

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 June 2019

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire
SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested a copy of the Developer's Justification Statement and supporting documentation in relation to a proposed housing development in the grounds of a grade II listed building. Shropshire Council refused the request, citing the exception at regulation 12(5)(e) of the EIR (confidentiality of commercial information).
2. The Commissioner's decision is that Shropshire Council was entitled to rely on regulation 12(5)(e) of the EIR to refuse the request.

Background

3. The Developer's Justification Statement ('the DJS') in question sets out a developer's proposals for a housing development in the grounds of a Grade II listed building that has fallen into considerable disrepair. The developer already owns the building and the surrounding estate. Attempts to sell the building in its current state have been unsuccessful and the DJS sets out the developer's proposal to build a small housing development in the grounds of the estate which would generate sufficient profit to fund the refurbishments necessary to make the main building saleable.

4. The DJS and supporting documentation set out in some detail the expected outgoings and income for the project, as well as a schedule of the work involved.

Request and response

5. On 23 October 2018, the complainant wrote to Shropshire Council ('the Council') and requested information in the following terms:

"RE: [name of property redacted] - JUSTIFICATION STATEMENT

At section 10.4 of the attached Deloitte Review of Enabling Development it says:

"The Developer's Justification Statement includes acquisition and holding costs amounting to £3,322,801.

This is broken down in the supporting documentation as being an aggregated cost of £3,014,293 in respect of acquisition costs and rolled up interest....."

Could I please have a copy of the Developer's Justification Statement and supporting documentation referred to?"

6. The Council responded on 6 November 2018. It stated that the information was exempt from disclosure under regulation 12(5)(e) of the EIR. The complainant then contacted the Council to point out that it had not provided any information about its consideration of the public interest.
7. The Council responded again on 21 November 2018. It explained in more detail why it believed regulation 12(5)(e) of the EIR applied and set out the public interest balancing test that it had conducted.
8. The complainant requested an internal review, which the Council provided on 19 December 2018. It upheld its decision to apply regulation 12(5)(e) of the EIR to withhold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 19 December 2018 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the Council was entitled to withhold the requested information.

10. The analysis below considers the Council's application of regulation 12(5)(e) of the EIR to withhold the DJS and supporting documentation. The Commissioner has viewed this information before reaching her decision.

Reasons for decision

Is the information environmental information?

11. Information is 'environmental information', and must be considered for disclosure under the terms of the EIR rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
12. The Commissioner considers that the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
13. The request is for information relating to the development of land for housing purposes. The Commissioner considers the request therefore relates to a measure as defined in regulation 2(1)(c) of the EIR which will or would be likely to affect the elements described in 2(1)(a), namely, land.
14. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

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

15. The exception under regulation 12(5)(e) of the EIR provides that public authorities are entitled to refuse to disclose information where disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law.
16. In assessing whether the exception is properly engaged, the Commissioner applies a four stage test, of which all parts must be met:
 - The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.

- The confidentiality would be adversely affected by disclosure.
17. The Council says that the withheld information is commercial in nature as it concerns a commercial activity – the development of land and selling of property. The withheld information details costs relating to the development at both the initial stages of restoration and the later marketing of the scheme to achieve anticipated sales values. The Commissioner agrees with the Council's assessment in this regard.
 18. With regard to whether confidentiality is provided for by law, the Council said that the information was provided to it in circumstances that created an obligation of confidence. It said that the information is marked 'confidential', and that a public report to the planning committee at the time noted that it was commercially sensitive. It said that the information is not trivial and is not in the public domain already. The Council is of the view that this demonstrates a common law duty of confidence.
 19. Having inspected its content, the Commissioner accepts that, at the time the information was provided to the Council, there was an expectation of a common law duty of confidence between the Council and the developer supplying it. Since the development remains ongoing, she considers that the duty of confidence still applies.
 20. With regard to whether a legitimate economic interest is being protected by confidentiality, the Council said that it had consulted with the developer and the developer believed that disclosure of the information would have an adverse effect on its ability to complete the development successfully. The development remains ongoing, and the developer said that disclosing information of this type, at this time, would cause harm to its business, and to the ongoing development, as it could affect its commercial bargaining position, and thus, its income.
 21. The Council said that the developer was able to demonstrate a causal link between the disclosure of the withheld information and the harm envisaged. The DJS and supporting documentation contain financial information on the estate development, including full details of the development's anticipated revenue, costs and profitability. The disclosure of the information would cause significant harm to the developer through the resultant compromise to both the ongoing tendering process (which involves sub-contractors and suppliers who would have access to published cost information as a result of any disclosure) and to the prospective purchasers who would be likely to obtain access to the sales values of the properties (which have yet to be offered to the market).
 22. It said that the withheld information covers a range of circumstances, from the tendering process (involving multiple sub-contractors and the

costs of materials from suppliers) to the sales and marketing process (which relates to purchasers of the renovated building and new properties). If the withheld information was disclosed, it had the potential to involve large numbers of sub-contractors, suppliers and purchasers, making it highly likely that disclosure would give them all access to information which would be significantly prejudicial to the developer's interests.

23. The Council therefore considered that disclosure of the information would adversely affect the legitimate economic interests of the developer (ie the person the confidentiality is designed to protect).
24. The Commissioner is satisfied that the Council has provided a clear explanation of the economic interests that are being protected by the confidentiality and how they would be adversely affected if the withheld information was disclosed.
25. The Commissioner is therefore satisfied that regulation 12(5)(e) of the EIR is engaged.

The Public Interest Test

26. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities must nevertheless consider whether the public interest in the information being disclosed is stronger than the public interest in maintaining the exception. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure. Thus, even if the information is confidential and disclosure would harm someone's legitimate economic interests, it may still be disclosed.
27. There is always a public interest in public authorities being accountable and transparent, and in processes that promote good decision making and uphold integrity. The EIR implement the *EU Directive 2203/4/EC* on public access to environmental information, and the public interest in this is clearly stated:

"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

28. The complainant has explained to the Commissioner that he believes there to be a discrepancy between the acquisition costs stated in the DJS and the price the developer actually paid for the property (according to Land Registry records). He believes that the developer was exempted from paying a development levy, and afforded other advantages, on the basis that it paid more for the land than he thinks it actually did. He

considers it to be in the public interest that the DJS and supporting documentation be disclosed so that the public may scrutinise what the Council (and other stakeholders) was told about the price paid by the developer.

29. In considering the public interest, the Council confirmed to the Commissioner that it had applied a presumption in favour of disclosure in order to promote transparency and accountability, greater awareness and understanding of environmental matters. In relation to planning matters, it acknowledged that there is a particular public interest in public participation, which carries a significant weight in favour of disclosure. In recognition of this, it publishes information relating to planning matters online; it follows that information about this planning application is published online.
30. The Council said that the withheld information relates to an 'enabling development', ie a "*development that would be unacceptable in planning terms but for the fact that it would bring public benefits sufficient to justify it being carried out, and which could not otherwise be achieved. The key public benefit to significant places is usually the securing of their long-term future.*"
31. It acknowledged that the requester has suggested that there is a public interest in the disclosure of the information requested "*to provide assurance that the local authority carried out proper scrutiny of the viability assessment*". The Council believes that this assurance is provided by the commissioning of an independent report on the valuation of the site. The report, undertaken by Deloitte, was jointly commissioned and funded by English Heritage (now Historic England) and Shropshire Council. English Heritage led on procuring the work and Deloitte was selected by English Heritage to undertake it in consultation with the Council. The purpose of appointing Deloitte was to provide both organisations with an independent assessment of the applicant's financial justification for the scheme.
32. The Council explained that English Heritage was the Government's statutory advisor and consultee for the historic environment. It was involved throughout the pre-application stage of this development and whilst the planning application itself was under consideration. This included the involvement and provision of a considerable amount of advice from its leading national expert on enabling development.
33. The Council therefore considered it followed best practice when determining the development application and that the public interest in carrying out proper scrutiny of the viability assessment had been demonstrated.

34. On the complainant's specific point about the amount paid by the developer, it commented as follows:

"The Council's understanding (and I believe also English Heritage's – now Historic England's - understanding) of the situation is essentially as stated in section 10.4 of Stage 2 of the 2014 Deloitte report... This was jointly commissioned by the [sic] English Heritage and the Council at the time the enabling development application was under consideration to provide an independent analysis and audit of the Applicant's Justification Statement.

The key point is that at that time the Applicant was not willing to disclose the purchase price of the Property to either the Council, English Heritage or Deloitte.

To a degree this this was somewhat academic because the purchase had taken place over a decade prior to the planning application being submitted, and the condition of the listed building had deteriorated substantially in the intervening period. Crucially, English Heritage's guidance requires the planning decision to be based on the value of property at the time the decision is taken and Deloitte's made their own independent assessment of this. To this extent the Applicant's purchase costs, some significant time prior to the planning application being submitted, were not of primary concern to either the Council or English Heritage: the focus instead being on assessing the value of the property at the time the scheme was under consideration.

The Council, as the local planning authority, and English Heritage, as the government's statutory advisor on the historic environment, therefore relied on Deloitte's report to assist them to determine whether the case for the enabling development scheme had been made, in relation to English Heritage's guidance on Enabling Development. This in turn enabled to [sic] English Heritage's enabling development experts to advise the Council, and the Council in turn to determine the planning application accordingly.

In these respects, the Council contends it followed best practice and applied appropriate due diligence when determining this planning application."

35. While considering the public interest in releasing the requested information, the Council said it had also considered the wider impact that disclosing the information could have. If the developer's commercial business is compromised as a result of disclosing the withheld information, this would have a detrimental impact on the restoration of the historic building that is the focus of the enabling development. The building has been neglected for some time and it is through the enabling development that its restoration has been able to commence. There is a

strong public interest in ensuring that the development successfully secures the long term future of this significant building.

36. The Council therefore felt that, on balance, the public interest in maintaining the exception significantly outweighed the public interest in disclosure.
37. The Commissioner accepts that disclosure of the withheld information would permit greater scrutiny by the public of the developer's proposals for developing the site – a development that the Council has acknowledged would not have been permitted had it not met the criteria for being an enabling development. However, she also accepts that the disclosure of this information would be of significant detriment to the success of the developer's project. In particular it would undermine its ability to obtain maximum profit from the new housing development. She recognises that the refurbishment of the main building hinges on the new housing development generating sufficient profit.
38. Independent oversight has been provided by a report by Deloitte, examining the developer's proposals, and the Council has provided further comment on the question of the price paid by the developer, which is what the complainant said motivated his request. Taking all the above into account, the Commissioner concludes that in this case the public interest in maintaining the exception outweighs the public interest in disclosure.
39. The Commissioner's decision is, therefore, that the Council was entitled to rely on regulation 12(5)(e) of the EIR to withhold the requested information.

Right of appeal

40. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Samantha Bracegirdle
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