

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 August 2024

Public Authority: Fareham Borough Council
Address: Civic Offices
Civic Way
Fareham
Hampshire
PO16 7AZ

Decision (including any steps ordered)

1. The complainant has requested information held by Fareham Borough Council (the council) relating to a closed meeting of the Executive where "commercial opportunities related to wider regeneration of Fareham Town Centre" were considered.
2. The council refused the request, citing regulation 12(5)(d) (confidentiality of proceedings) of the EIR. During the Commissioner's investigation, the council confirmed that it was now able to release part of the withheld information to the complainant.
3. Whilst the Commissioner is satisfied that regulation 12(5)(d) of the EIR is engaged in respect of all of the withheld information, he considers that the balance of the public interest favours the disclosure of part of this information.
4. The Commissioner requires the council to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information highlighted in yellow which has been provided separately to this decision notice.
5. The council must take this step within 30 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

6. On 6 December 2023, the complainant wrote to the council and requested information in the following terms:

“In July 2023 the Director of Planning and Regeneration requested that the Council approve a budget to support the delivery of transformational regeneration opportunities within Fareham Town Centre. There are apparently 13 proposals, each of which has an individual business case, and these are recorded in confidential appendices. Given the overspend of the original £30m set aside and the lack of clarity as to how the purchase of Fareham Precinct has been financed it is clearly in the public interest that these confidential appendices and directors report are disclosed to the public in full. This for the avoidance of doubt is my FOI request.”
7. On 12 January 2024, the council issued a refusal notice; it cited regulation 12(5)(d) of the EIR, and confirmed that it considered the public interest to favour maintaining the exception in this case. The council also said that the appendices referred to in the request did not form proposals to support individual business cases, as indicated by the complainant, but rather were “in the main technical documents and advice” relating to the budgetary proposals.
8. On 12 January 2024, the complainant requested an internal review, and on 8 February 2024, the council responded, maintaining its original position.
9. During the Commissioner’s investigation, the council decided to release the information contained within one of the appendices relevant to the complainant’s request.

Reasons for decision

10. This reasoning covers whether the council is entitled to rely on regulation 12(5)(d) of the EIR as its basis for refusing to provide the information held that is relevant to the complainant’s request.

Regulation 12(5)(d) – confidentiality of proceedings

11. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that, or any other public authority, where such confidentiality is provided by law.

12. In order for the exception to be engaged, the Commissioner considers it necessary for three conditions to be met:
 - The information must relate to confidentiality of proceedings.
 - The confidentiality of proceedings identified must be provided by law.
 - The disclosure of the information would adversely affect the confidentiality.
13. With regard to the first condition, the Commissioner considers that “proceedings” implies a certain level of formality and may include, but are not limited to, formal meetings that consider matters that are within the authority’s jurisdiction, situations where an authority is exercising its statutory decision making powers, and official legal proceedings. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.
14. The request relates to an Executive Committee meeting held on 26 July 2023. The public and press were excluded from that part of the meeting where agenda item 9(1), which concerned proposals relating to “Consideration of commercial opportunities related to wider regeneration of Fareham Town Centre”, was discussed and a decision was reached.
15. The withheld information consists of a report and appendices that were considered by the Executive within the closed session, and were not made available to the public.
16. The council has referred to section 100A(4) of the Local Government Act 1972 (the LGA 1972) which states that:

“A principal council may by resolution exclude the public from a meeting during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information, as defined in section 100I”.
17. The council has said that, given the nature of the business which was to be considered under agenda item 9(1), there was an absolute necessity for the meeting of the Executive to have the ability to consider the relevant matter with the provision for confidentiality.
18. The Commissioner considers that the process described by the council has the necessary formality to constitute confidential proceedings for the purposes of regulation 12(5)(d), and the first condition is met.

19. In his consideration of the second condition, the Commissioner has had regard to the Upper Tribunal case of *Chichester District Council v the Information Commissioner and Lynne Friel* [2012] UKUT 491 AAC (23 August 2021)¹. In that case, the public authority had also relied on section 100A(4) of the LGA 1972 to hold part of a meeting of the Executive Board in a closed session.
20. The Upper Tribunal said that section 100A(4) of the LGA 1972 is not concerned with the withholding of information, but with the confidentiality of the proceedings in which the relevant recorded information was discussed. The Upper Tribunal subsequently found that the exception at regulation 12(5)(d) was engaged in relation to information that had been discussed at the closed session.
21. The Commissioner considers it important to note that the Upper Tribunal found that the exception was engaged because section 100A(4) of the LGA 1972 allows a local authority to consider matters in private, where those matters concern the discussion of sensitive or confidential information. There was therefore a statutory basis for regarding the proceedings as confidential.
22. Therefore, for the same reasoning set out in the Upper Tribunal case, the Commissioner considers that there is a statutory basis for regarding the proceedings as confidential in this case, and that the second condition is met.
23. With regard to the third condition, when considering the adverse effect, the term "would be" is taken to mean that it is more probable than not that disclosing the information would harm the confidentiality of the proceedings in question.
24. In the Commissioner's opinion, section 100A(4) of the LGA 1972 protects a formal process, and allows for important and confidential matters to be considered and discussed in private, and without risk of outside interference.
25. Whilst the complainant has argued that certain proposals that were approved at the meeting of 26 July 2023, have since been implemented, the Commissioner notes that at the time of the request the regeneration of the town centre was (and still is) an ongoing issue. As far as the Commissioner is aware, aside from Appendix A which was recently released by the council to the complainant, no further documents that

¹ [Decision;EA.2010.0153;dt16.03.11.pdf \(tribunals.gov.uk\)](#)

were considered in the closed session, or records of the discussions about these documents, are in the public domain.

26. Whilst acknowledging that section 100A(4) of the LGA 1972 does not prevent the disclosure of information under the EIR, the Commissioner considers that the disclosure of information which is protected by this statutory provision would, in the circumstances of this case, weaken the council's ability to protect a process which allows for a safe space in which to consider all relevant information. In the Commissioner's view, disclosure of the requested information would harm the ability to have free and frank discussions about the information, and make decisions about important matters such as the council's finances, and business and commercial activities.
27. The Commissioner is satisfied that the disclosure of the information held that is relevant to the complainant's request would have an adverse effect on the confidentiality of proceedings described, and that the third condition is met.
28. The Commissioner therefore finds that the exception at regulation 12(5)(d) is engaged, and will go on to consider the public interest test.

Public interest test

29. In the case of the exception at regulation 12(5)(d), it is necessary for the Commissioner to consider whether the adverse effect on the confidentiality of proceedings identified is outweighed by the public interest in the disclosure of the information.

The complainant's position

30. The complainant said in their internal review request that they only require the documents that were prepared in advance of the meeting and provided to the councillors, and that they do not require any details of the actual discussions that took place.
31. The complainant also advised that it had originally been reported in a press release that the cost of the Fareham Precinct was £14.25m. The complainant said that according to the capital monitoring report, the cost is £15.303m, and therefore over £1m more than the public were initially told.

32. The complainant also referred to a press release published on 3 August 2023², where the council advised that over £30 million of funding had been set aside to support “a significant regeneration programme.”
33. The complainant said that as the initial sum of £30 million has been far exceeded there is a public interest in understanding the reasons for this. They argue that the confidential appendices and director’s report should be disclosed in full as the public need to know the implications for public expenditure into the future, and how they might be affected through the further introduction of new income streams, or alternatively, cuts to services that might need to be made to finance the regeneration.
34. The complainant, in their representations to the Commissioner, has said that they consider that the council has provided the public with contradictory information. They have referred to the council’s response to a previous request where it stated that “whilst no regeneration projects have been identified at present, the Council acknowledges that the Town Centre Regeneration forms part of the adopted Local Plan.” The complainant has said that if it is the case that no regeneration projects have been identified, then the withheld information is unlikely to be confidential or sensitive and should be disclosed.
35. In addition, the complainant has said that information that they have received from a councillor contradicts the council’s claim that the appendices relevant to the request are not proposals supporting individual business cases, and that therefore there is a public interest in further clarity about this by the release of information.
36. The complainant has argued that there is a public interest in being able to hold councils to account on a day to day level, making sure that appropriate decisions are being made, the right questions are being asked, and ensuring councils are conforming to legal and regulatory duties in order to ensure that there is trust in its activities and expenditure.

The council’s position

37. The council has said that it recognises that there is a public interest in transparency, and for informed decision making. The council states that it accepts that there is greater expectation on public authorities to disclose information relating to financial decisions that relate to “the public purse”. It says that as the request relates to a significant amount of expenditure by the council for the regeneration of the town centre, it

² [Press Release \(fareham.gov.uk\)](https://www.fareham.gov.uk/press-releases)

understands that it is important to show that it is securing the best use of public money.

38. The council also states that it recognises the value in public participation, and that informing interested residents can aid healthy debate and helps to promote good decision making.
39. However, the council has said that it considers the public interest factors in favour of maintaining the exception at regulation 12(5)(d) to outweigh the public interest in disclosure of the withheld information.
40. The council has said that it was important to make the withheld information available to the Executive to ensure that the decision reached was as informed as possible. It argues that, given that the Executive were making a decision relating to a significant spend, it was necessary to have the provisions for confidential discussions, as the Executive needed to be able to reach an impartial and appropriate decision away from public interference. The council says that should the information have been placed into the public domain, it would have significantly undermined its position.
41. The council goes on to say that due diligence undertaken by purchasers is rarely made available to the public. It says that if it were not able to hold the proceedings privately, there is a risk that some information would need to be excluded, the result of which could mean decisions are not reached informatively, and this would lead to poorer decisions, which would not be in the public interest.
42. The council has also said that the release of the information is likely to provide an insight into matters relevant to its commercial position, and that this would place the council at a disadvantage in the marketplace, both now and in the future.
43. The council has argued that disclosing the information held that assisted in informing its decision could significantly undermine its position in relation to current and future negotiations relating to the town centre redevelopment, and also the purchase and sale of properties in the future. It says that it would reveal confidential information about both the council, and third parties, and would provide insight into the council's position and that given this, it would not be in the public interest to disclose the withheld information.

The Commissioner's decision

44. The Commissioner is mindful when making his decision, that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.

45. The Commissioner also considers that the purpose of section 100A(4) of the LGA 1972 is an important factor to take into account when considering the balance of the public interest test in this case. This statutory provision allows a council to hold certain meetings in closed session in order to protect the confidentiality of the discussions that are taking place. This implies that there is a public interest in protecting the process, and therefore, where the exception is found to be engaged, there is always some public interest in maintaining it.
46. The Commissioner also considers that it is important that council officers are able to discuss certain matters frankly and openly, away from public scrutiny, and to be allowed time and space to consider proposals. He therefore accepts that effective decision making requires certain matters to be discussed in private, and without outside interference, and it would not be in the public interest if this part of the process was not protected.
47. However, the Commissioner considers it important to take into account other factors that may affect the balance of the public interest in this case, including the events that took place between the time of the meeting and the date of the request. He has also had regard to the press releases published by the council on 3 August 2023 (referred to in paragraph 32 of this decision notice), 3 October 2023³, and 29 November 2023⁴.
48. The press releases reveal details about the council's expenditure and activities in relation to the regeneration, including the acquisition of properties. The press release of 29 November 2023, also invites the public to have their say in plans for the regeneration of the town centre, and the Commissioner therefore considers it important that the council provides as much information as possible about its plans, and actions already taken, in order to assist individuals in submitting their comments and own ideas.
49. In addition, whilst the council may consider that it has provided sufficient clarity to the complainant about the nature of the appendices that have been withheld, the Commissioner understands why the complainant considers there to be ambiguity on this point. He therefore considers there to be some value in the disclosure of information which would provide the public with a greater understanding and reassurance about the purpose of the meeting.

³ [Press Release \(fareham.gov.uk\)](https://www.fareham.gov.uk/press-releases)

⁴ [Press Release \(fareham.gov.uk\)](https://www.fareham.gov.uk/press-releases)

50. The Commissioner, having had regard to the events that took place between the time of the meeting and the date of the request, considers that the adverse affect to the confidentiality of proceedings which has been identified is significantly reduced in respect of some of the withheld information.
51. The Commissioner considers there to be a weighty public interest in transparency when it comes to the financial and decision making affairs of a council. Furthermore, in this case the request relates to a matter, the regeneration of the town centre, which will have a significant impact on local residents and involves a large amount of public expenditure by the council.
52. Therefore, having considered all of the information available and the presumption in favour of disclosure, the Commissioner has decided that the public interest in transparency and accountability, and having a greater understanding of the council's plans and activities as they relate to the town centre regeneration, favours the release of part of the information contained within the withheld report that is relevant to the request. The Commissioner has therefore ordered disclosure of this information, which is identified in a separate annex to this notice.
53. The Commissioner considers that disclosing the remaining withheld information contained within the report, and all of the appendices (with the exception of Appendix A which has now been disclosed by the council) would reveal details that are not currently in the public domain, including what he regards to be commercially sensitive information.
54. Whilst the complainant has said they do not require any records of the discussions that took place, the Commissioner is satisfied that disclosure of the information that was presented for consideration at the closed session of the meeting would reveal details of what was considered, discussed, and assisted the Executive in reaching a decision.
55. The Commissioner considers that public authorities should be as open and transparent as possible about their activities. However, he considers it pertinent that statute (section 100A(4) of the LGA 1972) recognises that there are circumstances where it is important that certain matters are discussed without outside interference in order to protect the integrity and to ensure the effectiveness of the decision making process.
56. The Commissioner considers there is a real risk that similar information may not be made available to committee members at future meetings, through fear that it may be made publicly available. In addition, in the Commissioner's opinion, if the safe space in which to discuss matters that form part of confidential proceedings is not protected, this is likely

to lead to less open and frank discussions between committee members. This would all result in poorer decisions, based on lower quality and limited information, which would not be in the public interest.

57. Whilst the Commissioner has determined that the passage of time has led to the balance of the public interest tipping in favour of the release of some of the withheld information, he considers that the public interest in protecting the safe space in which to consider and discuss proposals relating to the council's financial and commercial position carries some considerable weight in favour of withholding the majority of the withheld information in the circumstances of this case.
58. Given the above, the Commissioner is satisfied that, for the reasons set out above, the public interest favours withholding the remaining withheld information contained within the report and all of the withheld information contained within the appendices.
59. As previously stated within this decision notice, regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
60. The Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019) says that, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
61. As covered above, in this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception in respect of part of the withheld information, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(d) was applied correctly to that part of the withheld information which is not subject to paragraph 4 of this decision notice.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

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