

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 02 May 2018

Public Authority: Folkestone & Hythe District Council
Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information relating to the council's plans to construct a new town currently known as Otterpool Park and its collaboration with its development partner Cozumel Estates Limited (Cozumel). The council disclosed some information but refused to disclose other information citing regulations 12(5)(e) and 12(5)(f) of the EIR.
2. During the Commissioner's investigation the council confirmed that it no longer wished to rely on regulation 12(5)(f), as it felt on reflection that regulation 12(5)(b) of the EIR applied instead.
3. The Commissioner's decision is that the council has correctly applied regulations 12(5)(e) and 12(5)(b) of the EIR to the remaining withheld information and that the public interest rests in favour of maintaining these exceptions.
4. The Commissioner does not require any further action to be taken.

Request and response

5. On 19 May 2017, the complainant wrote to the council and requested information in the following terms:

“Under the Freedom of Information Act I would like all correspondence between Shepway District Council [now Folkestone & Hythe District Council] (its Councillors and officers) and the owners of Folkestone Racecourse relating to Otterpool Park Newtown and Folkestone Racecourse over the period June 1st 2015 and June 30th 2016.

This means correspondence between Shepway District Council (its councillors and officers) and any company owned by the [redacted] ([names redacted]) - in particular, Aldersgate Investments, Arena Leisure/Arena Racing Company but also any other company owned by the [redacted] used to correspond with Shepway District Council.

Correspondence covers emails or any other electronic communications, reports, letters, minutes and meeting notes”.

6. As the complainant received no response, she referred the matter to the Commissioner on 7 September 2017.
7. The Commissioner wrote to the council on 7 October 2017 and requested that it responds to the complainant’s request by 23 October 2017.
8. The council responded on 18 October 2017. It released some information but withheld other information citing regulations 12(5)(e) and 12(5)(f) of the EIR.
9. The complainant requested an internal review on 25 October 2017.
10. The council carried out an internal review and notified the complainant of its findings on 20 November 2017. It upheld its previous application of regulations 12(5)(e) and 12(5)(f) of the EIR.

Scope of the case

11. The complainant contacted the Commissioner again on 2 January 2018 to complain about the way her request for information had been handled. She stated that she accepts regulation 12(5)(e) of the EIR applies to the bids submitted for planning, master planning and project management consultancy advice (referred to as item 3 in the council’s internal review response) but does not accept that it applies to the

option agreements that are being negotiated in respect of areas of land at Otterpool (item 1) or the proposed acquisition of an area of land by a third party (item 2). The complainant also confirmed that she does not agree that regulation 12(5)(f) applies to legal advice shared by Cozumel with the council.

12. The Commissioner's investigation has therefore focussed on items 1 and 2 of the internal review, as described above, and the legal advice shared by Cozumel with the council.
13. During the Commissioner's investigation the council disclosed a redacted version of the template options agreement (item 1) to the complainant. This notice will therefore address the remaining withheld information at this point.
14. Additionally, during the Commissioner's investigation the council confirmed that it now wished to rely on regulation 12(5)(b) of the EIR for the legal advice, rather than regulation 12(5)(f), understanding that regulation 12(5)(b) of the EIR is more fitting to requests for this type of information.

Background

15. The council informed the Commissioner that it is seeking to promote the construction of a new town in the district on land adjoin the M20 junction 11 and the proposed development is known as Otterpool Park. It stated that it has entered into a collaboration agreement with Cozumel relating to this development and Cozumel is the owner of the former Folkestone Racecourse, which falls within the area of the proposed new town. The council itself has also purchased land at Otterpool Manor Farm; land which also falls within the proposed new town. The council is therefore the local planning authority for this development and the landowner of key land to be used.

Reasons for decision

Regulation 12(5)(e)

16. Regulation 12(5)(e) of the EIR states that a public authority can 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.

17. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
18. In accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
19. Dealing with the first bullet point, the council has said that the withheld information relates to the entering into of agreements that enable or will enable the council and Cozumel to purchase land. The information contains details of negotiations and identities of different parties and the entering into agreements of this nature is a commercial activity. The parties naturally wish to make sure that they get the best deal. For the landowners, they wish to maximise the value of their asset and for the council and Cozumel they wish to acquire it at the lowest possible price.
20. It stated that the entering into of agreements is also part and parcel of achieving a commercially viable comprehensive development as well as achieving an acceptable commercial return. It argued that the council's motivation is not profit in the same way as a private company but that does not mean that it does not enter into such agreements for gain. How it will ensure that the new town is developed has not yet been determined but the council will not be looking to make a loss in its transactions. It stated that where Cozumel is concerned, it is a private company which naturally wishes to see a return on its investment and ensure that their shareholders receive dividends.
21. The Commissioner is satisfied that the withheld information is commercial in nature. It relates to ongoing commercial activities between the council and Cozumel and different third parties to facilitate the proposed new development. The activities involve the sale and purchase of land required for the proposed development; such activities are for profit or gain on both sides of the negotiation and so are commercial in nature.

22. Turning now to the second bullet point, the council has stated that it is satisfied that the withheld information is subject to the common law duty of confidence. It argued that the information is not trivial; it concerns the development of a new town which if carried out successfully will be of major benefit to the council and the taxpayers of the district. The information is not in the public domain; as it has only been shared internally with senior management and those directly involved in the project and with the council's development partner Cozumel.
23. It confirmed that the obligation of confidence can certainly be implied in this instance. Those involved in the development are clearly aware of the negotiations that are taking place and the importance and sensitivity of the information. In addition, it argued that information relating to property transactions would normally be expected to import an obligation of confidence.
24. The Commissioner considers this element of the exception will be met if the information is subject to confidentiality provided by law. This may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
25. In this case, the Commissioner considers the withheld information is subject to a common law duty of confidence rather than a duty of confidence provided by a contractual obligation or statute. The information is not trivial in nature or otherwise publically available. The council has explained that the withheld information relates to ongoing negotiations with different third parties in relation to the sale and acquisition of land required for the proposed development; information which is not trivial and has only been circulated to those involved with the development whether within the council itself or with its development partner. She is satisfied that it therefore has the necessary quality of confidence and was imparted in circumstances importing an obligation of confidence.
26. Referring to bullet points three and four, the council referred to the Commissioner's guidance on the application of this exception. It stated that it understands that legitimate economic interests can relate to retaining or improving market position, ensuring that competitors do not gain access to commercially sensitive 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.

27. The council argued in this case that the withheld information contains sensitive and confidential information about ongoing commercial negotiations with different third parties relating to the option agreements. Although the negotiations were at an advanced stage at the time of the request, they were still current, ongoing and not finalised. It also argued that more were anticipated at the time of the request. It stated that disclosure would adversely affect the council's bargaining position, as it would disclose vital information to those it is negotiating with or is likely to negotiate with in the near future about what it is trying to achieve, for what price and based on what specific terms and conditions. Disclosure would adversely affect the council's ability to secure the best possible deal, could result in it having to pay more than it otherwise would have done or alternatively not being able to reach agreements with the parties involved. This would have a knock on effect on the value of its land and its ability to progress the proposed development of a new town.
28. The Commissioner is satisfied that at the time of the request the council was in the advance stages of commercial negotiations with different third parties relating to the option agreements it was trying to secure for the acquisition of land for the proposed development. The withheld information contains the council's bargaining position and the Commissioner accepts in this case that if the information was disclosed it would adversely affect the council's ability to negotiate fairly and competitively. Disclosure would reveal the council's bargaining position to those it is still negotiating with. If this were to occur it would adversely affect the council's ability to secure the best possible deal. It could lead to the council having to pay more or offer less favourable terms or potentially hinder it from reaching the agreements it requires. This would adversely affect the council's ability to deliver the proposed development; a development in which it has already invested a considerable amount of time and resource.
29. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) applies to the withheld information. She will therefore go on to consider the public interest test.

Public interest test

30. The council advised that it understands there is a significant amount of interest in the major development of a new town; the proposal is controversial and unpopular with certain sections of the local community. It confirmed that it also recognised that it is acting in two different capacities – as the local planning authority on the one hand and as a landowner or potential landowner of certain areas with a "private" interest in seeing the land developed on the other. The council

accepted that this dual role will have potential conflicts which is an argument for a greater degree of transparency and accountability than might otherwise be the case.

31. However, in this case the council contends that it is in the public interest for it to be able to function effectively in a commercial sphere. The disclosure of the information would jeopardise its position with regards to ongoing and future negotiations that are required concerning the options to purchase.
32. It argued that as a public authority it has a duty to negotiate the best possible financial deal to protect the public purse, which in turns enables it to provide the best possible service to its constituents. It commented that local government finance is under pressure and making savings is required in order to balance budgets. It must therefore be able to negotiate in the same manner as any other body. Publication could jeopardise the ability to negotiate effectively.
33. In addition the information, in part, relates to the negotiations of its development partner. Cozumel informed the council during another request for similar information that it considered disclosure would seriously compromise its ability to effectively and competitively negotiate options to purchase land in and around the region and to engage with other negotiations for the purposes of their business interests.
34. The council stated that disclosure would seriously damage its relationship with its development partner and would affect future dealings not only with Cozumel but other potential partners and such consequences are not the interests of the wider public.
35. Disclosure would also seriously damage its relationships with those it is currently negotiating with too, as they expect the discussions currently taking place and the agreements being discussed to remain private and confidential.
36. The council said that it acknowledged the importance in transparency. However, the wider aspects of the Otterpool Park development have been adequately explained to the public and continue to be so through the council's website. The proposals are in line with government policy and the council has taken steps to ensure, as far as possible, that it keeps its two functions (landowner and planning authority) distinct. It does not consider the public interest arguments in favour of disclosure carry sufficient weight to outweigh the adverse effect disclosure would cause and therefore the arguments in favour of maintaining this exception.

37. The Commissioner recognises that there is significant public interest in the proposed development. It is likely to impact on a large number of individuals who live in areas close to the proposed Otterpool Park and have a noticeable impact on the farm and other land which has been bought and will be used for the development. She understands from what the council has said that the development is controversial and has faced opposition from the local community. Additionally she recognises that the council will play a dual role in this development and these roles will inevitably have conflicting interests. In cases where the council is a landowner and the planning authority as well there is a weighty public interest argument in favour of greater transparency and accountability.
38. However, the Commissioner considers there are weighty counter arguments in this case as well. She considers the timing of a request is an important factor when balancing the public interest arguments for and against disclosure. In this case, she notes that the council was still in the midst of ongoing commercial negotiations with different third parties and would more than likely be entering into other negotiations with other parties in the near future in order to progress the proposal. She has accepted that the withheld information would adversely affect these ongoing and near future negotiations, as disclosure would reveal the council's bargaining position to those it is trying to negotiate with before an agreement has been secured. This would be revealing the council's hand upfront and would hinder the council's ability to negotiate fairly and competitively with those third parties. It would lead to the council securing a less favourable deal and less favourable terms and such consequences are not in the interests of the wider public.
39. There are strong public interest arguments in favour of maintaining a public authority's ability to compete fairly and competitively in the market place. If it was unable to do that, it would have negative consequences on the public purse and ultimately the services it can provide.
40. In this case the Commissioner accepts that there are compelling public interest arguments on both sides and the balance between them is finely balanced, in the main, due to the number of people the development will affect and the dual role the council will play in the formulation and potential delivery of the development. However, she has decided that due to the timing of the request in relation to the commercial negotiations still ongoing and the detriment disclosure would cause to the commercial interests of the council at this time that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception.

Regulation 12(5)(b)

41. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
42. Again, in accordance with regulation 12(2), the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
43. The council stated that the information being withheld under this exception is legal advice obtained by Cozumel from their legal representatives which is subject to legal professional privilege (LPP). It was shared with the council, as its development partner on a confidential basis.
44. The Commissioner is satisfied that information subject to LPP falls within the scope of this exception. This follows the findings of the Information Tribunal in the case of *Kirkcaldie v Information Commissioner & Thanet District Council (EA/2006/001, 4 July 2006)*. The tribunal stated that:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.”
45. The Commissioner has reviewed the withheld information and she is satisfied that it does constitute legal advice between client and adviser; in this case Cozumel and its legal representatives. It is therefore subject to LPP. The Commissioner notes that the legal advice was shared with the council. However, she considers that this was a limited disclosure made a confidential basis, as the council and Cozumel are development partners for the purposes of the proposed development. No unrestricted disclosure has been made to the world at large or to the general public so the withheld information maintains the same level of confidentiality as it did do before it was shared with the council.
46. In terms of the adverse effects if the information was disclosed, the council has said that disclosure would adversely affect the course of justice, as it would undermine the fundamental common law principles of LPP. It does not consider there are any special factors in this case that would make it think that the disclosure of this information would not undermine the general principles of LPP. Disclosure would

undermine a legal adviser's ability to give free and frank advice and may discourage people from seeking such advice in the future.

47. The Commissioner accepts that disclosure would adversely affect the course of justice. She agrees with the council that disclosure would undermine the fundamental common law principle of LPP. It would hinder the council's ability to obtain free and frank legal advice in future which would have a detrimental impact on its future decision making. It would discourage legal advisers from giving candid, free and frank advice in the future if it were known that such information could make its way into the public domain for anyone to see. Disclosure would adversely affect the course of justice. Disclosing legal advice to the world at large would adversely affect the ability of the council and other bodies more generally from obtaining a fair trial and defending and protecting its interests.
48. For the above reasons the Commissioner is satisfied that regulation 12(5)(b) of the EIR applies in this case. She will now go on to consider the public interest test.

Public interest test

49. The council confirmed that it recognised the strong inherent public interest in disclosure and in ensuring that it is seen to be transparent, fair and accountable to the public. It argued that it understood there is a significant amount of public interest in the major development of a new town and acknowledged that its proposal is controversial and unpopular in certain sections of the local community. It went on to say that it also acknowledged that there were strong public interest arguments in favour of disclosure as a result of it acting in two different, potentially conflicting, capacities as the local planning authority and the landowner of a piece of land earmarked for its own proposal.
50. However, it considers the public interest rests in maintaining the exception. It stated that it is in the public interest to enable it to work with third parties on projects. Such joint working necessarily entails trust between the parties. It stated that it is working with Cozumel jointly to develop a new garden city. Disclosing legal advice subject to LPP, which was provided in confidence would severely damaging the trust between Cozumel and the council and its working relationship.
51. It explained further that the joint development will require a high degree of co-operation and exchange of information some of which will be sensitive in one way or another. Failure to maintain confidence would severely impede the council working effectively with Cozumel. It went on to say that the advice sets out certain concerns. Parties to a complex development such as the garden town need to be able to share concerns

in private, these concerns could be seized on by opponents to the scheme and maybe exploited. It stated that there are bound to be areas of disagreement, consideration of risk and legal advice, these have to be kept confidential in order that a project of this scope can proceed. The council argued that the advice provided in the withheld information is still live and prior to formal planning permission being sought many of the concerns raised will remain relevant.

52. The council concluded by saying that it considers the public interest in favour of disclosure of this information is outweighed by the public interest in favour of maintaining the exception.
53. Again the Commissioner acknowledges the public interest in transparency and accountability and enabling the public access to information to help it understand more clearly why certain decisions have been made. She recognises the significant public interest a development of this scale with attract and that it will potentially effect a large number of local residents if it does go ahead, some of which have concerns about what is proposed and others who will be opposed to it completely. The Commissioner also understands the dual role the council is going to playing during this project; landowner and planning authority, the potential conflicts of interest and therefore the greater need for openness and transparency on behalf of the council to ensure that it does keep both roles distinct from one another as much as possible and acts fairly and only in the best interests of the public.
54. However, the Commissioner considers in this case that there are more compelling public interest arguments in favour of maintaining the exception. She considers the public interest in the maintenance of this exception is always strong due to the fundamental importance of the general principle of upholding the administration of justice. The exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. Disclosure of legal advice would weaken the concept of LPP so the Commissioner considers that there would have to be "special or unusual factors" in a particular case to justify not giving these arguments such weight.
55. The Commissioner has already acknowledged that there are weighty public interest arguments in favour of disclosure in this case due to the size of the proposed development, the number of people likely to be affected and the nature of the council's role in it, as both the planning authority and substantial and important landowner of land earmarked for the development. But she does not consider these are sufficient to justify disclosure of information subject to LPP. She considers the public

interest arguments in favour of maintaining the concept of LPP and the ability to access free and frank legal advice carries more weight.

56. Overall, therefore, the Commissioner has concluded that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exception.

Procedural matters

57. The Commissioner notes that the council failed to respond to the complainant's request within 20 working days of receipt. The request was received on 19 May 2017 but the council did not respond until 18 October 2017 and following the intervention of the Commissioner. When it did respond it released some information but withheld other information in accordance with two exceptions in Part 3 of the EIR.
58. The Commissioner finds the council in breach of regulation 5(2) in this case, as it failed to make the information it was able to disclose available to the complainant within 20 working days of the request.
59. She also finds the council in breach of regulation 14(2) of the EIR, as it failed to provide a refusal for the information it considered was exempt under Part 3 of the EIR to the complainant within 20 working days.

Right of appeal

60. 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

61. 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.

62. 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:

Samantha Coward
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