudice the commercial interests of PegasusLife.*
45. The council has stated that disclosure of the amounts budgeted for construction and contingency at the pre-contract stage would weaken the developer's economic position and harm their negotiating position.
46. The Commissioner agrees that the arguments presented by the council and the developer demonstrate it to be likely that disclosure would adversely affect the legitimate economic interests of the developer. As such she finds that the final condition of the regulation has been met.
47. The Commissioner has therefore determined that Regulation 12(5)(e) is engaged and consequently must now consider where the balance of public interest lies.

The public interest test

48. The council's reliance on 12(5)(e) is subject to a consideration of the public interest test. Under Regulation 12(1)(b) a public authority may refuse to disclose environmental information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
49. Under Regulation 12(2) a public authority shall apply a presumption in favour of disclosure.
50. The Commissioner considers that weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. Such disclosures assist the public in their understanding of how public authorities make their decisions and in turn they are likely foster greater trust in public authorities.
51. Furthermore she considers that in many circumstances the disclosure of recorded information may allow greater public participation in the decision making process.

Public interest test arguments in favour of disclosure

52. The complainant asserts that the council benefits directly from the sale of the land to the developer and that the withheld financial formation would have been central to the valuation of that sale. He states that the redacted costs have been at the heart of public debate regarding the council's decision to sell the land. He advises that the East Devon Alliance Group (a local community activist organisation and political party) stated *"it was an exceptionally bad deal, because, in accordance with the old land buyer's rule of thumb, the landowner of a site should expect around a third of its developable value."*
53. The complainant also argues that the viability of affordable housing is *"indisputably a matter of public interest... as both the council and the developer have insisted that the development would be unviable if affordable housing were provided, it is therefore in the public interest that the full set of costs be made available – including any anticipated contingency, profit and construction costs."*
54. The council acknowledges that *"because the development in this case is taking place on land formerly owned by the council, there has been some interest from the public in land sale and valuation issues."*

Public interest in maintaining the exemption

55. The council stressed that the viability assessment was undertaken independently of the council by Plymouth City Council, who in turn received independent advice. It asserts that the exemption is invoked to protect the commercial interests of a private company, rather than the council. It maintains that the redacted information is regarding the developer's costs and therefore does not relate to the spending of public funds.
56. The council argues that *"the public benefit lies in protecting the commercial interests of companies enabling them to continue to operate in a competitive and efficient market."*

Balance of the public interest arguments

57. The Commissioner acknowledges the compelling public interest arguments regarding the sale of land previously owned by the council relating to the subsequent profit margins achieved by the developer. Furthermore she recognises that there is public interest in viability assessments and decisions regarding affordable housing.
58. The Commissioner considers that the timing of this particular request is an important factor when balancing the public interest arguments for

and against disclosure. She is conscious that at the time of the request the commercial negotiations are ongoing and that contracts for the construction work had not been awarded. She accepts that disclosure of the withheld information would harm the negotiating power of the developer which may result in the negotiation of less favourable terms.

59. The Commissioner has decided, with due consideration of the timing of the request in relation to the commercial negotiations, that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception.

Right of appeal

60. 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

61. 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.
62. 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