

Environmental Information Regulations 2004

Decision Notice

Date: 10 December 2009

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Summary

The complainant requested a copy of a viability report provided in support of a planning application made by a developer in relation to the Lakota Club and Coroners Court. The Council sought to rely on the exception available at regulation 12(5)(e) of the EIR explaining that the report consisted of commercially sensitive information and that to disclose the information would be a breach of confidence. The Commissioner has investigated and has determined that the exception is not engaged. Therefore the Commissioner finds that the withheld information should be disclosed. The Commissioner also identified a series of procedural breaches in relation to the way the Council dealt with the request.

The Commissioner's Role

1. The Environmental Information Regulations (the EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the Commissioner). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the Act) are imported into the EIR.

Background

2. Planning Policy Guidance Note 15 (PPG15) was issued jointly in September 1994 by the Department of Environment and Department of National Heritage. It outlines central government policy and provides advice to local authorities, applicants and other interested parties on the operation of the planning system in relation to the historic building environment.

3. A proposal for demolition of a listed building should be accompanied by verifiable information and documentation, objectively addressing each of the criteria set out in PPG 15. In this case the planning applicant, a developer, has provided three documents to the Council in order to satisfy this requirement. These documents are referred to by the Commissioner as the 'viability report'.
4. On 28 January 2008 Bristol City Council (the Council) published a planning application on its website which sought permission to convert the Coroners Court (a grade II listed building) into 19 residential units of accommodation and to demolish the Lakota Club in its entirety to provide a new development of 38 flats, a restaurant/café and affordable business space. The planning application was published to enable interested parties to comment and contribute to the decision making process.
5. The Lakota Club was originally built as a Malthouse and Storehouse in around 1857. The Coroners Court dates from the same period. Both buildings are situated next to the Stokes Croft Conservation Area.

The Request

6. The complainant wrote to the Council on 28 January 2008 stating:

"Before our client can make effective comments on the conservation area application, it requires site [sic] of the viability report. Can you therefore consider this letter as a request for the provision of the information in accordance with the Environmental Information Regulations 2004."
7. The Council responded on 5 March 2008 explaining that it considered that the information was exempt by virtue of regulation 12(5)(e) of the EIR. The Council explained that it considered that disclosing the information would prejudice the commercial interests of the planning applicant by providing potential competitors with a commercial advantage. The Council therefore considered that disclosure would constitute an actionable breach of confidence.
8. On 14 March 2008 the complainant requested an internal review of the Council's application of the exception. The complainant put forward a number of representations to the Council including the suggestion the Council had not considered its obligations under the EIR Code¹ on accepting information in confidence.
9. On 4 April 2008 the Council provided the complainant with the outcome of its internal review. The Council maintained its view that disclosure would constitute an actionable breach of confidence. The Council also stated that the planning applicant had been contacted and confirmed that in the opinion of the planning applicant the information was commercially sensitive.

¹ Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391)

10. When considering the public interest the Council advised that it had considered that the public interest was served better by non disclosure as it determined that to release the information would constitute a breach of confidence. It also stated that the disclosure of the information would prejudice the commercial interests of the planning applicant. Therefore the Council upheld its decision to refuse the requested information on the basis of regulation 12(5)(e).

The Investigation

Scope of the case

11. On 28 July 2008 the complainant contacted the Commissioner to complain about the way in which its request had been handled.
12. On 24 April 2009 the complainant contacted the Commissioner to discuss its complaint. The complainant specifically asked the Commissioner to consider whether the Council should have disclosed a copy of the viability report at the time of the request.
13. On 29 April 2009 a heavily redacted copy of the viability report was provided to the complainant following an application to the Administrative Court in respect of judicial review proceedings.
14. The Council confirmed to the Commissioner that the Council had provided the redacted copy of the viability report as a consequence of a court order. It argued that this was not a voluntary disclosure to the public at large. As such the Council explained that it was not withdrawing its reliance on regulation 12(5)(e) for the redacted information.
15. The scope of the Commissioner's investigation has therefore been to determine whether the Council was correct to refuse to disclose the full viability report at the time of the request by virtue of regulation 12(5)(e).

Chronology

16. On 2 June 2009 the Commissioner requested information from the Council in respect of its application of regulation 12(5)(e) of the EIR.
17. The Council responded on 2 July 2009 repeating the arguments it had made to the complainant. In relation to the public interest the Council stated that it believed its ability to receive this kind of information would be prejudiced if the information were to be disclosed.
18. On 21 July 2009 the Commissioner advised the Council of his view that it had failed to demonstrate how the exception was engaged. He also advised that the Council had failed to provide detailed arguments in relation to the public interest test. The Commissioner explained that in the absence of such detailed arguments

he would be likely to find that the information should be disclosed, and encouraged the Council to informally resolve the complaint.

19. The Council requested a number of extensions to the Commissioner's deadline for a response. The Commissioner was of the view that he had provided the Council with a number of opportunities to provide a submission, so he set a final deadline of 17 August 2009.
20. On 17 August 2009 the Council corresponded with the Commissioner to explain that it was maintaining its position that the information was exempt. Whilst the Commissioner encouraged the Council to engage in informal resolution, the Council indicated that it would prefer that the Commissioner make a formal decision in the case.

Analysis

Exception – Regulation 12(5)(e)

21. Regulation 12 of the EIR states:

(5) 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'.

22. The Commissioner's general approach to the exception is to consider it as broken down into 4 elements, all of which would be required for the exception to be engaged:
 - 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 interest?
 - Would confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

23. The Commissioner notes that the requested information (the viability report) consists of a cost breakdown for the planning application and the options to refurbish the Lakota Club. Given that the planning application is for commercial enterprise, the Commissioner considers that this information is clearly commercial in nature.

Is the information subject to a duty of confidence provided by law?

The Council's position

24. The Council provided the Commissioner with a letter from the developer, dated 6 October 2006, which had been provided to oppose the application for Judicial

Review (see paragraph 13 above). Within this letter the developer stated “our view is that the information contained in the viability report such as the purchase price of both properties and our construction costs were and are commercially sensitive.”

25. The Council explained that the developer’s planning consultants had indicated that, although some of the information that they had provided to the Council could be made public, the viability appraisal and cost breakdown were to be regarded as confidential.
26. Therefore the Council was of the view that the developers had provided the viability report in confidence as opposed to the information it was obliged to provide under the planning process. The Council did not believe that the developer was required to provide the viability report in order to satisfy the requirements of PPG 15.
27. The Council did not however provide any further evidence to support its claim that the viability report had been provided in confidence, despite a number of opportunities to do so provided by the Commissioner.

The complainant’s submissions

28. The complainant put forward a number of submissions to the Commissioner. The complainant explained that it considered that the viability report should be publicly accessible as it was provided as part of the planning process. The complainant considered that the planning process was designed to be publicly accessible and it followed that the report should be in the public domain.
29. Further, the complainant explained that it did not consider the information has the necessary quality of confidence to be considered ‘confidential’. The complainant explained that PPG 15 requires a developer to make a case justifying demolition of a building in a conservation area. The complainant argued that PPG 15 does not suggest that justifications for demolitions will be delivered in confidence.
30. The complainant also outlined that it considered that PPG 15 inherently requires this type of information to be provided, therefore the planning applicant was obliged to produce a viability report. The complainant stated that a planning application of this type submitted without a viability report would have little or no prospect of obtaining planning permission.
31. The complainant referred the Commissioner to the EIR Code at paragraph 53, which states:

“A public authority should only accept information in confidence if it is essential to obtain that information in connection with the exercise of any of the authority’s functions and it would not otherwise be provided.”
32. The complainant explained that as it considered that the viability report had to be provided by the planning applicant, as such, the Council should not have accepted the report in confidence.

The Commissioner's view

33. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
34. The Council has suggested that a common law duty of confidence applies in this case. The Commissioner has therefore considered:
 - Whether the information has the necessary quality of confidence
 - Whether the information was shared in circumstances importing an obligation of confidence

Does the information have the necessary quality of confidence?

35. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. The Commissioner further considers that information which is of importance to the confider should not be considered to be trivial.
36. The Council has explained to the Commissioner that the viability report contains information which is not in the public domain and that it is therefore inherently capable of having the necessary quality of confidence. Further, it confirmed that the information was not considered to be trivial as it contained the results of a professional assessment prepared privately for the developers.
37. The Commissioner has considered the viability report and the submissions made by the Council. He notes that the information is not otherwise accessible and is not trivial. He is therefore satisfied that the information does have the necessary quality of confidence and, as a result has gone on to consider whether the information was shared in circumstances importing an obligation of confidence.

Was the information shared in circumstances importing an obligation of confidence?

38. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*² suggests 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".
39. Such an approach was adopted by the Information Tribunal in *S v Information Commissioner and the General Register Office (EA/2006/0030)*. The Tribunal concluded that an interview gave rise to an obligation of confidence, as the interviewee could expect any information to be provided to be kept in confidence

² *Coco v AN Clark (Engineers) LTD* [1969] RPC 41

because of “the fact that the interview is conducted in private, the display of notices indicating that the statistical information provided in the same interview is confidential and the nature of the information being sought” (paragraph 54).

40. The Commissioner has therefore considered the Council’s assertion that the planning applicant had a reasonable expectation of confidence. However the Commissioner notes that the Council has not provided any evidence to support this assertion, despite being provided with a number of time extensions to enable it to obtain legal advice.

41. The Commissioner has also considered the complainant’s submission that the information was provided to the Council under a duty arising from PPG 15 which states:

“Proposals for demolition in conservation areas should also be assessed broadly against the criteria for demolishing listed buildings, within paragraphs 3.16-3.19 of PPG15. The criteria require justification that the existing use is no longer viable; that alternative uses have been explored; details of any functional or structural issues and an assessment of the buildings general contribution to the area.”

42. The Commissioner considers that he is able to distinguish this case from the Tribunal decision in *S v Information Commissioner and the General Register Office* as in that case, there were a number of factors which would have led to the provider of the information to conclude that there was an obligation of confidence. In this case however the Commissioner considers that the developer would be aware of the requirements of PPG 15 which requires a prospective developer to make a case justifying the demolition of a building in a conservation area. In light of this, it appears to the Commissioner that it would be reasonable to assume that the information provided to the Council by the developer may be open to wider public scrutiny, particularly as the planning application has already been made public.

43. Further the Commissioner notes that the Council has placed information on its website³ highlighting that the Council is subject to the Freedom of Information Act 2000. Whilst this information is provided in the context of pre-planning applications, the Commissioner considers that the developer will have been ‘placed on warning’ that planning information may be disclosed under the terms of the Act. This, combined with the requirements of PPG 15 has led the Commissioner to conclude that there is not a reasonable expectation of confidence in this case.

44. For the reasons set out above, and largely because of the lack of arguments provided by the Council, the Commissioner is not satisfied that the confidentiality of the withheld information is provided by law. Therefore the Commissioner does not find the exception at regulation 12(5)(e) engaged.

³ available at <http://www.bristol.gov.uk/ccm/content/Environment-Planning/Planning/pre-application-enquiries.en>

45. Consequently, it is not necessary for the Commissioner to consider the public interest test in relation to this case.

Procedural Requirements

46. The full text of the regulations referred to can be found in the Legal Annex at the end of this Notice.

Regulation 5(1)

47. Regulation 5(1) provides that environmental information shall be made available upon request.
48. As the Commissioner has determined that the exception claimed by the Council is not engaged, the Council breached the requirements of regulation 5(1) as it failed to make the requested information available on request.

Regulation 5(2)

49. Regulation 5(2) requires a public authority to provide information as soon as possible and no later than 20 working days after the receipt of the request.
50. As the Commissioner finds that the exception claimed by the Council is not engaged, it follows that the information ought to have been disclosed to the complainant at the time of his request. In failing to disclose this information requested within 20 working days of receipt of the request the Council breached regulation 5(2) of the EIR.

Regulation 14(2)

51. Regulation 14(2) requires that a public authority issue a refusal to a request for information within 20 working days.
52. The complainant made a request for information dated 28 January 2008; the Council issued a refusal notice on 5 March 2008. The Council took 26 working days to issue a refusal to the request and therefore breached regulation 14(2) of the EIR.

Regulation 14(3)(b)

53. Regulation 14(3)(b) provides that public authorities seeking to withhold information must state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure.
54. The Commissioner's view is that the Council failed to adequately explain the factors it considered in determining that the public interest in maintaining the exception outweighed the public interest in disclosure. The Council has therefore breached regulation 14(3)(b) of the EIR.

The Decision

55. The Commissioner's decision is that the public authority did not deal with the request for Information in accordance with the Act.
- The Commissioner finds that the exception at regulation 12(5)(e) of the EIR is not engaged and the withheld information should therefore be disclosed.
 - In failing to disclose the information the Council breached regulation 5(1), and in failing to disclose it within 20 working days of receipt the Council breached regulation 5(2).
 - The Council also breached regulations 14(2) for not issuing its refusal notice within 20 working days and 14(3)(b) for not adequately explaining the public interest arguments.

Steps Required

56. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the requested information to the complainant
57. The public authority must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

58. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

59. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 35 calendar days of the date on which this Decision Notice is served.

Dated the 10th day of December 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1)

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2)

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1)

“Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

Regulation 12(2)

“A public authority shall apply a presumption in favour of disclosure”

Regulation 12(5)(e) – Exception

Regulation 12(5)

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

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates. “

Regulation 14 - Refusal to disclose information

Regulation 14(3)

“The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).“