

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 August 28, 2024

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

Decision (including any steps ordered)

1. The complainant requested information relating to Folkestone and Hythe District Council's (the Council) housing stock. The Council provided some information but cited regulation 12(5)(e) (commercial interests) and regulation 12(3) (personal data) of the EIR to withhold further information.
2. The Commissioner's decision is that the Council was correct to apply regulation 12(5)(e) to withhold some of the information falling within the scope of the request.
3. The Commissioner does not require further steps.

Request and response

4. On 24 November 2022, the complainant wrote to the Council and requested information in the following terms:

"Please provide me with any information on the Stock Condition Survey of Social Housing Stock undertaken by Rapley's LLP which began on the 12/05/21 and ended on the 10/12/2021, at a cost of £163,290."

5. The Council responded on 21 December 2022, providing some information but withholding other information under regulation 12(5)(e) (commercial or industrial information) and regulation 12(3) (personal information) of the EIR.
6. Following an internal review the Council upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner on 1 March 2024, to complain about the application of regulation 12(5)(e) to their request. The complainant has not challenged the application of regulation 12(3).
8. The following analysis covers whether the Council was correct to apply regulation 12(5)(e) of the EIR to withhold some information falling within the scope of the request.

Reasons for decision

Regulation 12(5)(e) – Commercial confidentiality

9. Regulation 12(5)(e) states 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.
10. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
 - 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?
11. The information withheld under regulation 12(5)(e) comprises various financial figures within the Stock Condition Survey produced for the Council by Rapleys LLP.
12. The report provided an independent opinion of the re-investment required for the Council's stock of social housing for the next 30 years.

Is the information commercial or industrial in nature?

13. For information to be commercial in nature, it needs to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.
14. Having viewed the withheld information the Commissioner is satisfied that the withheld information is commercial in nature.
15. This is because it relates to the work and investment required to the Council's stock of social housing over the next 30 years.
16. This can be considered commercial in nature as the information within the report will inform the Council's long term business plans and budgets.

Is the information subject to confidentiality provided by law?

17. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party, information jointly created or agreed with a third party, or information created by the public authority itself.
18. With regard to the common law duty of confidence, there are two issues that need to be considered:
 - Does the information have the necessary quality of confidence? In the Commissioner's view if the information is not trivial nor in the public domain, it has the necessary quality of confidence.
 - Was the information shared in circumstances creating an obligation of confidence?
19. The Council has explained that the information was provided in confidence by a third party for use only by the Council. The information enabled the Council to shape its 30 year Housing Revenue Business plan, it is therefore not trivial and not in the public domain.
20. The report itself states that it is specifically for the Council's use.
21. The Commissioner is therefore satisfied that the withheld information is subject to a duty of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

22. The information in question here is redacted content that relates primarily to forecasts, estimates, costs, or budgetary information. The Commissioner has viewed the withheld information.
23. The council argues that the release of sensitive financial information would have had a prejudicial effect on the Council's ability to run a competitive tendering process and receive value for money on the public purse.
24. The Commissioner considers that, as the tendering process was live at the time of the request, confidentiality would be required to protect the tendering process.

Would confidentiality be adversely affected by disclosure?

25. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have already been identified.
26. For the reasons set out above, the Commissioner finds that regulation 12(5)(e) is engaged.

Public interest test

27. As with other exceptions under the EIR, when regulation 12(5)(e) is engaged, the public authority must carry out a public interest test in order to decide whether the information should be withheld.

Arguments for disclosure

28. The Council has acknowledged that there is an inherent presumption in favour of openness and disclosure of information under the EIR.
29. It stated that disclosure of the information would give the public a greater understanding of decisions made, or matters being considered by the Council.

Arguments against disclosure

30. The Council argued that making available commercially sensitive financial data could harm or damage the Council by providing prospective tenderers an advantage, and potentially disadvantaging the Council from a competitive tendering exercise which would not be in the public interest.
31. The Council maintains that it was not in the public interest to release the redacted estimated cost information in the original survey because, at the time of the request, the linked business plans and models had not been formally agreed through the proper democratic process of Council and Cabinet.

The Commissioner's view

32. The Commissioner notes that, due to the delay in the Council carrying out an internal review, a significant amount of time passed between the original request and the complaint being brought to him.
33. When considering the application of exceptions the Commissioner must consider the circumstances at the time of the request rather than at the time the case was submitted to him for consideration.
34. This means that any arguments for, or against, disclosure should be balanced against the protection of the legitimate interests of the parties involved at the time the request was made, 24 November 2022.
35. The Commissioner considers that there is a legitimate public interest in the transparency of the Council's processes.
36. In this case the information relates to future funding of the Council's social housing stock. There is a strong public interest argument in favour of the Council being clear about its intentions for future investment in its social housing stock and how much this is likely to cost the public.
37. In the particular circumstances of this case the Commissioner has considered if, at the time of the request, disclosure of the information would likely have caused harm to the process and if disclosure would have served the public interest.
38. At the time of the request, the competitive tendering exercise for the proposed work had not been completed, nor had any business plans or models linked to the proposed investment in social housing been formally agreed through the proper democratic process of Council and Cabinet.

39. There is a weighty argument to preserving the principle of confidentiality and that there is an underlying public interest in ensuring the confidentiality of the Council's processes. Allowing it to properly consider the various arguments and opinions required when making a significant investment in its stock of social housing.
40. Having considered the arguments for and against disclosure it is the Commissioner's opinion that, while the arguments are finely balanced, the arguments for maintaining the exemption at the time of the request outweigh those for disclosure.
41. Therefore the Commissioner's decision is that the public interest in maintaining the exception outweighs that in favour of disclosure, and therefore the public authority was entitled to rely on regulation 12(5)(e) of the EIR to refuse to provide the withheld information.

Procedural matters

42. The complainant requested an internal review on 12 December 2022. As the Council failed to provide its response until 29 February 2024, it has breached regulation 11(4) of the EIR.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ben Tomes
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