

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 December 2022

Public Authority: Barnsley Metropolitan Borough Council

Address: Town Hall
Barnsley
S70 2AQ

Decision (including any steps ordered)

1. The complainant requested from Barnsley Council, ('the council'), information relating to the development of a link road, associated with a wider development of housing and infrastructure in the area. The council provided some information, but redacted some information under Regulation 12(5)(e) (commercial confidentiality).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(e) to withhold the information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 3 November 2021, the complainant wrote to the council and requested information in the following terms:

“Please supply me with details and copies of the funding agreement between Barnsley Metropolitan Borough Council and the South Yorkshire Mayoral Combined Authority, together with details and copies of the back to back developer agreement (s) between the Barnsley Metropolitan Borough Council and the Barnsley West Consortium and/or any other agreements or undertakings, which now exist between the Barnsley Metropolitan Borough Council and the Barnsley West Consortium in relation to the funding of the proposed Site MU1 link road, or any other matter which is part of the above-mentioned planning applications.”
5. The council responded on 29 November 2021. It disclosed redacted versions of the funding agreements.
6. On 26 March 2022 the complainant requested that the council carry out an internal review. He argued that the council had redacted too much information from the information it had disclosed. He also argued that the "exceptional" public interest in knowing the amount, key target dates and benchmarking of the spending of public money, and objections to Site MU1, outweighed the legitimate economic interests in the exception being maintained.
7. Following an internal review, the council wrote to the complainant on 18 May 2022. It disclosed further information but applied Regulation 12(5)(e) to withhold other information. Further information was disclosed to the complainant in April 2022.
8. The council highlighted that over time since the request was made, the sensitivity of some of the information has lessened, and as at the time of writing this decision notice, it is now liaising with the developer to confirm whether further information can be disclosed to the complainant. However, the Commissioner must make his decision as to whether the council was correct to withhold the information as it did at the time when it initially responded to the request.

Scope of the case

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

9. The following decision notice analyses whether the council was correct to withhold the information which it did under Regulation 12(5)(e).
10. Regulation 12(5)(e) applies to information where its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
11. The Commissioner has considered the four tests which he normally considers when deciding whether the exception should be maintained or not.
12. Firstly, he is satisfied that the requested information is commercial in nature. It relates to the councils procurement of land and services in order to complete the development. The procurement and provision of services in a competitive environment is a commercial issue.
13. The Commissioner also accepts that the information was provided in confidence. The information is clearly more than trivial as it relates to the wider project of providing large numbers of new housing to the borough, and relates to one element of this, a link road required in order to facilitate the wider development. The withheld information includes details of required land purchases and contracts to deliver the link road.
14. The circumstances in which the information is held, and the council's reason for holding it, would in the Commissioner's view, be sufficient to impose an obligation of confidence upon the council and its employees. Council employees who had access to the information would understand that that information was to be held in confidence until such time as the necessary purchases and agreements were achieved. Some information may even need to remain in confidence beyond this point. The information therefore has the necessary quality of confidence.
15. Thirdly, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest. He has decided that the council was correct to consider that a disclosure of the information would have an adverse affect upon its, and its associated parties commercial interests.
16. In deciding this, he has taken into account the council's argument that the information relates to work which was still ongoing at the time of the request.

- The council argued that it redacted information which would potentially prejudice any procurement exercises; the publication of land title numbers and other information in relation to the acquisition.
 - Third-party land acquisition deals, which are required to deliver the scheme, had not been finalised at the time of the request.
 - The council argued that land title numbers, and information in relation to the acquisition, were redacted to prevent other developers' outbidding on land required to deliver the link road.
 - The procurement of external contractors to deliver the works had also not been completed at the time of the request.
 - It clarified that it also redacted specific terms which it considered could prejudice the developer's ability to access borrowing in order to complete the development.
 - The developer had also confirmed that it considers that the information is commercially sensitive.
17. The Commissioner accepts, given the arguments above, that a disclosure of the withheld information would put the council in a position where it would be more difficult to negotiate and finalise deals, and it would be less likely to obtain best value for the contracts within those deals, if the redacted information had been disclosed at the time that it initially responded to the request.
18. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the council disclosed this information.
19. The Commissioner has decided that Regulation 12(5)(e) of the EIR is engaged by the information which the council is withholding. He has therefore gone on to consider the associated public interest test.

The public interest test

20. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. Regulation 12(2) also provides that a public authority shall apply a presumption in favour of disclosure.

The public interest in the information being disclosed

22. There is a public interest in the disclosure of information about a matter which will have a substantial impact upon the environment. The development is controversial amongst the local community¹. Some within the community argued that it will potentially cause traffic problems, or simply move known traffic problems from one area to another.
23. The development will cost a substantial amount of public money in order to complete it. There is a public interest in the council being transparent about the costs it perceives will be involved in completing the project.

The public interest in the exception being maintained.

24. The Commissioner notes that the wider decision as to whether the area should be developed or not has already been made via a decision to adopt the Barnsley Masterplan Framework, and the Barnsley Local Plan in 2019²³. This followed a public consultation exercise. The decision was made to go ahead with the wider development, and the requested information relates to part of the development process. The public interest in having access to the withheld information in order to facilitate lobbying against the overall development of the land is therefore lessened as this information does not relate to that wider question.
25. The council has disclosed the majority of the contract. It has only redacted sections where it considers that its disclosure at the time of the request would affect ongoing negotiations and/or its ability to obtain best value and/or the developer's ability to obtain funding in order to complete the development.
26. The council's arguments in this case therefore relates to information where work has not yet been concluded, and the disclosure would potentially undermine its ability to do that at best value (or at all).
27. There is a public interest in protecting the ability of authorities to complete work within the time schedules it is working to, and for best value.

¹ <https://www.barnsleychronicle.com/article/21529/controversial-mu1-plans-break-cover>

² <https://www.barnsley.gov.uk/services/planning-and-buildings/local-planning-and-development/our-local-plan/masterplan-frameworks/barnsley-west-masterplan-framework/>

³ <https://www.barnsley.gov.uk/media/17249/local-plan-adopted.pdf>

The Commissioner's conclusions

28. On the evidence and arguments presented to him by both parties, the Commissioner has decided that the public interest in the exception being maintained outweighs the public interest in the information being disclosed in this instance.
29. Whilst there is a public interest in the council being transparent about the costs and timescales involved in the development, a disclosure of the redacted information at the time of the request could undermine the ability of the council to achieve best value, or could even threaten the viability of the project. In practical terms, the public interest in the exception being maintained may therefore temporarily outweigh that in disclosure until such time as the circumstances allow for the information to be disclosed without those negative effects occurring.
30. There is a public interest in protecting information relating to ongoing negotiations and procurements from disclosure. A disclosure of the information would ultimately make it harder for the council to obtain land and services at best value to tax payers. It could make negotiations take longer, and provide opportunities for competitors or interested parties to seek to undermine negotiations by refusing to sell relevant land, or by buying property prior to the purchases being completed in order to either gain profit through its sale, or to prevent the development from being completed.
31. Whilst there are circumstances where the public interest in disclosure justifies the disclosure of information, even with the risks outlined above, the Commissioner does not consider that this is such a case.
32. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has borne this in mind when reaching his decision. However, the above demonstrates that the Commissioner's view is that the public interest in the exception being maintained clearly outweighs that in the information being disclosed at the time that the request was initially responded to. Therefore, the Commissioner's decision is that the presumption in favour of disclosure required by Regulation 12(2) does not change the outcome of his decision that the exception was correctly applied by the council in this case.
33. The Commissioner has therefore decided that the council was correct to apply Regulation 12(5)(e) to withhold the information from disclosure.

Other matters

34. In making this decision, the Commissioner notes that the council's responses to both the complainant and the Commissioner were limited in respect of the description of the public interest test which it carried out.
35. Whilst the Commissioner was able to reach a decision, based upon the information provided and his understanding of the background to the request in this instance, he expects the council to provide a fuller description of the public interest test which it has carried out to both requestors, and to the Commissioner, in responding to future requests.

Right of appeal

36. 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

37. 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.

38. 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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