

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 July 2019

Public Authority: Hartlepool Borough Council
Address: Civic Centre
Victoria Road
Hartlepool
Cleveland
TS24 8AY

Decision (including any steps ordered)

1. The complainant has requested information about an Economic Viability Assessment. Hartlepool Borough Council ("the Council") disclosed some information, and withheld the remainder under regulations 12(5)(e) and 12(5)(f).
2. The Commissioner's decision is that the Council has failed to demonstrate that regulations 12(5)(e) and 12(5)(f) are engaged. The Council has also breached the requirement of regulation 5(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
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 5 March 2018, the complainant wrote to the Council and requested information in the following terms:
 1. *The "revised Economic Viability Assessment", referred to in paragraph 1.88 of the Committee Report, submitted to the Council by the Applicant in December 2017 (or submitted in December 2017 on the Applicant's behalf).*
 2. *The notes, correspondence or other records of the Council's Assistant Director for Economic Growth and Regeneration, from 1 July 2017 until 31 January 2018, in which the viability of the Application was considered, particularly the confirmation that the revised Economic Viability Assessment was "broadly acceptable".*
 3. *The "previous Economic Viability Assessment" referred to in paragraph 1.86 of the Committee Report.*
6. The Council responded on 3 April 2017. It took the following actions:
 - In respect of parts 1. and 3. of the request, it withheld the requested information under section 43(2) and 41 of the FOIA.
 - In respect of part 2 of the request, it disclosed held information subject to some redactions under section 43(2) and 41 of the FOIA.
7. On 4 May 2018, the complainant asked the Council to undertake an internal review.
8. The Council provided the outcome of its internal review on 6 June 2018. It confirmed that the request should have been dealt with under the EIR, and stated that the withheld information was exempt under the exceptions provided by regulation 12(5)(e) and 12(5)(f).

Scope of the case

9. The complainant contacted the Commissioner on 30 July 2018 to complain about the way the request for information had been handled, and specifically that the Council was not entitled to rely upon regulations 12(5)(e) and 12(5)(f) to withhold information.
10. The Commissioner considers the scope of the case to be the determination of whether the Council is correctly applied regulations 12(5)(e) and 12(5)(f).

Reasons for decision

Regulation 12(5)(e) – Commercial confidentiality

11. Regulation 12(5)(e) states:

For the purposes of paragraph 1(a), 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.

12. The Commissioner's public guidance on this exception¹ explains that, in order for this exception to be applicable, there are a four conditions that must be met. These are:

- (i) Is the information commercial or industrial in nature?
- (ii) Is the information subject to confidentiality provided by law?
- (iii) Is the confidentiality provided to protect a legitimate economic interest?
- (iv) Would the confidentiality be adversely affected by disclosure?

13. The Commissioner's guidance goes on to clarify that, although condition (iv) is a necessary element of the exception, once the first three conditions are met, it is inevitable that condition (iv) will be satisfied.

(i) Is the information commercial or industrial in nature?

14. 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."* The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

15. The Council has informed the Commissioner that the information relates to the commercial activity of a third party, Tunstall Homes Limited, which is a developer seeking to create a housing development of 1200 residences on private land in the suburbs of Hartlepool. As of the date of

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

the request, the third party was negotiating with landowners over the sale price of the land. The withheld information includes the land values of the private land, the potential fees and profits of the third party, and costings. The Council considers that until such a time that the sale price is public knowledge, the information can be defined as commercial in nature.

16. Having reviewed the withheld information in conjunction with the Council's explanation, the Commissioner is satisfied that the information is commercial in nature, and that the first condition has been met.

(ii) Is the information subject to confidentiality provided by law?

17. 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.
18. 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.
19. 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.
20. The Council has informed the Commissioner that the information is not trivial, and has been provided it by the third party as evidence in support of a planning application. The Council has stated that "*...there is a reasonable expectation that detailed costs supplied as part of a planning application are supplied/handled in confidence and not divulged.*"
21. The Commissioner notes that the information relates to the anticipated profits and costs of the developer, and the Council's analysis of the developer's position. As such, she agrees that it is not trivial in nature. Furthermore, she acknowledges that the information from the developer was provided to the Council with an expectation that it would be handled in confidence, and that it has not been shared widely.
22. The Commissioner is therefore 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?

23. The First-tier Tribunal (Information Rights) ("the 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.
24. It is 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.
25. 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)*

The Council's arguments

26. In requesting the Council's submissions on this aspect, the ICO advised the Council of the following:

With regard to point (iv) please ensure that you clearly explain how disclosure of the withheld information would adversely affect the particular economic interest that has been identified. Please ensure that this explanation demonstrates a clear link between disclosure of the information that has actually been withheld and any adverse effect.

27. The ICO also advised the Council that it strongly recommended that its response was guided by both recent decision notices and the ICO's guidance, which demonstrated the Commissioner's approach to the exceptions and procedural sections of the EIR. The ICO provided the Council with the relevant URLs to access these resources.
28. In providing its submissions, the Council has explained to the Commissioner that the confidentiality of the information is to protect the developer's economic interest, and that if the information was disclosed it would be of benefit to competitors, including the complainant, who is a competing developer. The Council went on to state that the public

disclosure of the information, which represents "detailed costings", would:

- a) "Undermine ongoing negotiations with landowners which may result in less favourable terms for the applicant."
- b) "Improve the market position of competitors, who could use the information to gain a commercial advantage."
- c) "Result in a loss of income for the developer/landowners."
- d) "Jeopardise the ability to maximise profit and the advantage will be gained by a competitor."

29. The Council went on to explain that:

On the balance of probabilities if detailed costings were to be released before the land has been 'sold' then it would weaken the applicant's economic positions by harming their negotiating position and affecting their opportunities to maximise profit.

30. The Council has advised the Commissioner that it has consulted with the developer about the potential disclosure of the information. The developer has responded:

Tunstall Homes Limited do not want their Viability Assessment to be made available in the public domain. Indeed, that is the norm when developers/applicants submit viability assessments in respect of planning applications (usually for housing development but not exclusively) as the assessments contain commercially sensitive information and for this reason the individual assessments are kept private and confidential between the developer/applicant and the Council, acting in its role as Local Planning Authority.

The Commissioner's analysis

31. As emphasised by the Commissioner in decision notice FER0733406² (which also considered the application of this exception to an Economic Viability Assessment), in order for regulation 12(5)(e) to be engaged it must be shown that specific adverse effects would follow as a direct result on information being disclosed. There is, therefore, an enhanced

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259562/fer0733406.pdf>

need for public authorities to show a causal link between the withheld information and claimed adverse effects.

32. It considering the Council's submissions, the Commissioner has noted that, whilst the Council refers broadly to the potential adverse effects that it considers disclosure would cause, no evidence has been provided that allows the Commissioner to understand how and why, in respect of the proposed development and its specific circumstances, these adverse effects would occur. It is also relevant for the Commissioner to note that the Council has sought to apply its broad assertions to a large volume of information spanning reports, emails and other documents, with no apparent differentiation between the content and sensitivity of those documents.
33. In this case, the Council has failed to explicitly demonstrate the causal link between the information and the claimed adverse effects. On this basis the Commissioner must find that the condition (iii) has not been met, and that the exception is not engaged.

Regulation 12(5)(f) – Interests of the information provider

34. Regulation 12(5)(f) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure...

35. The Commissioner's public guidance on this exception³ explains that its purpose is to protect the voluntary supply to public authorities of

³ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.

36. With regard to engaging the exception, as recognised by the Tribunal, a four stage test has to be considered, namely:
- (i) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - (ii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - (iii) Has the person supplying the information consented to its disclosure?
 - (iv) Would disclosure adversely affect the interests of the person who provided the information to the public authority?

Does the information fall under the regulation?

37. The exception relates to information that has been voluntarily provided to the Council by a third party.
38. The Commissioner has reviewed the withheld information. It is relevant for the Commissioner to note that regulation 12(5)(f) has been applied to a significant volume of information (of over 200 pages) in conjunction with regulation 12(5)(e). There has been no apparent effort by the Council to relate regulation 12(5)(f) to only specific parts of this withheld information.
39. The Commissioner is aware that regulation 12(5)(f) is commonly applied to the information provided within Economic Viability Assessments. However, it is noted that a substantial part of the withheld information represents internal emails and reports that have passed between officers within the Council in the course of their employment. In the absence of any argument by the Council to the contrary, it is reasonable for the Commissioner to find that such information has not been provided to the Council by a third party.
40. The Council has seemingly chosen to blindly apply the exception to the entirety of the information, and in such a situation, it is not appropriate for the Commissioner to independently judge which information has been provided by a third party and which has not.

41. On this basis, the Commissioner must conclude that the withheld information, considered as a whole, does not fall within the scope of the regulation, and consequently that the exception is not engaged.

Regulation 5(2) – Time for compliance

42. Regulation 5(2) states that an information request should be responded to no later than twenty working days after the date of receipt. In this case the Council did not respond to the request within the time for compliance. On this basis the Commissioner must find a breach of regulation 5(2).

Right of appeal

43. 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

44. 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.
45. 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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