

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

Date: 4 March 2020

Public Authority: Mendip District Council
Address: Cannards Grave Road
Shepton Mallet
Somerset
BA4 5BT

Decision (including any steps ordered)

1. The complainant has requested a copy of a developer's agreement relating to the Saxonvale site in Frome. Mendip District Council refused the request, withholding the information under the exemption for commercial interests – section 43(2) of the FOIA. At the Commissioner's direction the council reconsidered the request under the EIR and disclosed a redacted version of the information, withholding information under the exception for commercial confidentiality – regulation 12(5)(e).
2. The Commissioner's decision is that Mendip District Council initially wrongly handled the request under the FOIA and breached regulation 5(1) and 14(1) of the EIR and that it correctly applied regulation 12(5)(e) to withhold some of the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 10 May 2019, the complainant wrote to Mendip District Council (the "council") and requested information in the following terms:

"Under the terms of the Freedom of Information Act 2000, I would like to request a copy of the developers agreement signed between Mendip District Council and Acorn Property Group following or prior to the purchase of the Saxonvale site in Frome."

5. The council responded on 7 June 2019. It stated that it was extending the time for compliance to consider the public interest in relation to the application of the exemption in section 43(2) of the FOIA. On 14 June 2019 the council sent the outcome of its deliberations and confirmed that it was refusing the request under section 43(2).
6. Following an internal review the council wrote to the complainant on 29 July 2019. It stated that it was maintaining its position.

Scope of the case

7. On 12 August 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. It occurred to the Commissioner that, due to the nature of the request, it was likely that the information constituted environmental information as defined in regulation 2(1) of the EIR. She, therefore, invited the council to reconsider the request under the EIR and issue a new response to the complainant.
9. Subsequent to its reconsideration, the council disclosed a redacted version of the information to the complainant, withholding some details under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(5)(e) to the withheld information.

Reasons for decision

Is it Environmental Information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. In this case the withheld information relates to measures which will have an impact on the use of land, namely the sale of land for potential development. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").

15. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
17. As such, the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
18. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

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

"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"

20. In order for this exception to be applicable, there are a number of conditions that need to be met. The Commissioner 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?

21. For information to be commercial or industrial in nature, it will need to relate to a commercial activity of the third party concerned. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
22. The council has submitted that the information in this case is clearly commercial in nature as it relates to the commercial activity of the sale, purchase and potential development of land for profit. Specifically in this case, the council confirmed that Sale and Overage Agreement (SOA) contains a wide range of commercial information including but not limited to:
 - Specific figures regarding the amount and type of properties which may be developed;
 - Specific figures regarding the total quantity of land to be used for development space;
 - Specific terms placing commercial obligations (both in terms of development and otherwise) on either party;
 - Calculated or foreseen percentages relating to profitability;
 - Details of those providing guarantees (both personal and company guarantors);
 - Specific figures relating to promotional costs;
 - Specific dates providing timelines, phase deadlines and similar timescale related information;
 - Specific dates relating to termination provisions;
23. The council further argued that in concluding the agreement, it was acting in a commercial capacity as landowner, and the SOA reveals the specific details as set out above which were agreed following commercial negotiations between itself and third parties.
24. Having considered the withheld information and the council's submissions, the Commissioner is satisfied that that it relates to the sale, purchase and potential development of land for profit and that it is commercial in nature.

Is the information subject to confidentiality provided by law?

25. 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.
26. 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.
27. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
28. The council has argued that the SOA specifically provides for confidentiality satisfies the burden to demonstrate that confidentiality is provided by law.
29. It has further argued that, in any event, the information satisfies the common law test of confidence for the following reasons:
 - It satisfies the necessary quality of confidence in that is not trivial, is not in the public domain, and has been shared with only a limited number of people. To be specific;
 - The information withheld is not trivial in that it relates to the financial viability of the sale and development, and its disclosure could seriously damage the current and future competitiveness of both the council and the purchaser developer;
 - The information is not in the public domain, and is only collated in writing within the SOA; and
 - Only senior members of the council and the developer have visibility of the information.
30. The council clarified that the information was shared in the context of commercially sensitive and private negotiations and affirmed that any reasonable person acting in that context would assume that the information provided to them was done so in confidence
31. Having considered the withheld information and the council's submissions, the Commissioner is satisfied that the information is subject to the common law duty of confidence in that it is not trivial in nature, has the necessary quality of confidence and was provided as

part of the process whereby it was expected by all parties concerned that information would be held in confidence.

Is the confidentiality provided to protect a legitimate economic interest?

32. 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 the confidentiality is designed to protect.
33. 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.
34. The Commissioner has been assisted by the Tribunal in determining how 'would' needs to be interpreted. She accepts that 'would' means 'more probable 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"*.
35. The council has argued that the disclosure of the SOA in full would certainly damage the economic interests of both the purchaser of the land, and the council, and therefore the taxpayer. The council has submitted that disclosure of commercial information at this critical time would lead to a real loss of competitive advantage, damage the ability of the council to obtain value for money both now and in the future, reduce its bargaining position and damage its ability to generate revenue and enter into similar projects in future.
36. The council has further argued that timing in this instance is particularly important: Information contained within the SOA is current and applies to a live planning purchase and development process which is still in process. The council explained that the particular site to which the SOA relates has a long history of failed projects and non-development.
37. The council explained that the party named as the purchaser in the SOA, "Frome (SV) limited" is a company which is part of the "Acorn Property Group" ("Acorn"), which is shorthand adopted to describe the various corporate entities making up the group's operation as a whole. As such, they are not entirely one and the same, but are very closely related and can reasonably be considered as such for the purposes of considering commercial impacts. The council has argued that disclosure of the agreement would damage both Frome (SV) and Acorn Property Group's interests as a whole, as future commercial contracts, pricing etc. by

Acorn will likely be conducted along similar principles and with similar commercial terms. The council explained that it sought the view of Acorn, and confirmed that their current position is that disclosure of the information is more probable than not to damage their legitimate economic interests in that it would give competitors and landowners insight into their pricing and commercial approach, providing an unfair advantage in future competitive tenders and land negotiations.

38. The council has confirmed that is likely to be engaged in future transactions where the transaction structure, the nature of the information, and the degree of similarity between transactions will be significant. It has asserted that prejudice to its bargaining position in future negotiations on such matters is, therefore, highly likely to occur.
39. The council has explained that development and development opportunities are often controversial, and opponents and competitors can and often do seek to undermine development by exerting pressure on commercial factors. The council has argued that for this reason also, the disclosure of the information is highly likely to result in prejudice to commercial interests and policy objectives.
40. The council has further argued that difficult and complex development opportunities are often marginal in terms of viability. It has suggested that commercial prejudice caused to such projects does not have to be great in order to render them non-viable, meaning that prejudice in the form of inadequate land value or non-development is a highly likely consequence.
41. The council directed the Commissioner to a decision notice issued to Basingstoke and Deane Borough Council in relation to a comparable request¹. It highlighted that in that notice, the Commissioner accepted that certain attributes of the information made it more likely than not that disclosure would result in adverse effects. The council has argued that the same attributes apply to the withheld information in this case, namely, that disclosing the information would:
 - provide valuable commercial information to third parties and competitors;

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2260276/fer0722834.pdf>

- affect parties ability to deliver projects and diminishing commercial bargaining power;
 - undermine current and future negotiating positions;
 - setting out key dates and timescales;
 - provide inside knowledge of potential areas of disruption and challenge; and
 - adversely affect a local authority budget;
42. The Commissioner considers that the council has identified the relevant effects of disclosure and has shown a causal link between the possible and likely effects, and the withheld information. The withheld information principally comprises of information which forms part of the ongoing negotiations. It is clear from the withheld information that at the time of the request those negotiations are ongoing and premature release of information could jeopardise them. This would consequently harm the legitimate economic interests of the council and the developer.
43. Having considered the withheld information and the submitted arguments the Commissioner is satisfied that disclosure would cause a degree of harm to the developer's and the council's legitimate economic interests.
44. The Commissioner considers that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criteria are met then the exception will be engaged. Consequently, the Commissioner has concluded that the council was correct to engage the exception at regulation 12(5)(e).

Public interest test

45. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure. Even where the exception is engaged, the information may still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.

Public interest in disclosing the information

46. The council has acknowledged that disclosure of the requested information would promote accountability, transparency and scrutiny of the council's commercial activities. It has also accepted that increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters.
47. The complainant has argued that it is in the public interest for the council to be open and transparent about its use of public funds. The council has argued that the information does not relate to monies spent by the council. It acknowledges that, whilst the complainant expresses interest in the sums paid in respect of land owned by the council, this information does not form part of the information request but, it will, in any event, be a matter of public record via the Land Registry.
48. The complainant has asserted that disclosure may ensure that any tender process was open and transparent and it would help ensure clarity around fairness, equity and value for money in the overall tender process. The council has rebutted this argument, asserting that the information does not relate to a tender process but to the sale of land which provides an opportunity for development. The council considers that, in fact, disclosure of the information might damage value for money in relation to this project and others like it by disclosing the council's bargaining position.
49. The complainant has also asserted that there is a potential public interest in transparency where there is a suspicion of wrong doing in relation to the information. The complainant has raised concerns that the agreement identified in the request may be subject to the Public Contracts Regulations 2015, and may have been improperly agreed.
50. Again, the council has rebutted this assertion, confirming that it considers that it entered into the agreement in good faith, and that it considers that the agreement does not fall within the scope of the Public Contracts Regulations 2015.
51. The council has further argued that, in order for this factor to have weight, there must be more than a mere suspicion or allegation of wrongdoing, i.e., there must be a plausible basis for the suspicion, even if it not proven. The council's position is that the SOA was entered into in good faith, with the benefit of professional advice.
52. The council has affirmed that, in this case, there is no evidence or suggestion that any action has been taken to gain an unfair advantage for itself or others, and there was no attempt to create an artificial or sham arrangement. It has further suggested that there is no evidence or

suggestion that the council has acted in bad faith or with an unfair motive and that if any such suggestion was made by a party it would be robustly defended.

53. The council confirmed that, in any event, it did not seek to make redactions relating to clauses relating to these issues, in an attempt to be as transparent as possible. It confirmed that the only redactions made relate solely to commercially sensitive information.

Public interest in maintaining the exception

54. The council has argued that disclosure of the SOA would result in a number of effects detrimental to the economic interests of Mendip District Council, including the following:
- Damage to the commercial relationship between Mendip District Council and Acorn Property Group, which like all such commercial relationships is founded on a basis of trust between the authority and participating economic operators. Those operators must be able to communicate any relevant information to a contracting authority without fear that the authority will communicate to third parties items of information whose disclosure could be damaging to them.
 - Reputational damage to Mendip District Council which would result from disclosure leading to prejudice of its partners' commercial interests. Disclosure of commercially sensitive information would reduce the confidence that customers, suppliers or partners may have in the Council, thereby creating a detrimental impact on the Council's ability to conduct commercial activities. Specifically, it is likely that the Council will enter into future projects with third parties on similar commercial bases in the future. Third parties will be less likely to engage constructively on projects where they consider there is a significant risk that their commercially sensitive information will be released.
 - Reduction of Mendip District Council's ability to obtain best value for public funds in future tendering arrangements. Disclosure of information relating to the Council's commercial agreements with Acorn Property Group would prejudice the Council's negotiating position in any future, similar tendering arrangements.
55. The council has further argued that disclosure of the information would adversely affect its ability to generate income and meet housing policy aims for the following reasons:
- It is part of the council's role to generate capital and revenue. Disclosure of the financial arrangements in the agreement will

weaken the Council's and the purchaser's negotiating position in respect of future transactions on Saxonvale and other sites.

- The disclosure of the information would prejudice the development of Saxonvale and other sites and have an adverse impact on the Council's policies to encourage housing delivery. The likelihood of prejudice is high in relation to Saxonvale.
56. The council has also argued that disclosure of the SOA would result in a number of effects detrimental to the commercial interests of Acorn Property Group, including;
- Provision of insight into the business model of Acorn Property Group which could give their competitors an advantage when competing against them in future tendering arrangements. Disclosure of information relating to the Acorn Property Group's commercial agreements with Mendip District Council would prejudice their negotiating position in any future, similar tendering arrangements.
57. In relation to the severity of adverse effects resulting from disclosure, the council explained that the Saxonvale site has lain empty for over a decade and that it has worked with a number of commercial applicants over that time but none has been successful in bringing development forward. The council confirmed that Saxonvale is a complex site, but as well as the challenges there are great opportunities arising from the views of the river and the sloping nature of the site. It clarified that, historically there have been a number of failed attempts at redevelopment with no plans ever coming to fruition.
58. The council explained that its plan is to help facilitate the development of the site and aid the delivery of new homes and regeneration but it also has to generate capital and commercial returns for the local authority. It confirmed that, given its duties and objectives in relation to the provision of housing (including affordable housing), and the limited supply of suitable sites, it is essential that complex sites where viability is an issue are not made more difficult. The council considers that it is highly likely that the disclosure of the information will result in prejudice, putting the sale and the development of the site in jeopardy and resulting in a great loss to local people, the local economy and the council.
59. The council has also highlighted that the specific information in this case relates to a relatively recent land sale and associated commercial terms. The council considers that it is likely that any disclosure of those terms will still represent valuable market information to competitors and the information cannot be said to be "out of date" or diminished in importance. The council asserted that the freshness of the information

increases both the likelihood and severity of the adverse impact on Acorn Property Group and the council itself.

Balance of the public interest

60. The Commissioner acknowledges that the severity of the identified impact of disclosure on both parties is intensified because of the timing of the request and the associated sensitivity of the information. She accepts that disclosure of the information at this time would produce the effects identified by the council.
61. The Commissioner is mindful that the complainant has a specific personal interest in accessing the information. She also acknowledges that they have genuine concerns about the council's governance in relation to the SOA. It is not the Commissioner's role to adjudicate where allegations are made about a public authority's conduct except where these explicitly relate to information request handling, however, she accepts that wrongdoing or a legitimate suspicion of wrongdoing can represent a public interest weighting in favour of disclosing information. However, this will only be in cases where the specific information in question directly relates to any such suspicions and where its disclosure would either dispel or vindicate suspicions.
62. In this case the council has rebutted the complainant's allegations in relation to its handling of the SOA and the Commissioner has not been presented with evidence which leads her to discredit the council's account. In any event, the Commissioner is not convinced that disclosing the withheld information would address this point and is confident that the adverse effects disclosure would cause to the council's and Acorn's legitimate economic interests would be overshadowed by any public benefits resulting from disclosure.
63. The council has argued that to provide the full unredacted information would allow competitors, suppliers, contractors and purchasers an unfair commercial insight into the financial context of any development carried out by Acorn, with a direct onward effect on payments to be made to the council. It maintains that it is essential that the council and relevant third parties are able to conduct commercial relationships in normal conditions of confidentiality without being at a serious disadvantage purely because of their status as a public body. The council considers that the information disclosed contains substantial details of the arrangements for such matters including the overage arrangements and that these disclosures serve the public interest in this matter.
64. Having considered the relevant arguments that Commissioner is satisfied that the public interest in this matter is weighted in favour of maintaining the exception. Whilst she acknowledges the complainant's specific interest in the information and the broader public interest she

does not consider that these interests outweigh the public interest in protecting the legitimate economic interests which have been identified.

Right of appeal

65. 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@justice.gov.uk

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

66. 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.

67. 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