

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

Decision notice

Date: 3 July 2018

Public Authority: Stockport Metropolitan Borough Council
Address: Town Hall
Edward Street
Stockport
SK1 3XE

Decision (including any steps ordered)

1. The complainant has requested to see the information in the appendices from a Cost Plan Review for a planning application submitted to Stockport Metropolitan Borough Council. The Council refused to provide this on the basis of the exceptions at regulation 12(5)(e) and 12(5)(f) of the EIR.
2. The Commissioner's decision is that the Council has correctly engaged the exception at regulation 12(5)(e) and that the public interest in this case favours maintaining the exception. She requires no steps to be taken.

Request and response

3. On 7 August 2017 the complainant wrote to the Council and requested information in relation to a planning application and a Cost Plan Review report prepared by Rex Procter & Partners. The complainant requested the following information used in the production of the report:

"Dimensioned drawings of the new school and shared facilities

Statement of Work / Architects Brief provided to SST's Architect's for school and shared facilities

School Student Capacity information provided to the architects”

4. It seems some of the interactions between the complainant and the Council were verbal and under the EIR verbal requests for information are valid requests. That being said on 13 September 2017 there was a further written request made to the Council and reference to this having been previously refused on the basis of commercial confidentiality. The request was as follows:

“We have raised serious concerns with the way this [the Viability Assessment/Cost Review] process was carried out, and specifically the very narrow terms of reference as regards the assessment of build costs, in our recent submission entitled “Response to Carillion Viability Assessment / RP&P Cost Plan Review” dated August 2017. Our submission makes use of government data and documents to demonstrate the flawed conclusions of this process. (A copy of this submission is attached for your reference).

- *Release of the information in appendices A to E of the RP&P Cost Plan Review*

We fail to understand how much of this information could be withheld as ‘commercially sensitive’. This application is predicated on a commercial case, namely selling Green Belt land with the express intent to fund a commercial project (one which our evidence demonstrates is hugely over-sized and represents a substantial business expansion by stealth). Therefore the imperative for the release of commercial information in this case must surely be great.”

5. The Council responded on 27 October 2017. It stated that the information in Appendix E was now available online but the information in Appendices A-D was being withheld on the basis of the exceptions from disclosure at regulations 12(5)(e) and (f) of the EIR.
6. The Commissioner queried whether this constituted an internal review response given that it seems there was a number of verbal requests and responses which seem to have created some confusion. However, it is accepted by both parties that the correspondence of 27 October was intended to be the internal review outcome as there had been a previous refusal to provide the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 20 November 2017 and again on 27 December 2017 to complain about the way his request for information had been handled.

8. The Commissioner confirmed with the complainant that the scope of her investigation would be to determine if the information requested on 13 September 2017 (Appendices A-D of the Cost Plan Review) had been correctly refused on the basis of either regulation 12(5)(e) or 12(5)(f) of the EIR.

Reasons for decision

Regulation 12(5)(e) – confidentiality provided by law

9. Regulation 12(5)(e) of the EIR states that a public authority may refuse a request to the extent that disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
10. In common with all the exceptions provided by Regulation 12(5) for it to be engaged the public authority must be able to demonstrate that disclosing the withheld information 'would' have an adverse effect. This means that it must be more likely than not that the alleged harm would actually occur.
11. The specific exception provided by 12(5)(e) can be broken down into a four stage test. Firstly, the information must be of a commercial or industrial nature. Secondly, the information must be protected by a legal duty of confidence. Thirdly, that confidentiality is required to protect a legitimate economic interest, and finally the disclosure of the information needs to adversely affect that confidentiality.
12. The information in appendices A-D relates to a review of the cost plan undertaken by Rex Proctor & Partners as part of the Council's assessment of a planning application by the Seashell Trust. The information in the appendices is the detailed cost plans submitted by the Seashell Trust to the Council. The Seashell Trust proposed to transform their existing buildings and facilities on their existing campus and the works would comprise the construction of The Royal School, a training centre, sports hall and pavilion, sports pitches and car parks. The proposed development is intended to provide a mixed day and residential school for children between 2 and 18 years who have complex learning difficulties and communication difficulties.
13. The Council explained the Seashell Trust site is located within 90 acres of land that forms part of the Greater Manchester Green Belt. The Seashell Trust proposed to dispose of some of this land for housing development that would part fund and enable delivery of the proposed new facilities. The Seashell Trust's figures assumed a £30 million

funding contribution would be generated from the sale of the housing land that when combined with their own funding would deliver this £45 million "Transformation Project".

14. The appendices contain the detailed costs and the cost summaries relating to the project along with some additional supporting information.
15. In respect of the first test the Commissioner accepts that as the information relates to a proposed development and the specific costs associated with this project it is of a commercial nature.
16. Consideration of whether the information is protected by confidentiality can involve looking at whether there is a common law duty of confidence, a contractual duty of confidence or a duty of confidence imposed by statute.
17. In this case the Council has argued that the information is protected by a common law duty of confidence. The Council states the information was provided on a confidential basis; NJL Consulting (acting on behalf of the Seashell Trust) wrote to the Council in March 2017 to confirm the detailed costs information in the Appendices was considered to be commercially confidential and should not be made publicly available. The Council considers this demonstrates there was a clear expectation from the Seashell Trust that the information would remain confidential.
18. In addition to this the Commissioner notes the information is not trivial; it concerns a major new development with changes in land use and new construction. The information is clearly not in the public domain as it has only been shared between the relevant parties and the obligation of confidence can be implied in this case. Those involved in the development are clearly aware of the importance and sensitivity of the information.
19. She is satisfied that the information therefore has the necessary quality of confidence and was imparted in circumstances importing an obligation of confidence.
20. Turning to points three and four of the test of commercial confidentiality; the Council argues that the confidentiality of the information is needed to protect the economic interests of The Seashell Trust as well as the interest of agents acting on behalf of the Trust. It emphasises the Seashell Trust's charitable status and its work in providing care and education for disabled children and young people.
21. The Council considered releasing this detailed financial information would damage the Seashell Trust's ability to secure best value both in terms of land sale and in appointing building contractor(s). This could

lead to the Trust having to pay more or hinder it from reaching the agreements that it requires; impacting on the viability of the proposed development.

22. The Commissioner's guidance¹ on the application of this exception states 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.
23. The Commissioner is of the understanding that at the time of the request the development was still in the proposal stage and whilst negotiations and plans were ongoing, the proposed development was still current, ongoing and not finalised. It therefore stands to reason that commercial negotiations with different contractors, specifically building contractors, would still be outstanding. The withheld information contains the detailed financial breakdowns for the proposed development and the Commissioner accepts that disclosing this would adversely affect the Trust's ability to negotiate fairly and competitively as disclosure would reveal the finances available to the Trust. If this were to occur it would adversely affect the Trust's ability to secure the best possible deal. It could lead to the Trust having to pay more or offer less favourable terms or potentially hinder it from reaching the agreements it requires. This would adversely affect the Trust's ability to deliver the proposed development.
24. 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 arguments in favour of disclosure

25. The complainant argues that information on the cost and scale of the proposal is particularly pertinent and of great public interest as the proposal is based on a financial case involving the sale of Green Belt land. The complainant has raised concern that it is not clear who would gain/lose from the disclosure of this information given the Seashell Trust is proposing a Special Educational Needs and Disability (SEND) school

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

and its only competitors who would benefit from the information would seemingly be other SEND schools.

26. The complainant argues there is a public interest in the community being able to clearly see how much larger and more expensive the proposed Seashell Trust school is than any other recently built SEND school.
27. The Council recognises there is a public interest in the disclosure of information regarding a proposal which will involve the development of green belt land. It acknowledges that there is a public interest in disclosure to allow the public to more fully participate in the planning process.

Public interest arguments in favour of maintaining the exception

28. The Council argues that the public interest arguments in favour of disclosure and the need to be transparent to facilitate debate and understanding are, for the most part, met by the information that has already been provided by the Council. Overall cost summaries have been published on the Council's website and would provide a solid basis for member of the public to understand the proposals and contribute to the planning process.
29. The Council also argues that as it is accepted there would be an adverse effect on the Seashell Trust by disclosing the information that this also provides weight to the public interest in withholding the information. Disclosing information which would jeopardise the Seashell Trust's position with regard to its ongoing and future negotiations and inhibit its ability to proceed would not be in the public interest.
30. The Council's main argument seems to be that any organisation, but particularly a registered charity, should be able to be in a position to negotiate the best possible financial deal. The SEND school and proposed development will provide services to a number of children and young adults in a specialised environment and it would not be in the public interest to put this into jeopardy.

Balance of the public interest arguments

31. The Commissioner recognises there will be a significant amount of public interest in the proposed development, particularly given this will involve development of green belt land. There are suggestions from the complainant and the group he is involved with that there are concerns and possibly objections to the size of the development and question marks over whether such a large development is really necessary to meet the needs of the communities the SEND school will serve.

32. The Commissioner is also conscious that the information that makes up the appendices to the Cost Plan Review is the most detailed breakdowns of costs associated with the proposal. These cost estimates were provided by Mace Consulting to provide a realistic assessment of costs and a comprehensive list of all elements to enable a total figure to be calculated. This includes information on potential contractor costs and profits. It seems clear that this kind of information at this detail would, if disclosed, be of interest to contractors interested in bidding for work. Removing the ability for the Seashell Trust to effectively negotiate and seek the best value contract.
33. The Commissioner 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 Seashell Trust 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 Seashell Trust's bargaining position to those it is trying to negotiate with before an agreement has been secured. This would be revealing the Trust's hand upfront and would hinder the Trust's ability to negotiate fairly and competitively with those third parties. It would lead to the Trust securing a less favourable deal and less favourable terms and such consequences are not in the interests of the wider public as it may endanger the possibility of a new SEND school being built to the high specifications proposed by the Seashell Trust.
34. 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 fact the proposal will impact on green belt land. 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 Seashell Trust 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.
35. The Commissioner has therefore not gone on to consider the use of any other exception in this case.

Right of appeal

36. 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

37. 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.
38. 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

Jill Hulley
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