

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 September 2018

Public Authority: Northampton Borough Council
Address: The Guildhall
St Giles Square
Northampton
NN1 1DE

Decision (including any steps ordered)

1. The complainant has requested information about disposal of Council land in Northampton Town Centre (known as the Greyfriars site) and the selection process of the preferred developer. The Council supplied some information but withheld the remainder under regulation 12(5)(e) of the EIR – confidentiality of commercial information.
2. The Commissioner's decision is that Northampton Borough Council is correct to engage regulation 12(5)(e) for questions 3, 7 and 18 of the request, and that the public interest in maintaining the exception outweighs the public interest in disclosure. She finds that the exception is not engaged for questions 2 and 9.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the identity of the bidders who responded to the Council's stage 1 expression of interest for the Greyfriars site
 - Disclose the identity of the bidders who submitted full tenders in response to the Council's stage 2 invitation to tender for the Greyfriars site
 - Disclose the identity of the company that withdrew from the bidding process.
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 20 December 2016, the complainant wrote to Northampton Borough Council and requested information in connection with the disposal of Council land at the Greyfriars site in Northampton Town Centre, specifically the selection of the preferred development partner and future timetabling of the project. The full request is included as an appendix at the end of this decision notice.
6. The Council responded on 7 March 2017. It provided answers to some of the questions and supporting documents, but withheld the remainder under several EIR exceptions.
7. On 30 March 2017 the complainant requested an internal review of the Council's response. The Council wrote to the complainant on 7 July 2017, supplying some further information but also switching its reliance on EIR exceptions to FOIA exemptions for the remaining withheld information.

Scope of the case

8. The complainant contacted the Commissioner on 2 August 2017 to complain about the way the request for information had been handled. The complainant asked the Commissioner to specifically focus her attention on the Council's response to questions 2, 3, 5, 7, 8, 9, 10, 11, 14, 15, 17, 18, 19, 23 and 26. The complainant also considered that the Council had incorrectly considered the request under FOIA in its review response, and that the correct regime to apply was the EIR
9. Following the complaint made to the Commissioner and during the course of the investigation, the Council released further information to the complainant. By the end of the investigation, the complainant still considered the Council's response to questions 2, 3, 7, 9, 18 (highlighted in bold in the appendix) to be inadequate and requested release of all associated withheld information.
10. The Commissioner directed the Council to consider its responses to the outstanding questions of 2, 3, 7, 9 and 18 under the EIR. The Council continued to withhold information under 12(5)(e) of the EIR, and the Commissioner considers the scope of the case to be whether the Council was entitled to engage this exception, and whether it was in the public interest to do so.

Reasons for decision

Is the information environmental?

11. The Council originally responded to the information request under the EIR. However at the point of review, it switched its consideration of the request and responded under the FOIA.
12. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) and (c) which state that it is as '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;'

And

'(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;'

13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. During the investigation the Council maintained that the correct regime to apply was the FOIA as the whole tender process that was the subject of the request was for the sale of land, rather than the specifics of its development. However, it was made explicit in both stages 1 and 2 of the bidding process that the sale of the land was for development purposes and the tender documentation itself includes environmental information. In addition, the submissions from interested parties included plans and proposals that would clearly affect the environment and the Commissioner is therefore of the view the correct regime under which the request should be considered is the EIR, and directed the Council accordingly.

Regulation 12(5)(e)

15. The exception under regulation 12(5)(e) of the EIR provides that public authorities are entitled to refuse to disclose information where to do so would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law. If the exception is engaged, it is then subject to the public interest test.
16. In assessing whether the exception is properly engaged, the Commissioner applies a four stage test, of which all must be met:
 - The information is commercial or industrial in nature
 - Confidentiality is provided by law
 - The confidentiality is protecting a legitimate economic interest
 - The confidentiality would be adversely affected by disclosure
17. The Commissioner has considered each question that the complainant considers outstanding against the Council's application of the exception.

Question 2: Please confirm the number of expressions of interest received by the council and the identity of the parties making those expressions of identity

Question 9: Please provide confirmation of the identity of each party that submitted a tender to the council and confirm the identity of the party which withdrew its tender (as referred to in the Cabinet report for the 7 September 2016 meeting)

18. The Council supplied the complainant with a redacted copy of its bidding stage 1 scoring sheet. This showed that there were 6 bidders, 3 of whom went through to the second stage. It did not reveal the names of the bidders.
19. The Council states that it '*does not see any significant public interest arguments to make public the names of the organisations whose bids were not successful other than curiosity or inquisitiveness*' and that '*disclosure of their identity could cause them embarrassment and discourage them from taking part in any future tender process with the Council*'. It goes on to assert that this would '*significantly*' reduce ensuring best value in any regeneration projects.
20. The Council has not made specific reference to engaging exception 12(5)(e) for this question, but has inferred it from its responses to the complainant and the Commissioner. The Commissioner therefore now turns to the four stage test for 12(5)(e).

21. The names of the companies in the context of a bid process is commercial in nature. It reveals that the company submitted a bid for a project – a commercial activity - and that by doing so it considered it met certain commercial criteria. The Commissioner is therefore satisfied that the first test is met.
22. The Council has argued that all bidders have submitted their bids (which reveals their identities) with either explicit or implied confidentiality. In considering this matter the Commissioner has focussed on whether this information has the necessary quality of confidence and whether the information was shared creating an obligation of confidence.
23. The Commissioner accepts that, at the point at which the bids were made, there would have been an expectation on the part of the bidders that their identities were not made public. The bids provided details of unique, large-scale projects proposals requiring significant financial investment, and the identity of the companies associated with each proposal is consequently not trivial in nature. The Commissioner is therefore satisfied that the second test is met.
24. For the confidentiality to protect a legitimate economic interest, disclosure of the information would have to adversely affect the confidentiality of the interest it is designed to protect. The Council has said that revealing the names of the bidders could cause *'embarrassment'* and that *'publishing the names of companies associated with a failed bidding process would likely dissuade them or others from entering in to any future disposal process for this or any other sites. Disclosure would significantly harm the Council's future chances of realising full market value, recovery of demolition expenditure and best value for residents and the most appropriate site development.'*
25. It is not enough that disclosure 'could' cause harm. For this test to be met, it has to be more likely than not that the disclosure would cause harm. The Commissioner draws attention to *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011)*. The request was for a viability report for a new development submitted as part of the planning application. The Council and the developer asserted that disclosure could harm the developer's interests, but did not accept that they needed to demonstrate that harm would result. The Tribunal found that the exception was not engaged, saying that *"statements by interested parties that harm might or could be caused are insufficient [...] The use of words such as 'could' or 'may' do not in our view provide evidence of harm or prejudice to the required standard of proof"*.

26. The Commissioner is not persuaded by the argument that large companies would be deterred from bidding for future multi-million pound projects on the basis that their identities have previously been revealed on bids for other projects. Followed to its logical conclusion, if this was the case, companies would be denying themselves the opportunity of major business on the possibility that their identities would be revealed through an EIR or FOIA request. This is not a believable situation. If a developer was genuinely dissuaded from bidding simply on this basis its identity would be revealed, the public authority should rather question why, and the developer's commitment to openness and transparency when entering into lucrative partnerships with it.
27. The Commissioner is therefore not satisfied that the third test has been met and as a result, the regulation 12(5)(e) is not engaged. As the exception is not engaged, there is no need to consider the public interest test.

Question 3: Please provide any documentation received from parties expressing interest in the Greyfriars site

Question 7: Please provide a copy of each tender submission made by the shortlisted development partners

Question 18: We understand that Developer A is (redacted company name). Please confirm whether the Council concluded that (redacted company name) (or, different, Developer A) had sufficient financial strength in order to contract effectively with the Council and sufficient funding available to it in order to carry out the development. If so, please provide copies of the evidence and/or advice which the Council relied upon in reaching this conclusion.

28. The Council has explicitly applied regulation 12(5)(e) to information withheld under questions 5 and 7 and 18. It has argued that the information is commercial in nature as the information contained in bid submissions and communication with bidders is unique and that disclosure would allow competitors to understand the strengths and weakness of bidders and that ultimately, over time, this would reduce organisations' individuality. The assessments made by the Council on the financial strength of the successful bidder (question 18) were based on the information provided in bidders' submissions and it therefore maintains this is also commercial in nature.
29. Whilst the Commissioner is not convinced by the Council's argument that unique information makes it commercial in nature, having reviewed the withheld information, she is satisfied that as it clearly relates to the

sale and development of land in a competitive bidding process, it is commercial in nature. The first test is therefore met.

30. Turning to the confidentiality of the information, the Commissioner again considers whether or not it is trivial in nature, and whether it was shared in circumstances creating an obligation of confidence. The Council has provided the Commissioner with a copy of the footer of one of the bidder's emails, which makes reference to the potential confidentiality of the information contained therein, as evidence of confidentiality of the information supplied. However, the Commissioner notes that this is a standard email disclaimer used by the company and does not specifically relate to the bidding process concerned. She therefore does not accept that the withheld information attracts any formal contractually agreed obligation of confidence. Nonetheless, she does accept that, given the nature of the information withheld under the questions 3, 7 and 18 i.e. company specific bid proposals including delivery models and financial information, it is not trivial in nature and there would be a reasonable expectation that this information held a common law of confidence. In addition, some of the email exchanges between the Council and bidders make reference to information being provided in confidence. The second test is therefore met.
31. The Council has argued that the legitimate economic interest being protected by the confidentiality of the information is long term viability of the site, by ensuring that any proposed development met the Council's aims and objectives for the site and that delivery would be economically sustainable. It considers that releasing the information would enable competitors to scrutinise opposition bids in the future and as a result submit potentially 'unrepresentative' bids to secure work for which they would not otherwise have been successful. As the Commissioner has already noted, for this test to be met, the chance of the adverse effect has to be more likely than not.
32. The Council has made reference to the First-tier tribunal appeal *Sally Ballan v Information Commissioner (EA/2015/0021)*, stating that the same principles apply to its withholding of the information to question 3 and 7, but has not gone in to detail as to why it considers this relevant. Despite the Council's lack of explanation, the Commissioner notes that although this was an appeal made against the application of section 43 of the FOIA – commercial interests, there are some similarities. The appellant had requested information on a tender submission (for a leisure management system), that later turned out to be non-compliant. The Council withheld the information under section 43, which was upheld by the Commissioner. The tribunal appeal was dismissed, and the decision stated:

'It is our view that disclosing any of the requested information would be likely to prejudice the commercial interests of the Council. The way that a tenderer chooses to present its material and answer tender evaluation criteria and questions posed by the Council is likely to be an important means by which the authority is able to distinguish between and evaluate the commercial and technical merit of competing tenders in order to arrive at the most advantageous bid. Therefore, if tenderers were able to see previous successful bids submitted by competitors during a similar procurement process, it is likely that the competitiveness of this selection process and the authority's ability to achieve best value would be hindered, thus harming the authority's commercial interest.'

33. In this instance the withheld information covers the submissions of several bidders, and the due diligence checks undertaken regarding the successful bidder. It is not information relating to just one bidder, or a handful of documents. Some of it includes detailed financial proposals and assessments which offer important leverage and opportunity for negotiation for the Council in the bidding process. Thus, even if the withheld information was only used once by a competitor in a future bidding process (linked to this one or otherwise), the volume and nature of the information means that the likelihood of this happening is more probable than not. In this case the complainant is not an unsuccessful bidder in the Greyfriars development (in contrast to the Ballan case), but when a response to an EIR request is made, the information is released to the world at large and therefore potentially accessible to any individual or company that is interested.
34. The Commissioner therefore accepts that the confidentiality of the commercial information withheld in response to questions 3 and 7 and 18 protects the Council's legitimate economic interest of securing best value in similar projects, and that disclosure of the information would be more likely than not to harm those interests. It follows that by making this information public, its confidentiality would be adversely affected and so the fourth test is also met. The Commissioner finds that the Council was entitled to engage regulation 12(5)(e) to these questions and now turns to the public interest test.

The public interest test

35. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

Thus, even if the information is confidential and disclosure would harm someone's legitimate economic interests, it should still be disclosed.

36. There is always a public interest in the accountability and transparency of public authorities, and in processes that promote good decision making and uphold integrity. The EIR implement the EU Directive 2203/4/EC on public access to environmental information and the public interest in this is clearly stated:

'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.'

37. The request relates to information held concerning the disposal of an old bus station with a view to a multi-purpose redevelopment that would have a major impact the public infra-structure and local economy. There is an obvious public interest in this being undertaken in an open and transparent way that facilitates public participation.
38. The Council has, through its original response, own review process and during the Commissioner's investigation, released a significant amount of information falling with the scope of the request. This includes the invitation to tender documentation and the scoring of bids, but not then identity of bidders or their submissions.
39. The Commissioner notes that, following the selection of a preferred developer, the project subsequently collapsed. However, this was some time after the information request was made and therefore consideration of the public interest is confined to the period of the request and review.
40. For the withheld information, the Council believes that disclosure would harm its commercial interests by resulting in plagiarism and a reduced number of bidders for further projects. The Council has drawn the Commissioner's attention to the following paragraph in the Sally Ballan v IC previously referred to:

'Additionally, if a prospective tenderer were to be able to review its competitor's previous bid documents including trade secrets, this could inhibit competitive tendering and reduce the number of bidders willing to participate which would not be in the Council's interest. (It would be even less in the Council's interest if, as the Appellant appears to indicate, there are few competitors in this field.)'

41. Given that there were only 6 bidders for this project, 3 of which went through to the second stage and one of which withdrew, the numbers of involved parties is relatively small and therefore the risks identified in the above paragraph are real and significant for the Council going forward with any future similar projects.
42. The Commissioner therefore accepts that releasing bidding information into the public domain about this project would have a detrimental effect on the Council's ability to secure best value for future similar projects and that although there is a wider public interest in transparency and openness promoted by disclosure, this is a general argument and in the specifics of this case disclosure of the information would not directly influence other aspects of the public interest such as public participation in discussions or decision-making. Consequently the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 5

43. Regulation 5 provides that (subject to exceptions), a public authority shall make information available on request (regulation 5(1)) and within 20 working days (regulation 5(2)).
44. The complainant made the request on 20 December 2016, and the Council did not respond until 7 March 2017, well outside the 20 day time frame. The Commissioner therefore finds that the Council has breached regulation 5(2) of the EIR.

Regulation 11

45. Regulation 11 requires that a public authority responds to a review request within 40 working days. The complainant requested a review of the Council's initial response on 30 March 2017. The Council provided a review response on 7 July 2017, 69 day working days later. The Commissioner therefore finds that the Council breached regulation 11 of the EIR.

Right of appeal

46. 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

47. 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.
48. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix – Full Information Request

1. Please provide a copy of the advertisement placed by the council which requested expressions of interest in the Greyfriars development opportunity and confirm where the advertisement was placed
2. **Please confirm the number of expressions of interest received by the council and the identity of the parties making those expressions of identity**
3. **Please provide any documentation received from parties expressing interest in the Greyfriars site**
4. Please provide the evaluation criteria used to assess the expressions of interest and to arrive at a shortlist of development partners
5. Please provide any record of the evaluation of the expressions of interest undertaken by the council, the identity of officers or members involved in the evaluation exercise and the reasons for the selection of the shortlisted partners
6. Please provide a copy of the invitation to tender (ITT) issued to the shortlisted development partners
7. **Please provide a copy of each tender submission made by the shortlisted development partners**
8. Please provide any record of evaluation of the tenders received from the shortlisted development partners undertaken by the council and the identity of officers or members involved in the evaluation exercise, including but not limited to a record of the meeting or discussions concerning the final scoring which was undertaken on 5 August 2016
9. **Please provide confirmation of the identity of each party that submitted a tender to the council and confirm the identity of the party which withdrew its tender (as referred to in the Cabinet report for the 7 September 2016 meeting)**
10. Reference is made in the cabinet report for the meeting on 7 September 2016 to a request by officers for final bids from the remaining shortlisted development partners and for further clarifications. Please provide copies of any information received from the two development partners in relation to this request.
11. Please provide a copy of any record of the Council considering whether it would receive best consideration under Section 123 Local Government

Act 1972 in relation to the offers from the shortlisted development partners

12. Please provide a copy of the equalities impact assessment referred to on page 8 of the Cabinet report for the meeting on 7 September 2016
13. The Cabinet report for the meeting on 7 September 2016 refers to the fact that advisers were employed by officers to consider the proposals and professional advice sought in order to assess the scheme. Please confirm the identity of the advisers or professionals engaged for this purpose and their specialist area of expertise
14. For each adviser or professional engaged by the Council please provide
 - (a) A copy of the appointment
 - (b) A copy of the instructions given to the adviser or professional by the Council
 - (c) A copy of any report or draft report provided by the adviser or professional
 - (d) Copies of any comments by the Council on the conclusions reached by the adviser or professional and communicated to that adviser or professional following receipt of any report
15. In relation to the appointment of the consultancy advising on cinemas (Cinema Next Consulting), please confirm the following
 - (a) The number and identity of any other consultancies which the council approached before appointing Cinema Next Consulting
 - (b) When officers became aware of the commercial interests of Cinema Next Consulting in the cinema operator known as The Light, and
 - (c) The arrangements (if any) that were put in place to manage the potential conflict of interest between the appointment of Cinema Next Consulting by the Council and the commercial interest of that consultancy in the light
16. Reference is made in the report to Cabinet for the 7 September 2016 meeting to public information sessions held on 18 and 20 July 2016. In relation to the sessions
 - (a) Please confirm how the sessions were publicised in advance and where

- (b) Please provide a record of the consultation responses received as a consequence of those sessions, including numbers of consultation responses and type or content of responses
 - (c) Please provide a record of any analysis undertaken by the Council of the consultation responses over and above the feedback report included at appendix 5 of the cabinet report of 7 September 2016
17. The minutes of the Cabinet meeting on 7 September 2016 record the fact that viability for the 'Developer A' scheme was thought to be 'quite high'. Please confirm the basis on which officers or members reached this conclusion and provide a copy of any advice received by the Council in relation to viability
- 18. We understand that Developer A's is (redacted company name). Please confirm whether the Council concluded that (redacted company name) (or, different, Developer A) had sufficient financial strength in order to contract effectively with the Council and sufficient funding available to it in order to carry out the development. If so, please provide copies of the evidence and/or advice which the Council relied upon in reaching this conclusion**
19. The minutes of the cabinet meeting on 7 September 2016 refer to professional advice to the effect that the town could sustain two cinemas. Please confirm who gave that advice and provide a copy of any advice received by the Council to this effect.
20. Reference is also made in the minutes for the Cabinet meeting of 7 September 2016 that the Council was 'convinced' that the development of Greyfriars and the continued operation of Sol Central would not have an adverse effect on each other. With regard to this conclusion
- (a) Please confirm who gave the advice upon which the Council relied for this conclusion and provide a copy of any advice received by the Council to this effect
 - (b) Please explain how the Council reached that conclusion given the findings of the Cinema Next Consulting report received by the Council, which we understand indicated that a new cinema will draw significant business away from the competition, including a 30% drop in admissions at Vue Cinemas, Sol Central?
21. Please describe the involvement of the planning department in the selection and evaluation process for the development partner
- (a) Up to and including cabinet meeting on 7 September 2016, and

- (b) Since 7 September 2016 to the date of this letter
- 22. Please provide a copy of any instructions or documents issued to the planning department in the selection and evaluation process for the development partner
- 23. Please provide a copy of any advice or evaluation received from the planning department in respect of the selection of the council's development partner and confirm the identity of the officers providing or contributing towards that advice

Future Timetable

- 24. Reference is made in the minutes of the cabinet meeting 7 September 2016 to the intention of officers to release more information and name Developer A. Please confirm whether this has occurred and if so provide a copy of the information released.
- 25. According to the minutes of cabinet on 7 September 2016 Councillor Markham confirmed that there would be further recommendations that would come to Cabinet for approval during the remaining process for selection of the development partner. Please confirm the timing and nature of those recommendations
- 26. Please also confirm
 - (a) The current state of negotiations between Developer A and the council
 - (b) Whether heads of terms have yet been agreed and if so, provide a copy
 - (c) Whether any other form of agreement (including agreement for lease) exists between the developer and the council and if so, please provide a copy
 - (d) The estimated dates for the following milestones
 - (i) Agreed heads of terms
 - (ii) Agreement for lease
 - (iii) Submission of planning application
 - (iv) Grant of planning permission
 - (v) Making of any compulsory purchase order
 - (vi) Start of construction