

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 December 2017

Public Authority: Horsham District Council
Address: Parkside
Chart Way
Horsham
West Sussex
RH12 1RL

Decision (including any steps ordered)

1. The complainant has requested a copy of a review of a viability assessment relating to a planning application. Horsham District Council disclosed some of the information and withheld other information under the exception for commercial confidentiality (regulation 12(5)(e)).
 2. The Commissioner's decision is that Horsham District Council has failed to demonstrate that regulation 12(5)(e) is engaged.
 3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld 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.
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Background

5. The request relates to an outline planning application for a mixed use strategic development to include housing (up to 2,750 dwellings), business park (up to 46,450 m²), retail, community centre, leisure facilities, education facilities, public open space, landscaping and related infrastructure¹.
6. The application was submitted by Liberty Property Trust ("Liberty"). As the application indicated levels of affordable housing provision that fall short of the 35% policy provision, Liberty provided the council with a viability assessment to justify its position.
7. The council contracted Dixon Searle Partnership ("DSP") to produce a review of Liberty's viability assessment. The complainant requested a copy of this review.

Request and response

8. On 27 April 2017 the complainant wrote to Horsham District Council (the "council") and requested information in the following terms:

(RE: North of Horsham DC/16/1677 - DSP Report (DSP152521))

*"Please supply an **un-redacted copy** of the following report:
DSP Review of Applicant Submitted Viability Position - Final Draft v4.2 -
January 2017 in relation to the Planning Application noted above."*
9. The council responded on 25 May 2017. It stated that it was withholding the information under the exception for commercial confidentiality, regulation 12(5)(e)
10. Following an internal review the council wrote to the complainant on 29 June 2017 where it stated that it was maintaining its position.

¹ <http://horsham.moderngov.co.uk/documents/s6179/Appendix%201%20-%20Committee%20report%2028%2004%202017.pdf>

Scope of the case

11. On 11 July 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. During the Commissioner's investigation the council disclosed some additional information to the complainant.
13. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the remaining information under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

14. The council disclosed a redacted copy of DSP's review of Liberty's viability assessment (the "review"). It withheld the following paragraphs under regulation 12(5)(e):
 - 3.17
 - 3.21
 - 3.43
 - 3.44 (partially)
 - 3.45 (partially)
 - 4.5 (partially)
15. 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".
16. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

17. The council confirmed that the information relates to the commercial activity of a developer (Liberty), including construction costs, sale costs and yield estimates.
18. The Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

19. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
20. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
21. The council has confirmed that the withheld information relates to a large scale planning application that has not yet been decided and includes detailed information relating to prices, profits and costs. The council has stated that the information is held under a duty of confidence with an expectation that it will not be widely accessed, circulated or distributed.
22. The council has submitted that the information is not trivial in nature, that it has not been more widely shared and that it was provided as part of a process whereby the parties involved had an expectation that the information would be held in confidence.
23. In view of the above and, having had regard for the withheld information, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

24. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011)* that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a

legitimate economic interest of the person the confidentiality is designed to protect.

25. 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.
26. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".

27. The council has stated that disclosure of the withheld information would adversely affect its own legitimate economic interests and the interests of Liberty.

The council's legitimate economic interests

28. The council has explained that current financial predictions for the district *"...have to include income from the increase in dwellings and New Homes Bonus paid by central government to incentivise housing growth in the local area."*

The council has argued that disclosing the information would make it difficult *"...to attract the necessary investment from the private sector if commercially sensitive information is released at the stage where it would harm the legitimate economic interests of that commercial organisation."*

29. In essence, the Commissioner understands that the council considers that disclosing the information would make developers reluctant to engage with the council in pursuit of planning projects because of the risk that commercial information might be disclosed.
30. Firstly, the Commissioner has not been provided with any evidence that this phenomenon has ever happened or is likely to happen and, secondly, the Commissioner is highly sceptical that developers would deny themselves the opportunity to pursue potentially lucrative planning schemes. The Commissioner considers that the council's argument is

speculative and generic in nature and fails to meet the threshold for engaging the exception.

The legitimate economic interests of Liberty

31. The council confirmed that, in accordance with good practice in this regard, it sought the views of Liberty in relation to the potential disclosure of the information. The council provided the Commissioner with a copy of the relevant correspondence and confirmed that it deferred to Liberty's submissions in this regard. The Commissioner has considered Liberty's arguments and those provided by the council itself as they relate to each element of the withheld information.

Paragraph 3.17

32. Liberty has stated that the information refers to its "...future commercial plans and business strategies" and its disclosure would benefit competitors and potential customers, significantly impacting its ability to negotiate and compete in the market.
33. The Commissioner accepts that the ability of a party to negotiate can be inhibited by the disclosure of information which allows a competitor (for example) to adapt its strategy, based on what would otherwise be confidential knowledge. She accepts, therefore, that this outcome would constitute an adverse affect to Liberty's legitimate economic interests.
34. However, in order to demonstrate whether such an outcome *would* result from disclosure, the Commissioner considers it is necessary to detail what specific form the harm would take, link this to the specific information and provide evidence which shows the likelihood of the outcome occurring. In this case, the submissions provided are high level in nature and do not explain how a competitor (or customer) would use the information to the detriment of Liberty. The Commissioner is left with the impression that the exception has, in this instance, been applied on a general basis and she has concluded that, in relation to this withheld paragraph, the exception is not engaged.

Paragraph 3.21

35. Liberty has argued that disclosing the information in this paragraph would "...allow both competitors and potential customers... to gain access to commercially valuable information and this would significantly impact Liberty's ability to negotiate and to compete in the market in the future, both on this project and others."
36. Again, as with the analysis provided in relation to paragraph 3.17 above, the Commissioner finds the arguments submitted by Liberty to be

entirely generic in nature. The submissions have no regard for the specific nature of the information or details of the form that adverse affects to its negotiating abilities would take. The Commissioner has, therefore, reached the same conclusion, finding that the exception is not engaged in relation to the information in this paragraph.

Paragraph 3.43

37. In relation to this paragraph the council has stated that the information is *"...highly sensitive because it identifies future commercial plans, confidential internal business plans and strategies of Liberty. This information is a key trade secret of Liberty which if disclosed would undermine Liberty's competitive advantage."*
38. The Commissioner notes that Liberty itself did not provide specific submissions in relation to this paragraph. She further notes that the council's submission in this regard are generic in nature and do not explain how the qualities identified relate to the actual withheld information. The Commissioner is again left with the impression that the information has been withheld on a general basis without regard for the actual effects of disclosure and the relevance of the information to such effects. As she has not been provided with evidence that the council has directly reflected Liberty's views she further considers that the council's arguments are speculative in nature.
39. In view of the above the Commissioner has concluded that it has not been shown that the exception is engaged in relation to this paragraph.

Paragraph 3.44

40. In relation to this withheld paragraph the council, echoing Liberty's submissions, has stated that disclosing the information would *"...destroy Liberty's negotiating position with potential purchasers of the land."*
41. Having referred to the withheld information the Commissioner is not convinced that it represents anything more significant than what can be revealed via a Google search. As such she does not consider that the information would be of particular use to a competitor, certainly not to the extent that it would result in adverse affects to Liberty's legitimate economic interests. Again, the Commissioner considers that the council has failed to meet the evidential or explanatory threshold required to engage the exception and she has concluded that the exception does not apply.

Paragraph 3.45

42. In relation to this paragraph Liberty's submissions argue that disclosure of the information would provide competitors with details of its assumptions on land values which could be used to undermine its position in negotiations. Liberty has further argued that the information is a "key trade secret" of Liberty. The council's submissions echo those provided by Liberty.
43. Having referred to the withheld information the Commissioner considers that the arguments provided have no direct relevance. In relation to the information being a "trade secret" the Commissioner has received no specific submissions which explain why this is the case.
44. Liberty does make reference to a First-Tier (Information Tribunal) decision (EA /2010/0073, Department for Works and Pensions)² and states that this "supports" its position. However, whilst the Commissioner is mindful that this Tribunal decision considers what constitutes a trade secret and draws certain conclusions in this regard, she does not consider that it self-evidently supports the position adopted by Liberty. She has received no submissions from Liberty or the council which explain (for example) the level of expertise or expense involved in producing the withheld information. On the face of it there is nothing in the withheld information itself which suggests it meets the criteria for a trade secret. The burden to demonstrate that it does rests with Liberty/the council and neither have been forthcoming in this regard.
45. In the absence of submissions which explain why disclosure would produce the effects described or evidence in support of the claim that the information constitutes a trade secret, the Commissioner has determined that the information has been wrongly withheld. She has concluded that the threshold for engaging the exception has not been met, namely, it has not been shown that disclosure would harm Liberty's legitimate economic interests.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20\(0073\)%20Decision%2020-09-2010%20\(w\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20(0073)%20Decision%2020-09-2010%20(w).pdf)

Paragraph 4.5

46. Liberty's submissions here largely echo those considered above in relation to other withheld paragraphs, including references to the information constituting a trade secret.
47. Again, the Commissioner cannot see a direct correlation between the effects ascribed and the actual information that is being withheld and the submissions provided do not provide sufficient clarity in this regard. Where an exception is being applied it is the duty of public authorities to explain why and to provide evidence which demonstrates how disclosure will produce the ascribed effects.
48. The Commissioner is left with the impression that the council has been content to be steered by Liberty in relation to the information which should be withheld. This in itself is no bad thing – the Commissioner would not expect authorities to have diverse knowledge of the commercial concerns of third parties. However, the ultimate responsibility for handling requests rests with public authorities and the Commissioner makes it clear in her correspondence what level of detail is required to justify the use of exceptions.
49. In relation to this withheld paragraph, the Commissioner considers that neither the council nor Liberty have adequately explained why disclosing the information would result in adverse affects to Liberty's legitimate economic interests. She has, therefore, concluded that the exception is not engaged.

Conclusions

50. The Commissioner has concluded that it has not been shown disclosure of the withheld information would result in adverse effects to the legitimate economic interests of the council or Liberty.
51. In this instance, therefore, the Commissioner has decided that the council has failed to demonstrate that disclosure would adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.
52. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

Right of appeal

53. 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

54. 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.
55. 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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