

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 October 2021

Public Authority: Mid Devon District Council

Address: Pheonix House
Pheonix Lane
Tiverton
EX16 6PP

Decision (including any steps ordered)

1. The complainant has requested a copy of a document commissioned by Mid Devon District Council (the council) which sets out details of the estimated costs of a planned housing development.
2. The Commissioner's decision is that the council was not correct to rely on section 43(2) of the Freedom of Information Act 2000 (the FOIA) when withholding the requested information, but is entitled to rely on regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
3. However, by failing to deal with the request under the EIR, the Commissioner has found that the council has breached regulation 14(3) of the EIR.
4. Furthermore, as the council failed to provide its internal review response within the required 40 days, it has also breached regulation 11(4) of the EIR.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 15 July 2020, the complainant wrote to the council and requested information in the following terms:

I would like to request under the Freedom of Information Act, a copy or a view of the report compiled for MDDC by Randell Symonds LLP on the cost analysis for the housing development behind the Tiverton town hall currently under construction by the council's development company 3rivers ltd. As the contracts have already been awarded there can be no reasons of confidentiality or any other to stop the council from granting my request.

7. On 12 August 2020, the council confirmed to the complainant that it was refusing the request under section 43(2) of the FOIA. It stated that the disclosure of the information would prejudice the commercial interests of both itself, and its subsidiary company, 3 Rivers.
8. On 12 August 2020, the complainant requested an internal review. Following the Commissioner's intervention, on 21 October 2020, the council confirmed that it had upheld its previous decision.

Scope of the case

9. On 23 August 2020, the complainant contacted the Commissioner to complain about the council's failure to provide a response to his request for an internal review.
10. On 22 October 2020, the complainant contacted the Commissioner again as he was unhappy with the internal review decision he had now received from the council.
11. The Commissioner has firstly considered whether the requested information falls under the scope of the EIR, or the FOIA.
12. She has then gone on to determine whether the council was entitled to withhold this information in response to the complainant's request.

Reasons for decision

Correct Access Regime

13. 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.
14. Regulation 2(1)(c) of the EIR 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.
15. The council has referred to the Information Tribunal decision in the case of *Mid Devon District Council v ICO (EA/2018/0102)*¹ (the Tribunal case), in support of its decision to consider the complainant's request under the FOIA. It states that there are sufficient similarities between the two sets of withheld information for it to be appropriate to follow the same approach taken by the Tribunal.
16. However, the Commissioner regards there to be some key differences between the two cases.
17. The withheld information considered by the Tribunal was described as a one page document which set out a budget for a proposed property development (the same development relevant to this case). The Tribunal decided that such information did not '*possess the characteristics which bring it within the scope of the EIR.*'
18. Whilst it is not clear when the information considered by the Tribunal was created, it can be assumed that, at the very least, it predates 25 May 2017, the date of the information request that was under consideration in that case. Furthermore, it contains only a basic budget/outline of the potential costs, interest payments and revenue of a proposed development project which had not yet reached the planning submission stage.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2444/Mid%20Devon%20District%20Council%20EA-2018-0102%20\(20.06.19\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2444/Mid%20Devon%20District%20Council%20EA-2018-0102%20(20.06.19).pdf)

19. The withheld document relevant to this case, which is dated September 2017, contains a full breakdown of the estimated costs for all the works required to complete the housing development. The council has confirmed that this document supported the planning application for the development, which was submitted to the planning department on 12 September 2017 (and subsequently approved).
20. It is the Commissioner's view that the current withheld information is integral to a measure (the development itself and its construction) which will, or will be likely to, affect the environment.
21. The Commissioner therefore considers that the withheld information is environmental under regulation 2(1)(c) of the EIR, and that the request should be considered under this access regime.
22. The council has already confirmed that, should the Commissioner form the view that the FOIA is not the correct access regime in this instance, the information in its view should still be withheld under regulation 12(5)(e) of the EIR.
23. The Commissioner regards the council's arguments in support of the application of section 43(2) of the FOIA to be relevant, and transferable, to regulation 12(5)(e) of the EIR.

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

24. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
25. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
26. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.

27. Following receipt of the council's original response to her enquiries, the Commissioner received notification from the complainant that the construction company contracted by 3 Rivers was no longer working on the development; he also advised that 3 Rivers was now carrying out the work directly. The complainant believed that these changes weakened the council's argument for withholding the information he had requested.
28. Following further investigation by the ICO, the council confirmed that, since 31 March 2021, 3 Rivers has been managing the project through subcontractor work packages, rather than a main contractor. The council also confirmed that the completed date of the development is currently estimated to be May 2022.
29. The Commissioner is required to consider the circumstances that are relevant at the time of the request. Therefore, for the purposes of this decision notice, she can only consider the arrangements that were in place at that point in time, and not any subsequent changes that may have occurred.

Is the information commercial or industrial?

30. The withheld information consists of a report that gives a detailed estimate of costs which directly relate to the construction of a property development. Once completed, these properties will be sold.
31. The Commissioner is satisfied that the withheld information would have been relevant to the decisions made about the financing of the project, and also the negotiations with third party companies to carry out the work on the development.
32. Given the above, it is the Commissioner's decision that the details of the full estimated costings for the development relate to a commercial activity, that being the financial arrangement between the council and 3 Rivers, and also the arrangement between 3 Rivers and the third party company contracted to carry out the development; it is therefore commercial in nature.

Is the information subject to confidentiality provided by law?

33. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.

33. As far as the Commissioner is aware, whilst it may be the case that details of the loans² which the council has provided to 3 Rivers to carry out the required works may be in the public domain, the detailed estimated costings for the development are unique to the council's plans for development of the Riverside area, and are not currently accessible.
34. The Commissioner is therefore of the view that the withheld information is not trivial in nature, and that such information has the necessary quality of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

35. The Commissioner considers that, in order for the third condition of the exception to be satisfied, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
36. It should be noted that economic interests are wider than commercial interests, and can include financial interests.
37. The council has advised that disclosing the information to the world at large would allow competitors and suppliers to access the highly detailed costings of a single development, and that this would damage 3 Rivers' ability to secure value for money through the best price.
38. The council states that it must achieve the best return and value for its assets, resources and activities, including the commercial activities of 3 Rivers. It explains that the sole purpose of setting up 3 Rivers had been to generate an income for the council.
39. The council goes on to argue that in a competitive marketplace, a commercial entity would not be expected to disclose its detailed costings of a commercial development to the public. It states that it believes that placing the information into the public domain would prejudice the commercial interests of both itself, and 3 Rivers, and does not regard the public interest to be best served by doing so.
40. The council has confirmed that the contracting company that was undertaking the work did not have access to the cost estimate document. It states that the position of 3 Rivers in negotiating any variations to the contract, retentions etc, would be weakened, should the information be released into the public domain. It goes on to say

² [\(Public Pack\)Agenda Document for Homes Policy Development Group, 17/03/2020 14:15 \(middevon.gov.uk\)](#)

that the council would suffer similar prejudice, as any financial damage to 3 Rivers would also affect the council directly.

41. The Commissioner is satisfied that the disclosure of the detailed estimated costings by the council at the time of the request would undermine the position of 3 Rivers in a competitive marketplace. It would have a detrimental impact on its ability to get best value for the works to be carried out, as its commercial bargaining position would no longer be protected. In addition, given that 3 Rivers is a wholly owned subsidiary of the council, the Commissioner accepts that disclosure would also have an adverse effect on the finances of the council.
42. The Commissioner is therefore satisfied that this condition of the exception has been met.

Would the confidentiality be adversely affected by disclosure?

43. Although this is a necessary element of the exception, should the first three tests set out in paragraph 25 of this decision notice be met, the Commissioner considers it inevitable that this element will also be satisfied. In her view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.

Public interest test

44. As the exception under regulation 12(5)(e) is engaged, the Commissioner has gone on to consider whether the public interest in the disclosure of the requested information is outweighed by the public interest in maintaining the exception. When carrying out the test, the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).

The council's position

45. The council argues that whilst 3 Rivers is a wholly owned subsidiary, it is also a commercial entity in a competitive marketplace, and that as such, would not be expected to disclose its detailed costings to the public.
46. It states that information about the activities of 3 Rivers is published in its own accounts, and the Group Accounts for the council, both of which are publicly accessible. Its activities and information about the developments it is undertaking are also discussed regularly at cabinet meetings of the council (although it does confirm that statute provides for certain discussions to take place without the public being present).

47. The council argues that it has a duty to handle its finances and assets for the benefit of the community. It goes on to explain that it has had to deal with several years of austerity measures and cost cuts, and that the desire to raise income from alternative sources is to protect frontline services and minimise council tax increases. It says that the development is still ongoing, and considerable sums of public funds are involved which must be protected.
48. The council has also advised that when the development is completed, information about the sale process of properties will be publicly available, as well as the potential profit or loss; this data will be included in the company accounts, and the council's group accounts.
49. The council has advised that it believes that the factors set out above carry significant weight in favour of withholding the information.

The complainant's position

50. The complainant has argued that the report is '*essentially a viability study for the riverside site*' and that, at the time of the request, there was no reason for any commercial confidentiality.
51. It would appear that, given the significant overspend of the project to date, the complainant believes it to be important for the public to have access to the report in order to be reassured that the decisions made to proceed with the development were based on a cost estimate that was realistic and achievable.
52. At the time of the complainant's initial representations to the ICO, he argued that when the relevant report was created there was no contract with any third party company to carry out any of the required works on the development. Furthermore, as the contract had been awarded by the time of his request, he believes that there can be no justification for withholding this information.

The Commissioner's position

53. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the wider public's confidence of the decisions made by a public authority.
54. In this instance, it is clear that the relevant development project, and the way in which it has been managed by 3 Rivers, has been the subject of some controversy. There appears to have been major delays in construction, together with a significant overspend on the project to

date³. The council has also had to provide additional financial support to 3 Rivers, and concerns have been raised that there will be a financial deficit following the completion of the development⁴.

55. Given the above, the Commissioner appreciates that it would not be unreasonable for the public to expect a greater degree of transparency and openness about the decisions that were made about the development.
56. However, in her opinion, there is a very strong and inherent public interest in ensuring fairness of competition, and it would be firmly against the public interest if a company's commercial interests are harmed simply because they are a subsidiary of a public authority.
57. The Commissioner regards it to be pertinent that construction work was still ongoing at the time of the request. She accepts that there was a real possibility that subsequent variations to the contract with the third party construction company could arise, or that further contracts for works and services would be necessary.
58. The Commissioner has also taken into account the extent of that information which has already been placed into the public domain throughout the process, and whether this goes some way in meeting the public interest in matters relating to the costs and finance of the project.
59. She is aware that the minutes of a number of meetings⁵ which discuss the position of the development, the financial support provided to 3 Rivers, and the terms in which this finance has been agreed, are publicly available. The council also continues to release information about the project and its financing into the public domain.
60. It is only right that the council is held accountable for the decisions that it has made that relate to the expenditure of public money. The high level of investment by the council, the serious delays to the works planned, the potential overspend and loss of revenue, are all factors

³ <https://democracy.middevon.gov.uk/documents/s16959/Cabinet%20Report%20-%20Monitoring%20Month%209.pdf>

⁴ <https://www.devonlive.com/news/local-news/council-likely-overspend-757k-riverside-3988612>

⁵ <https://democracy.middevon.gov.uk/documents/s18835/3Rivers%20Cabinet%20Update-Options-Interim%20Funding%20request%20-%2029-10-20%20FV.pdf>

which weigh in favour of the release of information that relates to the development project.

61. However, it is the Commissioner's view that the publication of information by the council which provides updates on the position of the project, and its costs, goes some way in satisfying the public interest with regards to the processes which have, and continue to be, followed. If it is the case that there are concerns about the decision made to proceed with the development, or the way in which the development project has been managed, then there are more appropriate mechanisms to deal with such issues.
62. Furthermore, it is the Commissioner's view that the harm which would be caused to the economic interests of 3 Rivers, and the council, should this information be released at a time when construction work was (and still is) ongoing, carries some considerable weight in favour of withholding the information. If 3 Rivers were unable to achieve best value for any of the works that are to be carried out, this would have a direct, and detrimental, impact on the public purse, which would not be in the public interest.
63. Whilst this is a finely balanced case, the Commissioner has decided that, in this particular instance, the public interest arguments in support of withholding the information tip the balance in favour of maintaining the exception.

Procedural matters

64. Regulation 14(3) requires a public authority to provide the requester with a refusal notice specifying the exceptions within the EIR upon which it is relying.
65. In the circumstances of this case, the Commissioner has found that although the council originally considered this request under FOIA, it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR; in particular, regulation 14(3).
66. Regulation 11(4) of the EIR requires a public authority to complete its internal review as soon as possible, and no later than 40 working days after the internal review is requested.
67. The complainant requested an internal review on 12 August 2020. As the council did not provide a response until 21 October 2020, the Commissioner has found there to be a breach of regulation 11(4) of the EIR.

Right of appeal

68. 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

69. 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.
70. 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF