

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 June 2016

Public Authority: East Hampshire District Council
Address: Penns Place
Petersfield
GU31 4EX

Decision (including any steps ordered)

1. The complainant has requested information relating to a specific planning application. East Hampshire District Council disclosed some information and withheld other information under the exception for the confidentiality of commercial information (regulation 12(5)(e) of the EIR).
2. The Commissioner's decision is that East Hampshire District Council has failed to demonstrate that regulation 12(5)(e) is engaged and that it wrongly withheld the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld viability information to the complainant.
4. The public authority must take these steps within 35 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

5. On , the complainant wrote to East Hampshire District Council (the "council") and requested information in the following terms:

" (1) Copies of all communications relating to the Doone application between EHDC officers and councillors, the developers and Natural England.

(2) Details of all meetings held between EHDC staff, councillors and developers, including site visits.

(3) Inter-departmental communications on this subject between council planning officers and other EHDC staff, including references to consideration of imperative reasons and alternative sites.

(4) Copies of all briefing documents to council staff and councillors from the chair of the planning committee and any responses.

In all cases, please ensure you include contemporaneous notes of meetings and telephone conversations - handwritten and in print form."

6. The council responded on 5 November 2011. In relation to (1), the council provided the complainant with a link to the relevant section of its website and disclosed an email. The council also withheld some information under the exception for adverse affect to commercial interests (regulation 12(5)(e)).
7. In relation to (2) the council provided a link to its website and disclosed some handwritten notes. For (3), the council against referred the complainant to a specific section of its website. In relation to (4) the council confirmed that no relevant information was held.
8. Following an internal review the council wrote to the complainant on 8 December 2015. It stated that it was maintaining its position.

Scope of the case

9. On 21 December 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. During the course of the Commissioner's investigation the council disclosed additional information to the complainant. The complainant confirmed that they were content for the scope of the Commissioner's investigation to be confined to the information in part (1) of the request which the council withheld under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. The council has withheld information regarding a viability assessment relating to the proposed development.

12. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that 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".
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

14. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
15. The Commissioner notes that the viability assessment and associated correspondence were generated for the purposes of supporting an application by a developer to further its commercial ends. The information contains details of financial viability costings which were submitted in support of its proposals for development.
16. The Commissioner considers that the information is clearly commercial in nature, and has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

17. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
18. The council explained that the information in question was imparted by the developer in the form of documents and emails which relate to a viability report prepared by a third party on behalf of the developer.

19. The council has submitted that viability report is marked "private and confidential" and it considers that the report and cost estimates were provided by the developer on a confidential basis. It stated that it was implicit that all viability reports and costing information it receives are considered to be confidential and that this is its standard practice to enable frank and open discussions at the planning pre-application stage.
20. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
21. On the basis of the council's submissions, the Commissioner is satisfied that distribution of the withheld information has been limited and that it is not otherwise accessible.
22. Having viewed the withheld information, it relates to a development which will have an effect on the local area. The Commissioner therefore considers that the information in question is not trivial. He is satisfied that the information does have the necessary quality of confidence.
23. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*¹ suggested that the 'reasonable person' test may be a useful one. He explained:

"if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".
24. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012), the Tribunal accepted evidence that it was "usual practice" for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in this case as part of the public planning process.
25. In applying the "reasonable person" test in this instance the Tribunal stated:

¹ *Coco v A N Clark (Engineers) LTD* [1969] RPC 41.

*"in view of our findings ... that at the relevant time the usual practice of the council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided) ... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing."*²

26. On the basis of the explanations provided by the council, the content of the withheld information and the above criteria, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence. From the arguments supplied by the council, the Commissioner considers that the circumstances gave rise to an explicit obligation of confidence due to the wording used in the report, and due to the assurances shared between the developer and the council when discussing the information in question. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law and considers that this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

27. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
28. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

² Published online here:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

29. The council has suggested that disclosure of the information would adversely affect the legitimate economic interests of the developer. It has stated that disclosure would be damaging "...because it discloses rates to be paid to third parties and interest rates which might be of use to potential tenderers and competitors and that it was therefore submitted to the Council on the basis that it is confidential."
30. The Commissioner notes that the council's arguments in respect of the adverse effects of disclosure are very high level and largely identify principles which the council considers to be self-evident. However, in order for the exception to be engaged it is not enough to rely on general principles – it is necessary for specific adverse effects to be identified and a causal link to be established between the harm and the disclosure of specific information.
31. The Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing; however, he considers that it is for authorities to fully explain the relevant causes and effects in any given instantiation of this principle. Simply stating, as the council has done, that information "might be of use to potential tenderers and competitors" is not enough.
32. The Commissioner does not consider that the council has adequately described the nature of the harm that disclosure would cause, nor has it made a link between the alleged outcomes and the specific withheld information. The Commissioner considers that the council's arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information. He acknowledges that there might well be a case to be made for withholding the information under regulation 12(5)(e) but he does not consider that the council has made it in this instance.
33. Furthermore, the Commissioner considers that, where a third party's interests are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner* (EA/2006/0014, 11 December 2006). That case related to the commercial interests exemption under FOIA, but it is equally applicable to third party interests under regulation 12(5)(e).

34. In this case, the council has not provided any direct evidence that it consulted with the developer in this case. In the Commissioner's view, this further discredits the arguments the council has submitted in relation to any harm which disclosure might cause in this case.
35. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner does not consider that he has a duty to generate arguments on its behalf
36. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

37. 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@hmcts.gsi.gov.uk

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

38. 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.
39. 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

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