

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 April 2017

Public Authority: Pembrokeshire County Council
Address: County Hall
Haverfordwest
Pembrokeshire
SA61 1TP

Decision (including any steps ordered)

1. The complainant has requested all proposals that have been submitted in respect of the development of South Quay, Pembrokeshire. Pembrokeshire County Council provided some information, but refused the remainder by virtue of regulations 12(5)(c), 12(5)(e) and 12(5)(f) of the EIR. The Commissioner's decision is that Pembrokeshire County Council has correctly relied on regulation 12(5)(e) in respect of the remaining information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 1 April 2016, the complainant wrote to Pembrokeshire County Council ('the Council') and requested the following information in respect of the South Quay Site:

"...all of the proposals that have been submitted and that you are considering..."
3. The Council responded on 21 April 2016. Although the response indicated that it had been considered under the EIR, it cited section 43(2) of the FOIA on the basis that disclosure would, or would be likely to prejudice the commercial interests of individuals and the public authority.

Following an internal review the Council wrote to the complainant on 21 June 2016. It confirmed that it did consider the response under the EIR and that the EIR exception for confidentiality of commercial or industrial information is regulation 12(5)(e). It further confirmed that after considering third party responses, and the outcome of the public interest tests, it had concluded that some information relevant to the request should be disclosed, (the complainant's own proposal). However, it refused to disclose the remainder of the information in reliance on regulations 12(5)(c), 12(5)(e) and 12(5)(f).

Scope of the case

4. The complainant contacted the Commissioner on 21 June 2016 to complain about the way his request for information had been handled. The complainant informed the Commissioner that he is not satisfied that the Council has properly processed the request, and considers it has not identified the nature, extent or harm of the damage likely to be caused by its disclosure. He also expressed concern that the Council had not quantified the benefit of the public interest in its disclosure, or weighed the likely damage against the public benefits in any of the three exceptions considered. He further stated that the Council appears to have assumed that merely identifying the possibility of any harm is sufficient to outweigh the public interest in disclosure.

Reasons for decision

The appropriate legislation

5. Whilst the Council originally considered the request under the EIR, the Commissioner notes that it initially cited section 43(2) of the FOIA. The Council's internal review did, however, confirm that it had considered it under the EIR.
6. Regulation 2(1) of the EIR defines what 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form 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) and (b) as well as measures or activities designed to protect those elements...'

7. The Commissioner notes that the information concerns a proposal for the development of the South Quay site, Pembrokeshire and considers that this relates to a measure affecting or likely to affect the landscape in (a). She is therefore satisfied that the appropriate legislation under which to consider this request is the EIR.

Regulation 12(5)(e)

8. 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.
9. The Council is relying on regulation 12(5)(e) in respect of the withhold the information. In her assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
 - 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?
10. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

11. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

12. The Commissioner has considered the information withheld on the basis of regulation 12(5)(e). She notes that it is a development partnership proposal for the South Quay site and related email correspondence. As it concerns that sale or purchase of goods or service for profit, she is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

13. In relation to this element, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligation or statute.
14. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider are:
 - Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
15. As stated in paragraph 13 of this notice, the withheld information is a development proposal for the South Quay site and a small amount of related email correspondence all from Piece Regan (who submitted the other development proposal), and relating to its commercial interests.
16. Having considered the withheld information, the Commissioner is satisfied that the information is not trivial. Additionally, no evidence has been presented to the Commissioner to indicate that the information is in the public domain. The Commissioner therefore considers that the information does have the necessary quality of confidence.
17. The Council has informed the Commissioner that discussions were held with Piece Regan on a confidential basis. This was acknowledged by both parties at the time and recorded in the Council's notes of the meetings.
18. The Commissioner is therefore satisfied that the information was shared in circumstances importing an obligation of confidence and considers that the common law of confidence applies to this information.

Is the confidentiality required to protect a legitimate economic interest?

19. 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. 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 that on the balance of probabilities, 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 probable than not*'.
20. The Council considers that disclosure of the information would adversely affect the commercial interests of Piece Regan who submitted the development proposal.
21. Piece Regan has refused to give its consent to the release of the information into the public domain. It considers that the information it supplied to the Council is commercially sensitive, the disclosure of which would have a detrimental impact on the economic effect of its business both in the case of this particular project, and more generally by the release of its guidance notes. It has further argued that disclosure will result in an actual and consequential economic loss which it would seek to recoup.
22. The Commissioner has considered these arguments and the fact that the process was (and remains so at the time of writing) on-going at the time of the request, and therefore accepts that the confidentiality is required to protect the legitimate economic interest of the third party.

Would confidentiality be adversely affected by disclosure?

23. As the first three elements of the test cited at paragraph 10 of this notice have been established, the Commissioner is satisfied that disclosure of the information into the public domain would adversely affect the confidential nature of that information by making it publicly available, and would consequently harm the legitimate economic interests of Piece Regan. She has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the information

24. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
25. The Council has acknowledged that releasing the information would promote transparency and accountability for the spending of public money.
26. It has also acknowledged that disclosure would provide the public with greater understanding of what potential development plans there are for the site in question, and would enable public participation in decision making.

Public interest arguments in favour of maintaining the exception

27. The Commissioner considers that arguments in favour of maintaining the exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in protecting the principle of confidentiality and that of avoiding commercial detriment.
28. It has already been established, (paragraph 18) that the information was shared with the Council in circumstances that created an obligation of confidence. The Council has argued that disclosure of the information at the time of the request would cause detriment to the principle of confidentiality. It has added that there is a strong public interest in maintaining the principle of confidentiality as not only would disclosure undermine the established trust which has been developed between itself and Piece Regan, and in so doing damage their working relationship, but it would damage the general principle of confidentiality itself.
29. It has further argued that Piece Regan's economic interests would be harmed as their market position would be affected by the release of commercially valuable information, which would result in a loss of revenue and income. Additionally, the information includes advice on costings, development appraisals, concept advice and a Partnership proposal which are unique to Piece Regan, and which in some cases was acquired at a financial cost.
30. The Council considers that the disclosure of this information would result in a £25,000 loss for Piece Regan, and future work would be jeopardised, as competitors could either use Piece Regan's knowledge in

its entirety, or they could use it to enhance their own knowledge and applications. Additionally, other companies would know their pricing structures and undercut them, so reducing their ability to win contracts. The Council could be in a situation where the contract has been awarded to the lowest bidder, but find that it is unable to deliver the project on that budget because it had been based on under-cutting Piece Regan.

31. The Council has further argued that the timing of the request was a crucial factor because the Council was (and is) still seeking proposals for the development, meaning that the information submitted by Piece Regan was current and active. Additionally, Piece Regan may also decide to use the application they have already submitted to build upon and submit a new application.
32. The disclosure of this information while the application window is still open, would damage the relationship between the Council and Piece Regan, and with other companies who were considering submitting proposals but may decide not too if they see the Council disclosing applications before a decision has been reached. This would not only affect this particular development, but other future developments.
33. The Council has informed the Commissioner that it has no issue with sharing the information with the public once the application process has been closed, and undertaken a re-assessment of the information that is held. It has further suggested that in consultation with the companies involved, it might be that the best two submissions are released to the public for their opinions to be made, or if there is an outstanding proposal and a contract is signed, information can then be released to the public.
34. The Council has further explained to the Commissioner that it has been difficult to get applications for this particular development, and without the co-operation and goodwill of developers, the site will not be developed, which it has argued would not be in the public interest. The Council considers that it needs to do everything it can to obtain good proposals for this site and to do this, it considers it must protect the commercial confidentiality of the information.

The balance of the public interest arguments

35. The Council has acknowledged the importance of sharing information with the public, but has argued that the timing of this request is crucial, and plays an important factor in determining the balance of public interest.

36. The Commissioner has considered the arguments put forward both in favour of disclosure and maintaining the exception. The Commissioner acknowledges the explicit presumption in favour of disclosure under regulation 12(2) of the EIR and general principles of accountability and transparency of decisions taken involving the expenditure of public money and affecting the local population.
37. However, whilst she has seen no specific evidence to substantiate the arguments in respect of £25,000 loss to the third party, she does accept that the economic interests of the third party would be adversely affected by disclosure. She also considers that that the principle of confidentiality itself is a significant and weighty public interest factor. However, of greatest significance in her consideration of the balance of public interest test, is the timing of the request, as the process was on-going at this time. She has therefore concluded that the balance of public interest favours maintaining the exception and that the Council was correct to rely on regulation 12(5)(e) in relation to this information.
38. As the Commissioner has determined that regulation 12(5)(e) is engaged in respect of this information, she has not gone on to consider either regulation 12(5)(c) or regulation 12(5)(f).

Right of appeal

39. 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

40. 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.
41. 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

Catherine Dickenson
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