

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

Decision notice

Date: 13 June 2017

Public Authority: Medway Council
Address: Gun Wharf
Dock Road
Chatham
Kent
ME4 4TR

Decision (including any steps ordered)

1. The complainant has requested information relating to a specific planning application. The Commissioner's decision is that Medway Council has failed to demonstrate that the exception at regulation 12(5)(e), where disclosure would have an adverse effect upon the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest, is engaged. She has also decided that the council does not hold any further information relevant to the requests in this case.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the information requested at part 1.b.i. of the request.
3. The public authority must take this step 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

4. On 1 August 2016, the complainant wrote to Medway Council ('the council') and requested information in the following terms:

(In relation to planning application MC/15/4539)

"1. Concerning the Proposed Section 106 Agreement

a. Since June 1st 2016, please state what contact by meeting, discussion, correspondence, telephone or any other means has taken place between Medway Council and the applicant Redrow and/or its agents or professional advisers?

b. Starting from 1st 2016, please supply:

i. copies of emails and letters passing to or from Medway Council and the applicant and/or its agents or professional advisers.

ii. copies of notes of telephone conversations between Medway Council and the applicant and/or its agents or professional advisers.

ii. copies of notes of meetings or discussions between Medway Council and the applicant and/or its agents or professional advisers.

iii. copies of the draft or complete section 106 agreement.

c. Please advise when the payments of money which the Council requires to be paid to it by a section 106 agreement will be paid to the council.

d. Please state how it is decided what the wording of the section 106 agreement will be. Please advise:

1. If the final form of the agreement will be subject to the approval of a council committee before the council concludes it.
2. If the section 106 agreement will be presented to a council committee before the council concludes it, what is the minute of the authority for the committee to act on behalf of Medway Council in this matter?
3. If it is proposed that officers alone should conclude the terms of the section 106 agreement, what is the minute of the authority for officers to do this?"

2. Concerning the Planning Conditions

a. Since June 1st 2016, please state contact by meeting, discussion, correspondence, telephone or any other means has taken place between Medway Council and the applicant Redrow and/or its agents or professional advisers.

b. Starting from June 1st 2016, please supply:

i. copies of emails and letters passing to or from Medway Council and/or the applicant and/or its agents or professional advisers.

ii. copies of notes of telephone conversations between Medway Council and the applicant and/or its agents or professional advisers.

iii. copies of notes of meetings or discussions between Medway Council and the applicant and/or its agents or professional advisers.

c. All except the first two planning conditions require an act of approval by Medway Council before they can be complied with. For all planning conditions except the first two please advise if:

i. When officers in due course consider that each condition has been complied with, will a council committee or meeting be asked to authorise the condition being discharged.

ii. If it is proposed that officers alone should be able to discharge the conditions in due course, what is the minute of the authority for them to do so?

3. Generally in Connection with this Site Including Allegations of Breaches of Planning Control and Unauthorised Development

Starting from June 1st 2016, please supply:

a. copies of emails and letters passing to or from Medway Council and/or the applicant/or its agents or professional advisers.

b. copies of notes of telephone conversations between Medway Council and the applicant and/or its agents or professional advisers.

c. copies of notes of meetings or discussions between Medway Council and the applicant and/or its agents or professional advisers."

5. The council responded on 18 August 2016 with the reference number 101001078841. In relation to point 1 of the request, the council refused to provide the requested information citing the exception at regulation 12(4)(d) of the EIR. With reference to point 2a and 2b, the council said that no meeting, discussion, correspondence, telephone or any other means has taken place between the council and the applicant Redrow and/or its agents or professional advisers. It provided narrative information in response to point 2(c)(i) and a web link in response to

point 2(c)(ii). With regards to point 3, the council said that the information is not held.

6. On 24 August 2016, the complainant requested an internal review in relation to point 1 of the request.
7. The council provided an internal review on 22 September 2016 in which it maintained its original position.

Scope of the case

8. The complainant wrote to the Commissioner on 26 September 2016 to complain about the way his request for information had been handled.
9. During the course of the investigation, it became apparent that some of the information requested in this case was provided to the complainant on 29 November 2016 in response to a request he made on 1 November 2016 (council reference 101001143160). A complaint in relation to that later request is being dealt with separately under case reference of FER0661662.
10. The information provided was in response to parts 1.b.iii and 1.c – that being ‘copies of the draft or completed section 106 agreement’ and ‘Please advise when payments of money which the Council requires to be paid to it by a section 106 agreement will be paid to the council’.
11. As this information has been provided to the complainant, it will not be considered in this decision notice.
12. Given that the section 106 agreement was provided to the complainant, the Commissioner asked the complainant whether he requires part 1.d.1-3 to be considered as part of the complaint. The complainant confirmed that parts 1.d.1 & 1.d.2 of the request are now redundant but that he wishes to continue his complaint regarding part 1.d.3. of the request.
13. During the Commissioner’s investigation, the council’s position in relation to part 1.d.3 of the request changed. It initially said that this information was not held at the time of the request and as such should not have been included in the initial refusal of the entirety of question 1 but it should have been addressed separately. It later explained to the Commissioner that recorded information in response to part 1.d.3 is held in the form of Chapter 3, Part 4 of the council’s constitution. The Commissioner understands that such information has now been provided to the complainant, therefore it will not be considered in this decision notice.

14. The council's position in relation to parts 1.a, 1.b.i and 1.b.ii of the request changed during the Commissioner's investigation from stating that the exception at regulation 12(4)(d) of the EIR applies, to stating that this information is not held. The Commissioner pointed out to the council that the request at part 1.a appears to be for a list or schedule of what contacts have taken place rather than the content of those contacts which is requested at 1.b, and is likely to be held (albeit perhaps not already in list/schedule form). The Commissioner understands that the council has now provided the information requested at part 1.a of the request and therefore it will not be considered in this decision notice.
15. Therefore the Commissioner has considered whether, on the balance of probabilities, the council holds information, within the scope of the two different parts of the request both numbered 1.b.i and 1.b.ii.
16. The council's position in relation to part 1.b.i of the request also changed from stating that the exception at regulation 12(4)(d) of the EIR applies, to the application of the exception at regulation 12(5)(e). Therefore the Commissioner has also considered whether the council was correct to apply regulation 12(5)(e).
17. For the avoidance of doubt, the scope of this complaint is limited to consideration of the council's responses in relation to the following parts of the request:
 - 1.b.i, 1.b.ii and 1.b.ii.

Reasons for decision

Regulation 12(5)(e)

18. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
19. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares*

Association¹. All four elements are required in order for the exception to be engaged:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

The Commissioner has considered each of these factors in turn.

Is the information commercial or industrial in nature?

20. 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.
21. The council said that the section 106 agreement and correspondence made in negotiating that agreement relates to the commercial activity of the council.
22. The Commissioner understands that a section 106 agreement is an agreement between a developer and a local planning authority designed to make a development possible that would otherwise not be possible, by obtaining concessions and contributions from the developer.
23. The Commissioner is satisfied that information relating to the negotiation of the section 106 agreement is commercial in nature. Therefore, this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

24. 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.
25. The council has said that in this context confidentiality is imposed by the common law of confidence. It said that there is an expectation on behalf

¹ Appeal number EA/2010/0012

of both parties that the information is confidential and would not be disclosed.

26. In relation to the common law duty of confidence, the Commissioner considers that the key issues to consider are whether the information has the necessary quality of confidence, which involves confirming that the information is not trivial and is not in the public domain, and whether the information was shared in circumstances creating an obligation of confidence.
27. The Commissioner notes that the council has not specifically stated that the information is not trivial, is not in the public domain, and was shared in circumstances creating an obligation of confidence. However, given the council's argument that release of the emails could damage its legitimate economic interests, it is reasonable to assume that the council considers the withheld information to not be trivial and not already be in the public domain. In relation to the information being shared in circumstances creating an obligation of confidence, using the test of whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence, the Commissioner is satisfied that that the information was shared in circumstances creating an obligation of confidence.
28. Taking all of the above into consideration, the Commissioner is satisfied that the information is subject to confidentiality provided by law. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

29. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

Whose interests?

30. The council has said that release of the withheld information could damage its legitimate economic interests. It also said that it has not considered the position of the developer nor, owing to timescales, asked the developer for it, but believes it is safe to anticipate that the developer's responses would be similar to the councils but more in the context of protecting the developer's commercial activity and economic interests.
31. The Commissioner considers that if it is a third party's interests that 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*². That case related to the commercial interests exemption under FOIA, but it is equally applicable to third party interests under regulation 12(5)(e).

32. Therefore the Commissioner has only been able to take into consideration the council's own interests.

Legitimate economic interests and disclosure would cause harm

33. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
34. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. A public authority needs to establish, on the balance of probabilities, that disclosure would cause some harm. In addition to being able to explain the nature of an implied adverse effect, public authorities must be able to demonstrate the causal link between any such affect and the disclosure of the specific information.
35. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"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".

² Appeal no. EA/2006/0014, 11 December 2006

36. The council said that release of the withheld information could damage the commercial bargaining position of the council in the context of existing and future negotiations and that this could damage the council's ability to obtain the best possible outcome for the public purse. It said that to release information relating to these negotiations, either during or after the final agreement has been approved would be detrimental to the existing and possible future negotiations with developers. The council submitted that other developers who are looking to negotiate section 106 agreements would be privy to how negotiations were progressed in this particular case and this would damage the council's bargaining position, thus risking its ability to achieve the best possible outcome for the public purse.
37. The Commissioner does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect. No precise examples have been provided of how the release of specific information would result in the effects claimed. She does not consider that the council has linked the claimed consequences to specific information or sufficiently explained the causal sequence. The council supplied the Commissioner with 230 pages of emails that it said were being withheld under this exception. Upon examination, the Commissioner notes that some of that information, approximately 1/3, postdates that of the internal review provided in this case and would therefore fall outside the scope of the request. She also notes that the information contains many duplicate emails and that a large proportion of the information appears to be purely administrative, rather than being commercial or industrial in nature.
38. Whilst the Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing, and possibly for a period after that time, she considers that it is for public authorities to fully explain the relevant causes and effects. She also considers that each different section 106 agreement will have various factors to take into account.
39. The Commissioner considers that there is little clarity around the specific nature of the alleged adverse effects which disclosure could cause and how this would be generated by the withheld information. This lack of clarity suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.
40. As stated earlier, in order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. She 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. She considers that it is for public authorities to fully explain the relevant causes and effects.

41. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making her enquiries in this case, the Commissioner informed the council that her general approach is to allow one further opportunity for a public authority to submit thorough arguments in support of its position before recommending a decision. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link.
42. 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.

Regulation 5(1) – duty to make environmental information available on request

43. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.
44. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
45. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations.
46. The council said that the negotiation of a section 106 agreement is carried out between the legal representatives of all parties to the

agreement and that any correspondence between the planning officer and the other parties would be solely to introduce the council's legal representative and make initial comments on the first draft (the council said that such information is included within part 1.b.i of the request). It explained that this negotiation is usually carried out via email and that it is very rare that the matter would be discussed over the telephone. It said that if anything is agreed over the telephone, as is the nature of the legal profession, it is always followed up in writing, and in this case it would be via email and that such information is included within part 1.b.i of the request. In this specific case, council said that the knowledge of its legal representative is that this particular section 106 agreement was negotiated via email and as such, it is clear that there is no data held. It further explained that if, by chance, there was a telephone conversation or meeting, any data that may be held would be held in a follow-up email which are held in the council's bespoke case management system, Iken, which its Legal Services use to store all correspondence.

47. The council confirmed that no electronic searches were carried out specifically to find the information requested at the two different parts of the request both numbered 1.b.ii and 1.b.ii because it would be a duplication of the search carried out at for information within the scope of part 1.b.i of the request. It explained that the search carried out to identify the information within the scope of part 1.b.i of the request was a manual search of each document held in the Iken casefile. The council also said that if information were held it would be electronically held and that no information had ever been held which had since been deleted or destroyed or held in other locations.
48. In reaching a decision as to whether the requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold the information. The council confirmed that there is neither a statutory requirement nor business need for the requested information to be held.
49. The Commissioner also considered whether the council had any reason or motive to conceal the requested information. The complainant has stated that he wishes 'to know how the various provisions in the section 106 agreement were negotiated particularly as some appear illegal and are seemingly just an inducement to grant planning permission'. It is not within the Commissioner's remit to adjudicate on the planning process, however, she has not identified any reason or motive to conceal the requested information.
50. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any information relevant to either of the two different parts of the request both numbered 1.b.ii and 1.b.ii. She

acknowledges that no specific searches for the requested information were carried out but finds the council's explanation that such information would be within the scope of part 1.b.i of the request to be entirely feasible. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, she does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

Other matters

51. The Commissioner notes that the council changed its position in relation to this request on more than one occasion during the Commissioner's investigation and she found it necessary to seek clarification from the council several times. This could be an indication that the council did not apply a presumption of disclosure when considering the request and did not give the request proper or full consideration until towards the end of the Commissioner's investigation. The Commissioner is concerned about the inconsistent responses to this request and the delays in responding to her enquiries but is aware that there have been issues with staff resources within the Information Governance Team. The council should ensure in future that its first step upon receiving an information request is to identify all the relevant information it holds and provide it, unless a relevant exemption or exception applies. The council should also ensure that its responses to the Commissioner's enquiries are as thorough and timely as possible.

Right of appeal

52. 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

53. 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.
54. 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
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SK9 5AF