

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 February 2016

Public Authority: Guildford Borough Council
Address: Millmead House
Millmead
Guildford
Surrey
GU2 4BB

Decision (including any steps ordered)

1. The complainant has requested information relating to a draft masterplan for the redevelopment of Guildford town centre. Guildford Borough Council withheld the information under the exception for commercial confidentiality (regulation 12(5)(e) of the EIR).
2. The Commissioner's decision is that Guildford Borough Council has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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.

Background

5. The council has explained that it is in the process of preparing a Draft Local Plan, which is scheduled for public consultation in the summer of 2016. It confirmed that the Local Plan will be a plan for the future development of the local area, drawn up by the council as the Local Planning Authority (LPA).

6. The council clarified that, in order to provide evidence to support the Draft Local Plan it is preparing a draft masterplan for the development of the town centre and river corridor. It explained that one of the key aims of the draft masterplan is to propose and promote schemes that are deliverable and financially sound. According to the council's website, the draft Town Centre Master Plan (TCMP) is not a planning document and does not formally allocate any sites. For this reason, it will not carry any weight when determining planning applications. However, the final version of the TCMP will form part of the evidence base, which will help inform the next version of the new Local Plan.
7. It is within this context that the complainant submitted request for information associated with the draft masterplan.

Request and response

8. On 2 September 2015, the complainant wrote to Guildford Borough Council (the "council") and requested information in the following terms:

"We refer to the Council's 'Guildford Town Centre Masterplan' dated 27 August 2015 and, in particular, Section 5 of that document entitled 'Delivery'.

Please provide us with the relevant documentation which form the Council's evidence base for the conclusions reached in respect of viability for the development sites identified therein. In particular, we request the detailed valuation and associated documents prepared in respect of those development sites including the site at plot U).

If not already falling within the scope of the preceding paragraph, please also supply us with copies of the following documents in relation to the sites identified for redevelopment in the Masterplan:

- (i) The viability analyses undertaken;*
 - (ii) The development appraisals undertaken;*
 - (iii) The assessment of benchmark land value used to determine viability; and*
 - (iv) Copies of any reports (both internal and for wider dissemination) prepared to assess or verify the above on behalf of the Council and/or its independent viability consultants."*
9. On 29 September 2015 the council responded to the request and confirmed that it was withholding the entirety of the information under

the exception for adverse affect to commercial confidentiality (regulation 12(5)(e) of the EIR).

10. Following an internal review the council wrote to the complainant on 4 November. It stated that it was maintaining its reliance on the exception to withhold the requested information.

Scope of the case

11. On 13 November 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(e) of the EIR.
13. During the Commissioner's investigation the council disclosed the information requested in part iv of the request. The Commissioner has, therefore, confined his investigation to the application of the exception to the remaining elements of the request.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

14. In relation to all the elements of the request, the council has identified and withheld two spreadsheets under regulation 12(5)(e).
15. 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".
16. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He 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?

17. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
18. The council has confirmed that the information relates to its commercial activities, specifically its ability as a landowner to negotiate with private landowners and other public authorities which own sites in Guildford.
19. Having considered the council's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information relates to commercial transactions, namely the selling or buying of land. This element of the exception is, therefore, satisfied.

Is the information subject to confidentiality provided by law?

20. 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.
21. 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.
22. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark, Megarry J*, suggested that the 'reasonable person' test may be a useful one. He explained:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."*¹
23. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association (EA/2010/0012)* the Tribunal accepted evidence that it was 'usual practice' for all documents containing

¹ *Coco v A N Clark (Engineers) Ltd [1969] RPC 41.*

costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.

24. In applying the 'reasonable person' test the Tribunal stated:

*"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence) apparently without regard to the particular purpose for which they were being approved)... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realised that that was what the developer was doing."*²

25. In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another party. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. The exception will protect confidentiality owed by a third party in favour of a public authority, as well as confidentiality owed by a public authority in favour of a third party.

26. The council has confirmed that the information consists of valuations prepared in connection with development sites, viability analyses and development appraisals which include conditions of engagement. The council maintains that the information is not trivial and that it has not been placed in the public domain, being only accessible to employees with specific access and the consultants who created the information.

27. The Commissioner considers that, where information relates to the sale or utilisation of land, particularly where such processes are incomplete and where other contingent factors would be affected by such disclosure (such as associated land acquisition), it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, the Commissioner is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

28. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
29. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
30. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He 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".

31. The council has stated that the confidentiality in this case is designed to protect the council's negotiating position in the redevelopment of the town. It has argued that it has a duty to maximise the return for the community and to demonstrate best value at all times and that, should the information be disclosed, it would be likely to be held to pay higher sums with landowners "holding out".
32. The council has advised that it has a responsibility to work with landowners and potential developers to deliver the draft masterplan in a cohesive way for the next 25-30 years. It has stated that the valuation of properties and key sites is a key factor in the development of the draft masterplan and that disclosure of the information would (as an established principle) undermine its ability to obtain best prices.
33. The Commissioner notes that the council's arguments in respect of the adverse effects of disclosure are very high level and largely identify principles which the council considers to be self-evident. However, in order for the exception to be engaged it is not enough to rely on general principles – it is necessary for specific adverse effects to be identified and a causal link to be established between the harm and the disclosure of specific information.

34. The Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing; however, he considers that it is for authorities to fully explain the relevant causes and effects in any given instantiation of this principle. For example, the council has not explained why a necessary effect of disclosing the information would be that landowners would “hold out” in negotiations with the council.
35. Whilst the Commissioner can follow the general chain of consequences identified in the council’s arguments, he does not consider that a link has been made between the alleged outcomes and the specific withheld information. The Commissioner considers that the council’s arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information. He acknowledges that there might well be a case to be made for withholding the information under regulation 12(5)(e) but he does not consider that the council has made it in this instance.
36. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner does not consider that he has a duty to generate arguments on its behalf
37. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

38. 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

39. 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.
40. 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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