

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

Date: 1 October 2018

Public Authority: Hastings Borough Council
Address: Town Hall,
Queens Road,
Hastings,
East Sussex,
TN34 1QR

Decision (including any steps ordered)

1. The complainant has requested information relating to a viability report and associated documents for a site in Hastings. The council refused the request on the basis that Regulation 12(5)(e) of the EIR applies (commercial confidentiality).
2. The Commissioner's decision is that the council was correct to apply the exception to some of the information, however she has decided that it was not correct to apply the exception to the entirety of the viability report and its appendices. She has also decided that the public interest rests in withholding the information which she has identified as falling within the scope of the exception.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information outlined in the annex to this decision notice
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 23 June 2017, the complainant wrote to the council and requested information in the following terms:

"Following the Planning Committee decision to approve application [planning reference number redacted] for the Discharge of Section 106 Planning Obligation; which has resulted in the loss of 8 affordable housing units.

I note that the new planning application [planning reference and address of property redacted] makes no provision for affordable housing.

It is claimed by the applicants that affordable housing is not viable for this development.

Please provide me with the following documents:

- A copy of the applicants viability documents illustrating why affordable housing is not possible.*
 - The Development Viability Report, (Bespoke Property Group 2017) referred to in the officers report*
 - A copy of the Bruton Knowles assessment provided to the council referred to in the officers report."*
6. The council responded on 19 July 2017. It withheld the information on the basis that the exception in Regulation 12(5)(e) applied.
7. The complainant wrote back to the council asking it to take into account previous decision notices by the Commissioner and the First-tier Tribunal which had found that viability reports should be disclosed in those cases. The council responded again upholding its decision. The complainant then asked the council to carry out a review of its response to his request.
8. Following an internal review the council wrote to the complainant on 19 December 2017. It upheld its decision that the information is exempt from disclosure under Regulation 12(5)(e).

Scope of the case

9. The complainant contacted the Commissioner 20 January 2018 to complain about the way his request for information had been handled.

10. The Commissioner considers that the complaint is that the council was not correct to apply Regulation 12(5)(e) to withhold the information from disclosure.

Reasons for decision

11. The council applied Regulation 12(5)(e) to withhold the entirety of the viability report and its associated annexes.
12. Regulation 12(5)(e) of the EIR provides an exemption to the extent that disclosure of the information in question would adversely affect;

"the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest"

13. The wording of the exception sets out a number of tests or conditions that must be met before the exception can be engaged, namely:
 - a) Is the information commercial or industrial in nature?
 - b) Is the information subject to confidentiality provided by law?
 - c) Is this confidentiality provided to protect a legitimate economic interest?
 - d) Will the confidentiality be adversely affected by disclosure?

14. The Commissioner has considered each in turn below.

Is the withheld information commercial or industrial in nature?

15. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity of either the public authority concerned or a third party. The Commissioner is satisfied that the information in question is commercial information as it relates to the development of land for commercial activities, namely for the sale of new properties for a profit.

Is the withheld information subject to confidentiality provided by law?

16. The Commissioner considers that “provided by law” will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
17. The Commissioner is not aware of any statutory duty of confidence, and the council has not stated that the information is subject to a contractual stipulation of this. Therefore the Commissioner has considered the common law of confidence, which has two key tests:
 - does the information have the necessary quality of confidence?
 - was the information imparted in circumstances creating an obligation of confidence?
18. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain. The information is not otherwise within the public domain and is not trivial in nature. Therefore the Commissioner is satisfied that the information has the necessary quality of confidence.
19. The Council argues that the withheld information was provided to it in circumstances creating a duty of confidence.
20. The Commissioner notes that the front sheet of the viability report states that the report is confidential and that that the developers consider that the contents will be exempt under section 41 and 43(2) of the FOI Act. The Commissioner also notes that section 1.6 of the viability report itself provides a confidentiality statement.
21. The Commissioner also notes that throughout its responses to the complainant and the Commissioner the council has been clear and consistent that it understood that it owes a duty of confidence to the developer and that it therefore considers that it is not able to disclose the information without putting itself at risk being sued for breaching that duty.
22. The Commissioner is therefore satisfied that both the developer and the council understood from the outset that the information was being provided to the council under a duty of confidence.
23. The Commissioner’s decision is that the information therefore has the necessary obligation of confidence.

Is the confidentiality protecting a legitimate economic interest?

24. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person (or persons) 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. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets 'would' to mean 'more probable than not'
26. In correspondence with the Commissioner, the Council explained the adverse effect both for the Council and for the developer if the information were to be disclosed.
27. The council told the Commissioner what the adverse effect for the developer, Park Lane Group would be. It said that it had contacted Park Lane who had confirmed its view that the information should be withheld from disclosure. Park Lane identified the following reasons why it considered that a disclosure of the information would harm its legitimate economic interests:
 - *The viability is based on cost/m2, excluding abnormal items, using BCIS rates that were adjusted downwards to reflect their own historic internal cost information that is specific to The Park Lane Group.*
 - *The viability included detailed costs for a number of abnormal site costs. These abnormal items were costed using their own historic rates that they have from previous projects and such rates have been secured through their supply chain of sub-contractors and material suppliers on previous developments/sites.*
 - *As part of the post submission discussions with the Council and their appointed consultant Park Lane Group provided various additional cost sensitive items, this included amongst others a detailed breakdown of their Sales costs.*
 - *Should the viability be made available to competitors, then that information would cause Park Lane harm when tendering/bidding for future sites. Their competitors would have an unfair advantage in forming an opinion on how they would look to bid on future*

development sites and consequently this would have a harmful effect on their future business.

28. The Commissioner also asked the council to explain how a disclosure of the information would help competitors of Park Lane Group to change their behaviour/bidding strategies to be more competitive against Park Lane in future tenders. The council obtained a response from Park Lane on this issue which it provided to the Commissioner. Park Lane stated:

"The viability reports that we submitted in respect of our applications at [address redacted] contained cost information based on our own historic costs from developments that we have carried out in the past. The reports also included detailed Cost Plans that included measured works and rates for the abnormal/external works as well as the level of fees that we pay for professional services and other items.

We would remind you that this detailed information was reviewed by an independent assessor, Bruton Knowles, employed by the Council, who concluded that the costs included in our viability report were reasonable and arrived at the conclusion that the site was not capable of being viable, and therefore undeliverable, should onsite Affordable Housing provision being required.

Should this information become freely available to the public, and therefore to our competitors, it would give our competitors details of our cost base that we use when bidding for sites not just in Hastings but also in other neighbouring authorities. Therefore when bidding on future sites where planning permission has already been granted our competitors would be able to use this information to assess what our likely build costs would be and from that be able to form an opinion on what our bid would be for that site.

This would give our competitors a significant and unfair advantage that could inform how they would be bid for future sites where we are in competition and would therefore cause significant harm to our future business."

29. The Commissioner notes that the above arguments apply to specific sections of the report and associated documentation. However she considers that the arguments cannot apply to the entirety of the report. Her view is that the council has sought to apply the exception in a blanket form to withhold the entire document from disclosure whereas its, and Park Lane's arguments, only relate to specific information within the documents, namely financial and costing information provided as part of the report.

30. Having considered the withheld information the Commissioner is not satisfied that the entirety of the report is covered by the arguments submitted above. As such she considers that some sections of the report do not fall within the scope of the exception on the basis that the council has failed to demonstrate why a disclosure of that information would create an adverse effect upon the legitimate economic interests of any party.
31. The Commissioner has therefore outlined the information which she considers does not fall within the scope of the exception in Regulation 12(5)(e) in the annex to this decision notice.
32. However a disclosure of some of the information would provide costing information, and the effects of disclosure outlined by the council and Park Lane above do therefore need to be considered further for this information.
33. The report examines a number of potential options regarding the development and considers the viability of these options. In essence, the report analyses different sorts of development, and provides an analysis of the financial implications of these insofar as the developer is concerned. These are used to determine whether the outcome would be financially viable. As such, the financial information includes specific details of the costs to the developer in the specific circumstances outlined for each option.
34. Park Lane has explained that should this information be disclosed then its competitors would have access to its own costings for these sorts of developments, and for the sorts of issues which it faced in developing this particular site. Some of these issues will be faced again in future developments, and where this is the case competitors to Park Lane could use this information in determining the likely tender bids which Park Lane would make.
35. At the least, it would provide information to Park Lane's competitors which Park Lane would not have available to it about its competitors. This undermines an otherwise level playing field in the submission of bids, and would be likely to be disadvantageous to Park Lane being successful with its own bid.
36. In this sense the Commissioner accepts that the council's and Park Lane's arguments are merited and this part of the test is engaged for the specific information outlined within the annex.

Will the confidentiality be adversely affected by disclosure?

37. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it inevitable

that this element will be satisfied. In her view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.

The public interest

38. As the exception is engaged for some of the information the Commissioner has considered the public interest test required by Regulation 12(1)(b) for the information she has identified as falling within the scope of the exception. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
39. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in Regulation 12(2).

The public interest in the information being disclosed

40. The central public interest in the information being disclose relates to creating greater transparency on the issue of council decisions on planning applications, and in particular on the issue of affordable housing. There is a general public interest in transparency around the council's planning decisions, and in the public being able effectively to hold it accountable for those decisions; and there is also a specific interest in the public being able to understand how affordable housing agreements are reached.
41. The issue relates to both the potential for profitability of a development to the developer as compared to the need for affordable housing to be built. Generally speaking, following the National Planning Policy Framework (the NPPF), requires that where local planning authorities are considering the use of land for the development of houses it sets policies requiring that a percentage of these will to be affordable housing. The NPPF therefore sets out how local authority planning departments are intended to achieve this goal through drafting policies regarding developments where affordable housing should be required or considered. However, this expectation can be overruled in certain situations where it is demonstrated that the inclusion of affordable housing will make the proposed development unviable for the developer and there is a likelihood that the developer will not move ahead with the development because of this requirement.
42. A disclosure of this information would demonstrate the arguments used in this case to seek to overturn the requirement for affordable housing at the levels initially identified for the relevant site. It would, to an extent, highlight the evidence which was taken into account by the

council in the decision to lower the amount of affordable housing required of the developer when obtaining planning permission. In this case the complainant suggests that 8 affordable housing units were lost as a result of the council's decision following the receipt of the viability report.

The public interest in the exception being maintained.

43. The central public interest in the information being withheld relates to the protection of the legitimate economic interests of the developer for the reasons outlined above. The viability report contains detailed financial information which competitors of the developer could use to determine the levels of tendering bids which Park Lane might submit in future, similar sites. They can then use this information to provide a more competitive bid, making it more likely that their bid will succeed over Park Lane's.
44. Although the Commissioner recognises that each site, and therefore each bid, will differ dependent upon the circumstances in the area proposed for development, some elements will remain the same, or similar, and the disclosure of the detailed costings submitted by Park Lane in this viability report would allow its competitors insight into the likely costings which Park Lane would submit for elements of any future bids it might make (subject to indexing for inflation over the interim period).
45. The complainant has highlighted to the council that viability reports have previously been disclosed in similar circumstances. However it needs to be borne in mind that each viability report may differ in respect of the amount of detailed costing information which is included within it. Some reports might not therefore provide the level of detail to competitors which Park Lane is arguing would occur in this case. The council counter argued that a previous disclosure of a viability report was actually consented to by the developer. In this case Park Lane has not consented to the disclosure of the report for the reasons it has outlined above.
46. The Commissioner recognises the importance of preserving the integrity of commercial bargaining processes. There is a public interest in ensuring that private parties are not able to access information about their competitors, their suppliers or their customers that would enable them to increase their prices, tailor their offerings, or otherwise change their behaviour in a way that gives them an unfair advantage over their suppliers or their customers (a public interest which is recognised by the enactment of competition legislation to prevent private parties sharing such information among themselves). The Commissioner considers that the disclosure of such information is not in the public interest.

47. Having considered the arguments above the Commissioner recognises that the disclosure of the information she has outlined as being caught within the scope of the exception in the appendix to this notice would have the adverse effects outlined above.
48. Her decision is therefore that the public interest for this information rests with the exception being maintained.

Right of appeal

49. 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

50. 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.
51. 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 to Decision notice FER0721611

Viability Report

Appendices – disclose

Section 1 1.0 – disclose 1.1 to 1.15
 1.0 - withhold 1.16 – 1.18

Section 2 2.0 – disclose
 3.0 – disclose

Section 4 4.1 - disclose
 4.2 - disclose
 4.3 - disclose
 4.4 - disclose

Section 5 5.1 – disclose
 5.2 – disclose but withhold figure in 5.2.2
 5.3 – disclose
 5.4 – disclose
 5.5 – disclose

5.6 – withhold

5.7 – withhold

Section 6 6.0 – disclose, but withhold figures provided in 6.3

Appendices

Appendix A(i) – withhold

Appendix A(ii) – withhold

Appendix A(iii) – withhold

Appendix A(iv) – withhold

Appendix B – disclose

Appendix Ci – disclose

Appendix D – withhold

Appendix Dii – withhold

Appendix D Div - withhold

Appendix D(2) – withhold

Appendix D Dv – disclose

Appendix E-E (i) - withhold

Appendix E-Eii - withhold