

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 July 2019

Public Authority: Dorset Council
Address: County Hall
Colliton Park
Dorchester
DT1 1XJ

Decision (including any steps ordered)

1. The complainant has requested information about the preferred bid for the disposal and development of specific property owned by Dorset Council ("the Council"). The Council disclosed some information, and withheld the remainder under the exception provided by 12(5)(e).
2. The Commissioner's decision is that the Council has failed to demonstrate that regulation 12(5)(e) is engaged. The Council has also breached the requirement of regulation 5(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld 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 5 November 2017, the complainant wrote to the Council and requested information in the following terms:

I am formally requesting to inspect, under the rights set out in the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004, at the offices of North Dorset District Council the full details of the preferred proposal as it is a matter of strong public interest.

6. The Council responded on 29 May 2018. It disclosed some information, and withheld the remainder under the exemptions provided by sections 41 and 43 of the Freedom of Information Act ("the FOIA").
7. Following an internal review the Council wrote to the complainant on 5 July 2018. It upheld its position.
8. The complainant contacted the ICO, which asked the Council to consider whether the request would fall under the EIR. The Council subsequently issued a fresh response under the EIR on 23 January 2019, in which it disclosed further information subject to some redactions under the exception provided by regulation 12(5)(e).

Scope of the case

9. The complainant contacted the ICO on 24 January 2019 to complain about the Council's redaction of information under regulation 12(5)(e).
10. The ICO wrote to the Council on 9 April 2019 to direct it to the Commissioner's public guidance, and to request submissions on the application of regulation 12(5)(e). The Council subsequently provided a copy of the withheld information, and its arguments for the applied exception.
11. The ICO understands that the request was originally submitted to North Dorset District Council. That authority has since been dissolved, and its responsibilities are now held by Dorset Council, which was formed on 1 April 2019.

Reasons for decision

What information has been withheld?

12. The withheld information comprises redacted information from two documents, namely the 'Aster bid document' and a Cabinet report relating to it.

Regulation 12(5)(e) – Commercial confidentiality

13. Regulation 12(5)(e) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

14. The Commissioner's public guidance¹ on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

- 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 of nature?

15. The Council has explained that the information relates to the sale of property from the Council to Aster, and the proposed development of it by Aster.

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

16. The Commissioner accepts that such information can be defined as being commercial in nature.

Is the information subject to confidentiality provided by law?

17. In requesting the Council's submission on this aspect, the ICO advised the Council of the following:

With regard to point (ii) the ICO accepts that a confidentiality can be provided either by virtue of common law or by virtue of a specific statutory provision. However, please ensure that your response clearly explains on what basis the Council believes that the information is covered by a law of confidence.

18. In response, the Council has confirmed that it considers the information "is clearly covered by the Statutory Exemption Exception", but has not provided any specific detail about the nature of the confidence.
19. The Commissioner emphasises that the responsibility for demonstrating the correct application of an exception lies with the public authority. In the context of regulation 12(5)(e), it is not appropriate for the Commissioner to formulate arguments on behalf of the Council.
20. In the absence of any clear explanation by the Council of how the information is subject to confidentiality provided by law, the Commissioner cannot conclude that the second condition has been met.
21. On this basis the Commissioner finds that regulation 12(5)(e) is not engaged.
22. The Commissioner notes that insufficient arguments have likewise been submitted in respect of the latter two conditions outlined in paragraph 13. In respect of the required public interest test, the Council's arguments for and against disclosure are extremely limited with no explanation of the necessary balancing exercise. The Commissioner refers the Council to the observations recorded in 'Other matters'.

Regulation 5(2) – Time for compliance

23. Regulation 5(2) states that an information request should be responded to no later than twenty working days after the date of receipt. In this case the Council did not respond to the request within the time for compliance. On this basis the Commissioner must find a breach of regulation 5(2).

Other matters

24. The Commissioner highlights the importance of handling a request under the correct legislation. Determining the relevant legislation will inform the public authority of the how to proceed when handling a request; this is particularly so when the authority seeks to withhold information.
25. The Commissioner also highlights that the onus of demonstrating the valid application of an exemption (FOIA) or exception (EIR) lies with the public authority. In the circumstances of this case, the Commissioner notes that the Council has provided extremely limited arguments to support the applied exception.
26. The Commissioner has published comprehensive guidance for public authorities, including individual guidance documents for each of the EIR's exceptions. This guidance can be accessed at:
<https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

Right of appeal

27. 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

28. 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.
29. 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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