

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

Date: 1 August 2018

Public Authority: Hambleton District Council
Address: Civic Centre
Stone Cross
Northallerton
North Yorkshire
DL6 2UU

Decision (including any steps ordered)

1. The complainant has requested a copy of a viability assessment and associated District Valuer report relating to the Sowerby Gateway Development. Hambleton District Council withheld the requested information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Hambleton District Council has failed to demonstrate the regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to disclose the requested information.
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.

Request and response

5. On 2 October 2017, the complainant wrote to Hambleton District Council (the "council") and requested information in the following terms:

"Please send me a copy of the Economic Viability Assessment (EVA) regarding Phase 3 of the Sowerby Gateway Development, as submitted to the Council by Cushman and Wakefield on behalf of Taylor Wimpey. Please also send me a copy of the completed review of the EVA undertaken on behalf of the Council by the officers of the District Valuer."

6. The council responded on 30 October 2017. It stated that it was withholding the information under the FOIA exemptions for information provided in confidence (section 41) and commercial interests (section 43(2)).
7. Following an internal review the council wrote to the complainant on 24 January 2018. It stated that it had reconsidered the request under the EIR and that it was withholding the information under the exception for commercial confidentiality (regulation 12(5)(e)).

Scope of the case

8. On 19 March 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

10. The council has withheld the following information under regulation 12(5)(e) of the EIR:
- An Economic Viability Assessment (EVA) regarding Phase 3 of the Sowerby Gateway Development as submitted to the council by Cushman and Wakefield on behalf of Taylor Wimpey.
 - The completed review of the EVA undertaken by officers of the District Valuer (the "DV review").

11. 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".
12. 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?

13. The council confirmed that the withheld information details the economic viability of providing affordable housing as part of a proposed development.
14. Having viewed the withheld information the Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

15. 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.
16. 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.
17. The council has stated that it was provided with the EVA by Cushman and Wakefield on behalf of Taylor Wimpey with an explicit understanding that the information would remain confidential.
18. The Commissioner notes that the information is not trivial in nature and acknowledges that it was provided to the council with an expectation that it would be handled in confidence.

19. In view of the above, the Commissioner is satisfied that the EVA is subject to confidentiality provided by law.
20. Although the council does not explicitly cite the DV review in its submissions, having regard for the document and its content, the Commissioner is satisfied that this also is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

21. 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.
22. 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.
23. 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".
24. The council has confirmed that it considers that disclosing the information would result in Taylor Wimpey suffering "*financial detriment*". The council has stated that the information includes cost assumptions, land valuations and assessments for affordable housing and that disclosure would provide competitors with a "*...significant insight*" Taylor Wimpey's commercial strategy.
25. The council has further argued that disclosing the information would give competitors an "*...unfair advantage to adjust the prices on comparative developments*".
26. The Commissioner's letter to the council invited its submissions and confirmed that, where ascribed adverse effects relate to third parties, she expected that it should ensure that it has either consulted with the

party or parties in question or otherwise be able to demonstrate that it has direct knowledge of its concerns. The council stated that it did not consult with Taylor Wimpey following receipt of the request. It confirmed that, in generating its arguments for the ascribed adverse effects to Taylor Wimpey's interests it, instead relied on the general concerns about confidentiality set out at the time the EVA was provided to the council.

27. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")

"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable...."¹

28. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20\(14-03-18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20(14-03-18).pdf)

and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual."

29. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party's commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects *would* follow as a direct result on information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.
30. In this case the council's submissions make reference to high-level, generic categories of information (cost assumptions, land valuations and assessments for affordable housing) but do not explicitly identify the relevant elements of the withheld information or explain how disclosure would result in actual harm. In relation to its suggestion that disclosure of the information would provide competitors with an "*...unfair advantage to adjust the prices on comparative developments*" the council does not provide any examples of relevant comparative development nor explain the mechanism via which the "unfair advantage" would present itself.
31. Having viewed the withheld information the Commissioner considers that a case might be made for engaging the exception but that the council has, in this instance, failed to make this. In both the level of detail in its arguments and its failure to differentiate between the two withheld documents, the Commissioner is left with the impression that the council has sought to apply the exception on a general basis without regard for the specific factors or the level of detail required. The Commissioner also considers that, in failing to directly consult with Taylor Wimpey following receipt of the request, the council's arguments regarding potential harm do not reflect matters as they stood at the time of the request and, therefore, carry significantly less weight.
32. Whilst recognising that it might be that a case could be made for withholding the information, the Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case the Commissioner's letter of investigation clearly set out the

level of detail required for engaging the exception and the council has failed to meet this threshold.

33. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person.

Right of appeal

34. 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

35. 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.
36. 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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