# Environmental Information Regulations 2004 (EIR)

# Decision notice

**Date:** **27 February 2018**

**Public Authority:** **Forest of Dean District Council**
**Address:** **High Street**
**Coleford**
**Gloucestershire**
**GL16 8HG**

## Decision (including any steps ordered)

1. The complainant has requested a viability assessment relating to a proposed development. Forest of Dean District Council withheld the request information under the exception for commercial confidentiality (regulation 12(5)(e)).

2. The Commissioner's decision is that Forest of Dean District Council has failed to demonstrate that the exception in 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 requested 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.

## Request and response

5. On 25 July 2017, the complainant wrote to Forest of Dean District Council (the "council") and requested information in the following terms:

   *"In connection with Core Strategy Policy CSP.5 Housing, I am requesting the following information:*

   *Both the viability assessment submitted (I believe) by the Homes and Communities Agency and the associated independent assessment report commissioned by the Forest of Dean District Council, that were referred to by Keith Chaplin on 7/10/14 in his response to hybrid planning application P0663/14/OUT (Keith Chaplin correspondence attached)."*

6. The council responded on 4 September 2017 and stated that the requested information contained *"….commercially sensitive information and for that reason it will not be available for public release."*

7. Following an internal review the council wrote to the complainant on 16 September 2017. It stated that it was withholding the requested information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.

## Scope of the case

8. On 25 September 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(5)(e) to withhold the requested information.

## Reasons for decision

### Regulation 12(5)(e) – commercial confidentiality

10. The council withheld all the requested information under regulation 12(5)(e). The information in this case consists of a viability assessment carried out by a consultant regarding the viability of providing affordable housing in the proposed development.

11. 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".

12. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?*

13. The council confirmed that the information relates to the commercial development of Cinderford Northern Quarter, specifically, the purchase and sale of land, goods and services.

14. Having considered the withheld information and the council's submissions, the Commissioner is satisfied that the information constitutes commercial information.

*Is the information subject to confidentiality provided by law?*

15. 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.

16. 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.

17. The council has confirmed that the information is not trivial in nature, being related to a potential large scale development, and that it has not been placed in the public domain. It has further stated that the information was explicitly marked "private and confidential".

18. In view of the above and, having had regard for the withheld information, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

*Is the confidentiality provided to protect a legitimate economic interest?*

19. The Information Rights Tribunal confirmed in Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

20. 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.

21. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".*

22. The council has stated that the confidentiality attached to the information protects the legitimate interests of itself and potential developers of the site.

23. The council has argued that a developer has yet to be identified for the site and disclosing the information may assist potential developers in a way which could undermine the council's ability to maximise the potential of the site.

24. The council has stated that the risk to the proposed development was particularly acute at the time of the request as negotiations relating to the acquisition of land and deliverability were pending. It has stated that disclosure would be "likely" to prejudice such negotiations.

25. In relation to the ascribed harm to the interests of potential developers, the council has not provided any specific arguments in this respect.

26. Moreover, according to the general arguments provided by the council, far from harming potential developers, it appears to the Commissioner that disclosing the information would assist developers in negotiations with the council. On the basis of submissions provided, therefore, the Commissioner considers that the council has failed to demonstrate that

disclosing the information would harm the legitimate economic interests of potential developers.

27. In relation to the council's own interests, the Commissioner is struck by the vague and general nature of the council's arguments. She also notes that the terminology used by the council, which identifies the likelihood of harm occurring as "likely", does not meet the higher bar required for the engagement of the exception.

28. In relation to the argument that the matter is ongoing and that disclosure at this stage would impact on negotiations, the Commissioner recognises that a case could be made for withholding information in such circumstances. However, the arguments provided by the council do not identify a specific harm nor link this to the disclosure of specific elements of the information. The Commissioner is left with the impression that the council has sought to withhold the information on a general basis without regard for legitimate, discrete reasoning.

29. The Commissioner also notes that the viability assessment was produced in September 2014. She considers that, given the passage of time and associated changes in the market, any assumptions about land prices or other costings or associated conclusions in the assessment are unlikely to still be relevant. The council has not provided any details of how the information would be of use in the market at the time of the request.

30. Whilst recognising that it might be that a case could be made for withholding the information, the Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case, whilst the Commissioner's letter of investigation clearly set out the level of detail required for engaging the exception, the council chose not to make any further submissions, relying on its position as set out earlier.

31. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person.

*Would the confidentiality be adversely affected by disclosure?*

32. The Commissioner has concluded that disclosure would not adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.

33. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

**Right of appeal**

34. 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

35. 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.

36. 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**