

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

Date: 1 August 2024

Public Authority: Fareham Borough Council
Address: Civic Offices
Civic Way
Fareham
Hants PO16 7PU

Decision (including any steps ordered)

1. The complainant requested information relating to land transactions at Solent Airport. Fareham Borough Council (the "Council") withheld the information under the exception for the confidentiality of proceedings (regulation 12(5)(d)).
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(d).
3. The Commissioner does not require further steps.

Request and response

4. On 12 January 2024 the complainant wrote to Fareham Borough Council (the "Council") and requested the following information:

"It is quite clearly in the public interest that full disclosure of the proposed purchase and sale of land at Daedalus be made, so that the public at least, can effectively monitor the amount of expenditure it is expected to underwrite. So if you would like this as a question. What do each of these proposals contain, in full?"

5. The Council responded on 31 January 2024 and confirmed that it was withholding the information under the exception for the confidentiality of proceedings (regulation 12(5)(d)).
6. Following an internal review the Council wrote to the complainant on 5 March 2024. It confirmed that it was maintaining its position.

Scope of the case

7. On 9 March 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed that he would consider whether the Council correctly withheld the requested information.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being 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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. The Commissioner considers that, as the request relates to decisions taken in respect of land transactions, the information falls within the definition of environmental information provided by regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

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

11. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information in cases where 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. There is no definition in the EIR as to what exactly is covered by regulation 12(5)(d), but the Commissioner has issued guidance to assist public authorities in determining when the exception might apply. The guidance confirms that, for regulation 12(5)(d) to be engaged, a three stage test must be met:
- What are the proceedings?
 - Is the confidentiality of those proceedings provided by law?

- Would disclosing the information adversely affect that confidentiality?¹
13. The Commissioner considers that 'proceedings' implies a level of formality and may include formal meetings that considers matters within the authority's jurisdiction, situations where an authority is exercising its statutory decision making powers, and official legal proceedings.

Background

14. The Council has explained that Solent Airport is situated on a wider site at Daedalus (the "Site") where Faraday Business Park is being developed. It has confirmed that it is an Enterprise Zone/major employment site within the Borough allocated for 93,100 m² of employment workspace. The Council explained that Solent Airport itself is owned by the Council and operated by Regional and City Airports Ltd (RCA) on its behalf.

Are the proceedings subject to confidentiality provided by law?

15. The Council has confirmed that the withheld information relates to a meeting of its Executive regarding decisions around land transactions at the site. It has explained that it considers the proceedings were formal in nature as they relate to a meeting of the Council's Executive, chaired by the Executive Leader and consisting of Executive Members. It clarified that the Local Government Acts 1972 and 2000 set out functions of local authorities for permitted forms of governance for local authorities in England for which the Council adopted Executive arrangements, following the legislative requirements for holding Executive meetings.
16. The Council has explained that section 100A of the Local Government Act 1972 (the "Act") covers the admission to meetings and exists to protect the proceedings where confidential matters are discussed and considered. It clarified that this section of the Act is not concerned with the (withholding of) information, but with the confidentiality of the proceedings in which the relevant recorded information was discussed.
17. The council has submitted that section 100A covers the admission to meetings of principal Councils and specifically 4, 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

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-d-confidentiality-of-proceedings-environmental-information-regulations/>

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”.

18. The Council has confirmed that the two confidential items in question were withheld under Paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972². The Council has explained that this provision enables councils to withhold from publication confidential information and subsequently to enable that meeting to move into confidential session (to exclude the public and press) to consider the matter where the exemption is applied. To move a meeting into confidential session a resolution must be made at that meeting.
19. Having considered the Council’s submissions and referred to the withheld information, the Commissioner accepts that the meeting in question constitutes legitimate formal proceedings and, therefore, the first part of the test is met.
20. The next part of the test is to consider whether the confidentiality of the proceedings is provided by law. The Council has explained the specific statutory restrictions on disclosure above. The Commissioner, therefore, also considers that the second part of the test has been met.
21. The final consideration when applying the exception provided by Regulation 12(5)(d) is to assess whether the confidentiality of those proceedings would be adversely affected by disclosing the withheld information. 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.

Would disclosing the information adversely affect that confidentiality?

22. The Commissioner’s guidance clarifies that, just because particular proceedings are confidential, it doesn’t mean that the exception automatically applies. Even where an authority is satisfied that the proceedings are confidential, it can still only use this exception if disclosing the information would adversely affect that confidentiality.

² Paragraph 3 refers to information relating to the financial or business affairs of any particular person (including the authority holding that information).

'Adversely affect' means there must be an identifiable harm to, or negative impact on, the confidentiality of the proceedings³.

23. The Council has explained that, at the point the meeting took place – and at the current time – Heads of Terms have been agreed but the transaction is not yet legally binding on either party. The Council has argued that, in the absence of a legally binding position, disclosure would put the entire transaction at risk or result in a reduction in the land price achieved. The Council confirmed that this would not be in its interest, or that of the wider public/taxpayer.
24. The Council has further argued that disclosure of the transaction would also prejudice negotiations the Council is having with interested parties in other sites as release of information could bring a lack of trust in doing business with the Council. The Council has emphasised the importance that any discussions and considerations being undertaken in the formal committee setting were subject to confidentiality, where the decision makers could ask any questions and have open, balanced discussions without the restrictions of being overly cautious what was said in an open meeting.
25. The Council has argued that, if details of the transaction were to become public before being legally binding, there was a risk of competing landowners becoming aware and seeking to undermine the Council's position. Additionally, the Council considers that the withheld information contains details of activities were being competitively tendered when the decision was made and disclosure of the budgets would have been likely to increase the costs of the works. The Council also confirmed that a confidentiality agreement was in place and disclosure of information would be likely to breach this.
26. The Council further explained that, for members to consider, discuss, debate and reach a decision, they must have the most comprehensive information to hand. In this scenario, without this exemption, it would have significantly undermined the Council's position in being able to give the fullest information to the decision makers about the wider project. Where Members do not have to agree with a recommendation being put to them, it could be argued there was a risk that without the ability to have a confidential setting for open dialogue, it could have hindered effective decision making.

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-d-confidentiality-of-proceedings-environmental-information-regulations/>

27. Finally, the Council confirmed to the Commissioner that consideration was given at the time of the request, to whether the confidential reports could be released, or partially released but the view remained that there still needed to be confidentiality around them: whilst the decision had been made there were still ongoing negotiations that needed to have the protection of that confidentiality given the nature of negotiations.
28. In this case, having considered the Council's arguments, the Commissioner considers that disclosing the withheld information would result in harm to the decision making process which is protected by confidentiality in this case.
29. The Commissioner is therefore satisfied that disclosure would have an adverse effect on the confidentiality of the Executive decision making process in respect of specific land transactions, as it would damage the general principle of confidentiality itself and result in harm to the interests the exception is designed to protect.
30. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the general public interest in transparency and accountability surrounding decisions which have environmental implications.

Public interest in disclosure

31. The complainant has argued that almost everything related to the Site has been consistently withheld by the Council. They have argued that there are many examples of Councils facing huge debts and bankruptcy some of this caused by bad investment decisions. The complainant has suggested that the Council has no expertise in matters relating to the airport.
32. The complainant considers that the balance in favour of public disclosure should increase in order that the public can reassure themselves their Council is spending public money wisely, even if on occasion the information is subject to a degree of redaction.
33. The complainant has further argued that the ability to hold councils to account on a day-to-day level, making sure appropriate decisions are being made, the right questions are being asked, ensuring councils are conforming to legal and regulatory duties is key to trust. The complainant has also expressed broader concerns about the Council's approach to scrutiny.

34. The Council has acknowledged that there is a general public interest in transparency for informed decision making and to encourage public participation and understanding. They have also recognised that there is a general public interest in securing the best use of public money and there is greater expectation on public authorities to disclose information relating to financial decision as monies are 'the public purse'.

Public interest in maintaining the exception

35. The Council has argued that it was necessary to have the provision for confidential discussions given that the Executive were making a decision attached to which is a significant project under careful negotiation. It considers that it was important that the decision makers could undertake this decision and have associated discussions in a confidential setting, unfettered by constraint of what could, and what couldn't be made public.
36. The Council has highlighted the damage that disclosure would do to trust and transactional risk. It explained that for the sale of land the Council was under an obligation to keep the matter confidential by way of a confidentiality agreement, breach of which could have put the transaction at risk.
37. The Council has further argued that disclosure would have a detrimental effect on relationships with existing and future third-parties. If the Council breached a confidentiality agreement, it could project to others who may seek to do business with the Council, that it could not be trusted and have little regard of legal obligations in such Agreements. The Council confirmed that at the time of request, negotiations were ongoing.
38. The Council has argued that it is vital that it secures best value when undertaking commercial projects: whether this is sale or purchase of land to make best use of public money. It has argued that its ability to do this would be constrained by not having the ability to have meetings in a confidential setting, particularly where commercial transactions are underway.

Balance of the public interest

39. The Commissioner recognises that there is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law.
40. For this reason, the grounds on which confidences can be overridden are normally limited. A statute that prohibits disclosure of information may

include certain exemptions from the prohibition (usually for law enforcement purposes). In common law there may be a public interest defence to a breach of confidence.

41. The fact that the confidentiality must be 'provided by law' implies that there is an inherent public interest in protecting it – although the strength of such an interest will depend on the facts of each case.
42. On the other hand, there is always a general public interest in public bodies being transparent and accountable. There may also be more specific arguments for disclosure depending on the circumstances. For example, there is a need to ensure that proceedings, particularly where they relate to the use of public money / assets, are carried out fully and rigorously. More transparency is likely to increase public confidence in these regulatory mechanisms.
43. If proceedings are covered by an obligation of confidence, the information the public would normally have about them is likely to be limited. There may be a strong public interest in transparency if there has been a suspicion of wrongdoing or maladministration – however, this is only likely to be the case if such suspicions are credible and supported by evidence.
44. In this case the complainant has raised a number of concerns about the Council's approach to transparency in this specific matter and more generally. The Commissioner can only consider these concerns as they relate to the request under consideration.
45. As regards its approach to transparency regarding the Site, the Council confirmed to the Commissioner that revenue finances are reported to the Executive within the annual budget setting, end of year outturn and half year monitoring reports.
46. The Council explained that, to ensure transparency more detailed Daedalus finance specific reports, detailing airside and non-airside finances, are reported to the Daedalus Scrutiny Board. Additionally, capital expenditure at Solent Airport is also reported to the Executive within the annual capital strategy, end of year outturn and half year monitoring reports. It confirmed that requests for new capital schemes are reported individually and the latest Solent Airport Investment Plan has also been published.
47. The Council has explained that, given the significance of the Site, a financial framework has been set out within the Daedalus Finance Strategy, reported to the Executive on 7 March 2022. It also provided the Commissioner with substantial additional evidence of measures it

had taken to promote transparency and accountability in relation to the Site.

48. In addition to providing evidence of its general approach to transparency in relation to the Site the Council also confirmed that it had taken specific steps to assist the complainant in this regard, providing evidence that it had addressed questions submitted by the complainant and also met with them to discuss their concerns.
49. The Commissioner is mindful of the complainant's concerns but he not aware of any specific evidence of wrongdoing or maladministration in respect of the Council's handling of the Site. Whilst he accepts that disclosure might assist public scrutiny of the Council's decisions in relation to the use of public money / resources, he considers that it is also likely to result in harm to the Council's ability to reach effective decisions and obtain best value for the public in this regard. This cannot be in the public interest.
50. The Commissioner has accepted that disclosure in this case would result in the specific harm to the confidentiality of the proceedings identified by the Council, which would be compounded by the fact that matters to which they relate are still live. In view of the steps taken by the Council in respect of transparency and accountability in this matter and, given that there is no specific evidence of wrongdoing or maladministration in this matter, the Commissioner has weighted the competing public interest factors accordingly.
51. The Commissioner has therefore decided that, in all the circumstances of this case, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure.
52. 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. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*: "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).
53. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, 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.

Right of appeal

54. 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

55. 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.
56. 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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