

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 November 2022

Public Authority: Reigate and Banstead Borough Council
Address: Reigate Town Hall
Castlefield Road
Reigate
Surrey
RH2 0SH

Decision (including any steps ordered)

1. The complainant requested various information from Reigate and Banstead Borough Council ('the Council') in relation to Project Baseball and its crematorium proposal. The Council refused to disclose two documents falling within the scope of the request citing regulation 12(5)(e) (confidentiality of commercial information) and regulation 12(5)(c) (intellectual property rights), of the Environmental Information Regulations 2004 ('the EIR'). The Commissioner's decision is that Reigate and Banstead Borough Council were entitled to rely on regulation 12(5)(e) of the EIR to refuse to disclose the information contained within both documents. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 6 May 2021, the complainant wrote to the Council and requested the following information in respect of the Commercial Ventures Executive Sub-Committee, and specifically 'Project Baseball':

"The following information is hereby requested ...in relation to 'Project Baseball' – and the Crematorium proposal:

- Full business case, redacted where necessary
- Feasibility Study
- Risk Assessment
- Cost commentary – to include:
 - Total capital budget
 - Construction costs/budget

Percentage of tolerance, if applicable
Profit projections – estimated derived income per year with assumptions
The period in years until the full capital cost will be repaid...”

3. The Council responded on 23 July 2021, sending a redacted copy of its Business Case, and stating that a decision was still being made regarding the remaining information. A further response was sent on 13 August 2021 including redacted copies of the Project Baseball Business Case and the Project Business Case Review. The response also confirmed that it was withholding the following documents in their entirety in reliance on regulation 12(4)(e), regulation 12(5)(e) and regulation 12(5)(c) of the EIR:
 - Project Baseball Feasibility Report
 - Crematorium Financial Appraisal
4. Following an internal review the Council wrote to the complainant on 20 September 2022. It stated that it was withdrawing its reliance on regulation 12(4)(e) and upheld its original response in respect of regulations 12(5)(e) and 12(5)(c).

Scope of the case

5. The complainant contacted the Commissioner 3 December 2021 to complain about the way their request for information had been handled. They were not satisfied with the Council’s refusal to provide the requested information.
6. During the course of the Commissioner’s investigation, the Council amended its position and sent unredacted copies of the Business Case and Business Case Review documents. It confirmed that its position remained unchanged in respect of the remaining two documents on the basis that the third parties had refused consent for disclosure.
7. The scope of the Commissioner’s investigation is to consider whether the Council was entitled to refuse the remaining two documents on the basis of regulations 12(5)(e) and 12(5)(c). As he has decided that regulation 12(5)(e) applies to the withheld information, he has not gone on to consider regulation 12(5)(c).

Reasons for decision

Regulation 12(5)(e)

8. 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.
9. The Council is relying on regulation 12(5)(e) to withhold the following information which was produced by third parties:
 - Project Baseball Feasibility Report
 - Crematorium Financial Appraisal
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 required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
11. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

12. The Commissioner has had sight of both documents and accepts that they are commercial in nature as they relate to the feasibility and the financial appraisal of a scheme to build a crematorium which the Council referred to as Project Baseball. The information contains projections for a two different companies and how they were intending to generate profit.

Is the information subject to confidentiality provided by law

13. The Commissioner also accepts that at the time, the information was provided in confidence. The information is clearly more than trivial as it relates to two particular companies financial projections in relation to the proposed project. The circumstances in which the information was provided, would in the Commissioner's view, be sufficient to impose a duty of confidence upon the Council.

Is the confidentiality required to protect a legitimate economic interest?

Project Baseball Feasibility Report

14. The third party has stated that the report includes feasibility studies, risk assessments and construction costings which were provided solely for the use of the Council. It has further stated, that the data it used to put together these costings was drawn from a number of other Crematoria schemes it has worked with. It has argued that if this information was shared with the wider public, it could be replicated by its competitors and cause them commercial harm.
15. The Commissioner notes that the document is dated October 2020 and the request was dated 6 May 2021. The information is therefore likely to be current and of value to the third party's competitors. Additionally, at the point the public authority responded to the request, the Commissioner understands that the Project was still under consideration.

Crematorium Financial Appraisal

16. The third party has stated that it did the financial analysis using an advanced project appraisal model which was built by qualified professionals. The model and its outputs were made available to the Council as the client. The third party regards these models as commercially sensitive and has stated that if they were made public its business could suffer commercial harm from its competitors who could replicate its models for their own gain.
17. The Commissioner notes that this document contains figures from 2020 with projections up to 2045. As with the Project Baseball Feasibility Report, the information is therefore likely to be current and of value to the third party's competitors. As stated in paragraph 15 of this notice, at the point the public authority responded to the request, the Commissioner understands that the Project was still under consideration.

Both documents

18. Disclosing the information contained in both documents at the point the Council responded to the request would therefore have adversely affected the confidentiality of the information and thus harmed the economic interests of the third party.
19. Whilst the Commissioner is mindful of the public interest in transparency and accountability, and the presumption in favour of disclosure under regulation 12(2) of the EIR, in this case, he considers that the public

interest lies in allowing the public authority to negotiate the most favourable terms available.

20. The Commissioner is therefore satisfied that the Council was entitled to refuse the disputed information under regulation 12(5)(e) of the EIR.

Section 10(1) – time for compliance with request

21. Section 10 of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17 – refusal of the request

22. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

“A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice...”

23. The Commissioner notes that the complainant submitted their request on 6 May 2021 yet the Council did not respond until 23 July 2021. As the Council failed to both provide information and issue a valid refusal notice within the required deadline, the Commissioner has recorded a breach of section 10 and section 17(1) FOIA.

Right of appeal

24. 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

25. 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.
26. 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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF