

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 June 2019

Public Authority: Folkstone & Hythe District Council
Address: Civic Centre
Castle Hill Avenue
Folkstone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested copies of specific financial viability assessments in relation to a piece of land Folkstone & Hythe District Council is proposing to purchase. Folkstone & Hythe District Council provided some information but withheld the remainder under regulation 12(5)(e) (confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest) of the EIR.
2. The Commissioner's decision is that Folkstone & Hythe District Council has applied regulation 12(5)(e) of the EIR appropriately.
3. The Commissioner does not require Folkstone & Hythe District Council to take any steps as a result of this decision notice.

Background

4. At the time of the request, Folkestone & Hythe District Council (the council) was involved in negotiations for the purchase of land, (the Ship Street site), which had contamination issues.

Request and response

5. On 21 September 2017, the complainant wrote to the council and requested information in the following terms:

"Please could you provide me with all copies of the financial viability assessments produced by:

Savills (Valuers),

Betteridge and Milsom (Quantity Surveyors)

IDOM Merebrooks (Remediation Engineers)

I would expect this to include any emails between SDC and the above with all attachments."

6. The council responded on 18 October 2017. It provided some information but refused to provide the remainder citing regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
7. Following an internal review the council wrote to the complainant on 6 November 2017. It upheld its application of regulation 12(5)(e).

Scope of the case

8. The complainant contacted the Commissioner on 16 November 2017 to complain about the way his request for information had been handled. He explained that he considered that the requested information was not environmental information.
9. The Commissioner had already issued a decision notice -FER0669764¹ - in relation to a request from the same complainant to the present council, regarding the purchase of land with contamination issues.
10. During her investigation into the present complaint, the decision notice in relation to FER0669764 was being considered by the First-tier Tribunal. It was agreed that the present request would be put on hold until that was completed. However, that appeal is now being considered by the Upper Tribunal and the complainant explained that rather than

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014872/fer0669764.pdf>

wait for that decision, he wanted a decision notice regarding his present complaint.

11. The Commissioner also notes that during her investigation the council changed its name from Shepway District Council to Folkestone & Hythe District Council.
12. The Commissioner will consider the council's application of regulation 12(5)(e) and the way in dealt with the request for information.

Reasons for decision

Is the requested information environmental information?

13. Regulation 2(1)(e) of the EIR states that 'environmental information' constitutes cost-benefit economic analyses and assumptions used within the framework of the measures and activities referred to in 2(1)(c).
14. Regulation 2(1)(c) of the EIR states that 'environmental information' constitutes information on measures such as policies, plans and activities which are likely to affect environmental elements and factors. These are listed in regulations 2(1)(a) and (b).
15. The Commissioner considers that, given that the request relates to the proposed purchase and development of land and land is considered an element for the purposes of regulation 2(1)(a), it falls under the EIR.
16. During the Commissioner's investigation, the council disclosed some information it had previously withheld.
17. The Commissioner has considered the remaining withheld information which consists of: costings, revenue predictions, a cost summary, valuation appraisals and a letter from the council to Idom Meerebrook regarding a site appraisal.
18. The Commissioner will consider the council's application of regulation 12(5)(e).

Regulation 12(5)(e) – confidentiality of commercial or industrial information

19. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. It is also subject to the public interest test as set out in

regulation 12(1)(b): in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

20. When assessing whether this exception is engaged the Commissioner will consider the following points:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

21. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
22. The council explained that it was negotiating with the landowners of the Ship Street site; the financial viability report was commissioned to assess that site's value and therefore an appropriate price. It argued that this constituted commercial information.
23. The Commissioner has considered the withheld information and is satisfied that it is an assessment of the site's value and appropriate price. She therefore considers that it constitutes commercial information.

Is the information subject to confidentiality provided by law?

24. The Commissioner considers that ascertaining whether or not information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
25. 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.
26. The council explained that the withheld information relates to prices, profits and costs. It argued that the withheld information was not trivial - it concerns the value and viability of a major potential commercial investment. It also explained that the development of the Ship Street site (if carried out successfully) would result in the construction of 85 - 91 new units of housing and will be of financial benefit to it (and by extension, taxpayers).

27. The council also pointed out that the information was provided as part of a process in which the parties involved had an expectation that the information would be held in confidence. In addition, it explained that the information was held under a duty of confidence with an expectation that it would not be widely accessed, circulated or distributed. The council also explained although the information had been shared internally with senior management and those officers directly involved in the project and dealing with the present information request, it had not been shared more widely.
28. The Commissioner accepts that the withheld information is subject to the common law of confidence. It is clearly not trivial, is not in the public domain and was shared in circumstances creating an obligation of confidence. She notes the council's explanation that the withheld information has been shared internally with senior management and officers directly involved in the project but does not consider that this means that it has been widely accessed, circulated or distributed.
29. The Commissioner considers that a reasonable person in the council's position would consider the withheld information to be confidential. The council intends to invite tenders for the remediation work, negotiate with developers to construct the houses and commercial spaces and put some of them up for sale and lease. Under these circumstances, it would be reasonable to consider that information regarding costs and projections relating to profits would be confidential to the council.

Is the confidentiality provided to protect a legitimate economic interest?

30. The Information Rights Tribunal (the Tribunal) considered this point in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011). It held that to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
31. In the Commissioner's view it is not enough that some harm might be caused by disclosure. She considers that it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.

32. The council pointed to the Commissioner's guidance on regulation 12(5)(e)² 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.
33. In this case, the Commissioner is satisfied that the confidentiality is protecting a legitimate economic interest ie a commercial bargaining position in the context of existing negotiations.

Would confidentiality be adversely affected by disclosure?

34. Given that the Commissioner considers that the information is confidential in nature, she is satisfied that disclosure of the withheld information would harm the council's confidentiality and legitimate economic interest.
35. The Commissioner therefore considers that regulation 12(5)(e) is engaged. She will go on to consider the public interest arguments from both parties.

Public interest arguments in favour of maintaining the exception

36. The council argued that the public interest in maintaining regulation 12(5)(e) strongly outweighed the public interest in disclosure.
37. It pointed out that negotiations were ongoing at the time of the request. It argued that disclosure would prejudice its ability to negotiate effectively and potentially adversely impact on its commercial interest. The council also explained that its wider ambitions for the development of the area could be put in doubt.
38. Additionally, the council argued that it was in the public interest for it to be able to function effectively in a commercial sphere. Disclosure of the information would jeopardise its position regarding its negotiations to purchase the Ship Street site, relative to other potential buyers. The council explained that as a public authority, it has a duty to negotiate

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

the best possible deal to protect the public purse, which in turn allows it to provide the best possible service. It pointed out that local government finance is under pressure and that the current baseline position suggested a total level of saving of £9,048,000.00 over the period 2017/18 to 2024/25 will be required to balance the budgets in each of those years. The council argued that it must be able to negotiate in the same manner as any other body and that publication could jeopardise its ability to negotiate effectively.

39. Furthermore, the council explained that there is no exclusivity agreement between it and the landowner for the sale of the site. Under normal circumstances, potential purchasers would commission their own research into the site, or approach the existing holder of such a report to negotiate access. The council argued that the publication of the withheld information would effectively give this information to other potential purchasers for free, enabling them to purchase the site at a lower cost without commissioning any research of their own. This would provide a distinct commercial advantage to potential purchasers and undermine the council's own negotiating position.
40. The council also explained that should it succeed in purchasing the site in question, it would be necessary to procure a contractor to undertake works. Additionally, it explained that it would look to withhold financial information relating to the cost estimates of these works to ensure value for money from prospective tenderers, ensuring they provide a competitive quote based on their own research, instead of quoting the council's own figures. The council confirmed that the remaining information and remediation report would be published with the finance information redacted.

Public interest arguments in favour of disclosing the requested information

41. The council acknowledged that there was a public interest in the development of new residential sites within Folkestone and that there was also always a general public interest in disclosure, deriving from the purpose of EIR and the general principles of transparency.
42. The complainant argued that the information should be disclosed. In support of this, he pointed to the previous decision notice issued by the Commissioner (referred to in paragraph 9), which dealt with the same council's purchase of a piece of land with contamination issues (as the land in question in the present request, has). He explained that paragraph 60 of that decision notice noted that the council had made the following statement:

"It is not the most attractive option for a developer which is why the public authority has struggled to attract them in the first place."

43. In addition, the complainant explained that in the present case, in report C17/37 which went before the council on the 27th Sept 2017, it states at bullet point 1:

"For decades, the Council has sought the development of this site for residential use but it has not attracted private investment" and "This has been the case because no developer has seen the site as an attractive option to develop."

44. The complainant also explained that Part 1 Schedule 12A of the Local Government Act 1972, section 9 states:

"Information is not exempt information if it relates to proposed development for which the local planning authority may grant itself planning permission pursuant to regulation 3 of the Town and Country Planning General Regulations 1992."

45. The complainant explained to the Commissioner that the requested financial viability assessments "relate to" the proposed development. He also explained that the council has made it abundantly clear that it would be going to planning committee to request planning permission. In addition, the complainant explained that all the monies spent on the financial viability assessments, which are "part of the planning application, have come from the council's coffers, not the developers, of which the council was only half of anyway."

46. The complainant also pointed out that the new revised planning policy guidance issued alongside the National Planning Policy Framework in July 2018, stipulates that any viability assessment should be made publicly available except in exceptional circumstances. In all cases, an executive summary should be prepared and made public.

47. The complainant argued that an executive summary at least should be released but he wanted the full financial viability assessments.

48. Subsequently, the complainant explained to the Commissioner that another planning application had been published. He also explained that this was supported by the planning guidance which provides that *"Any viability assessment should be prepared on the basis that it will be made publicly available."* He explained that paragraph 57 states:

"Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether

particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available."

49. The complainant also asked the Commissioner to reconsider her decision regarding the council "who had to release the requested information had failed to do so by law." This appears to be a reference to the previous decision. However, that decision is still in the appeals process as explained in paragraph 10.

Balance of public interest arguments

50. The Commissioner has considered the public interest arguments from both parties.
51. The Commissioner notes the complainant's arguments regarding the amended National Planning Policy Framework. She notes that this was published after the request for information was submitted.
52. The council explained that it considered that the balance of the public interest favoured non-disclosure. It argued that it must be able to carry out its commercial activities effectively. Disclosure of the information would jeopardise the negotiations options and how the council could operate in the future. It also reiterated that negotiations were still ongoing at the time of the request.
53. The Commissioner considers that there is a public interest in knowing about the purchase of land by a public authority which has contamination issues. She notes the complainant's point about a previous decision notice which deals with the council's purchase of land with contamination issues and the fact that she ordered disclosure in that case.
54. The Commissioner accepts that there are similarities between the present case and the previous as referenced by the complainant. However, she notes that in the previous case, at the time the request was submitted, the land in question had already been purchased. In the present case, at the time of the request, negotiations were ongoing. The Commissioner has considered the council's arguments regarding this point.

55. The Commissioner considers that it is important for public authorities to be able to carry out its commercial activities effectively. She considers that disclosure of the information whilst negotiations are ongoing, would jeopardise the negotiations for the options and how the council could operate in the future.
56. The Commissioner also gives weight to the council's argument regarding its duty to negotiate the best possible deal to protect the public purse and being able to negotiate in the same manner as any other body. She agrees with the council that publication could jeopardise its ability to negotiate effectively.
57. Furthermore, the Commissioner notes the council's explanation that there is no exclusivity agreement between it and the landowner for the sale of the site. She gives weight to the council's argument that disclosure would effectively provide information to other potential purchasers for free, enabling them to purchase the site at a lower cost without commissioning any research of their own. She therefore accepts that disclosure of the withheld information would provide a distinct commercial advantage to other potential purchasers and undermining the council's negotiating position.
58. The Commissioner also accepts that there is a need for confidentiality until negotiations have been completed.
59. The Commissioner also notes the council's explanation that should it succeed in purchasing the site in question, it would be necessary to procure a contractor to undertake works. She also notes its explanation regarding looking to withhold financial information relating to the cost estimates of these works to ensure value for money from prospective tenderers, ensuring they provide a competitive quote based on their own research, instead of quoting its own figures. The Commissioner does not give these arguments any weight as the council has not yet purchased the land in question.
60. The Commissioner has weighed the public interest in avoiding prejudice to the commercial interests of the council whilst negotiations are ongoing. Her conclusion is that the public interest in avoiding this prejudice is a strong factor and so considers that the public interest in maintaining the exception outweighs the public interest in disclosure.

Conclusion

61. Taking all of the above into account, the Commissioner is satisfied that regulation 12(5)(e) has been applied appropriately in this case. She also considers that the public interest in maintaining the exception outweighs the public interest in disclosure.

Right of appeal

62. 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

63. 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.
64. 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

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