

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 1 September 2014

**Public Authority:** Vale of White Horse District Council  
**Address:** Abbey House  
Abbey Close  
Abingdon-on-Thames  
OX14 3JE

#### **Decision (including any steps ordered)**

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1. The complainant made a freedom of information request to the Vale of White Horse District Council for information regarding the decision to award a contract for the development of a local shopping centre. The Council disclosed some of the requested information but withheld further information by relying on the exception in regulation 12(5)(e) – (adversely affect the confidentiality of commercial or industrial information).
2. The Commissioner's decision is that regulation 12(5)(e) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - The Council shall disclose to the complainant the information falling within the scope of part 5 of the request and the 5 named documents falling within the scope of part 6 of the request.
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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 23 October 2013 the complainant made a request for information to the Council which read as follows:

*"I request information on the decision to award a contract to Doric Properties for the development of the West Way Centre, including, but not limited to:*

- 1. Bid documentation provided to prospective bidders;*
- 2. Process for and criteria for selection of successful bidder;*
- 3. Number of organisations who expressed an interest in bidding;*
- 4. Number of organisations who submitted a bid;*
- 5. Names of organisations who submitted a bid;*
- 6. Minutes of meetings and correspondence on the subject."*

6. The Council responded to the request on 22 November 2013 when it provided answers to parts 1 – 4 of the request. However, parts 5 and 6 of the request were refused on the grounds of 'commercial confidentiality'. The Council confirmed that the request was being dealt with under the EIR but no exception(s) were cited at this point.
7. On 27 November 2013 the complainant contacted the Council again and asked, amongst other things, for its reasoning as to why the public interest favoured withholding some of the requested information.
8. On 13 December 2013 the Council responded to the complainant's concerns but this was not interpreted as a formal request for internal review at this point.
9. The complainant subsequently asked the Council to carry out an internal review of its handling of her request and it presented its findings on 25 March 2014. The review upheld the initial response to the request and whilst again the Council failed to cite an exception from the EIR it explained that as regards part 6 of the request the information was "exempt information as set out in paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972". It also said that the request was framed in "too general a manner" for it to respond in full.

## Scope of the case

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10. On 7 April 2014 the complainant contacted the Commissioner to complain about the way her request for information was handled. The Commissioner agreed that the scope of his investigation would be to consider whether the Council was correct to refuse parts 5 and 6 of the request.
11. During the course of the Commissioner's investigation the Council identified 5 specific documents which the Commissioner considers fall within the scope of part 6 of the request. The Commissioner has agreed with the complainant that in considering the Council's response to this part of the request he will consider these five documents only.
12. The Council has confirmed that it is only relying on regulation 12(5)(e) to withhold the requested information. The Council had tried to suggest that part of the request could be refused as it was formulated in too general a manner. This appears to refer to the regulation 12(4)(c) exception. However, the Commissioner had to explain to the Council that it was unable to rely on this exception as it had failed to comply with regulation 9, a condition for applying this exception. The Council accepted this was the case.

## Reasons for decision

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### **Regulation 12(5)(e) – adversely affect the confidentiality of commercial or industrial information)**

13. Regulation 12(5)(e) provides that 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;*

14. In considering the application of regulation 12(5)(e) the Commissioner considers that the following four criteria have to be met:
  - (i) The information has to be commercial or industrial in nature;
  - (ii) The information has to be subject to a duty of confidence provided by law;

(iii) The confidentiality has to be required to protect an economic interest; and

(iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.

#### Part 5 of the request

15. The Commissioner has first considered the application of regulation 12(5)(e) to part 5 of the request – the names of organisations who submitted a bid for the West Way development. For this information the Council explained that disclosure of the information would adversely affect the interests of both the different bidders and the Council. It explained that its contract with Doric properties was conditional upon the fulfilment of a number of conditions including the granting of planning permission. It said that it was 'entirely possible' that these conditions would not be met at which point it could seek to reopen negotiations with the other bidders. It suggested that if their identity was known to each other there is a possibility of collusion which would damage the commercial interests of the Council. It also suggested that disclosure would have an adverse impact on the bidders and 'if they were identified in relation to their interest in other comparable sites'.
16. Under regulation 12(5)(e) the first step in engaging the exemption is establishing that the information is industrial or commercial in nature. In this case the information relates to the commercial development of land for profit. The Commissioner is satisfied that the information can be said to be commercial.
17. The second element of the test is that the information has to be a subject to a duty of confidence provided by law. For part 5 of the request the Council appears to be arguing that there is a common law duty of confidence owed to the bidders. It explained that there was an implicit obligation of confidence because it was conventional to maintain confidentiality of bidders for local authority contracts, certainly until contracts have been fulfilled.
18. A common law duty of confidence will exist where information has the necessary quality of confidence and where information was shared in circumstances giving rise to an obligation of confidence. Information will have the necessary quality of confidence if has not otherwise been made public and if it is more than trivial. Clearly, information regarding a bid for a multi-million pound development cannot be considered to be trivial and the Commissioner is not aware of the identity of the bidders having

previously been made public. As regards an obligation of confidence, the Commissioner is prepared to accept that there would be an implicit understanding that the identity of unsuccessful bidders would remain confidential. As such, the Commissioner is satisfied that there was a duty of confidence owed to the bidders.

19. However, to engage the exception a public authority must also be able to demonstrate that that confidentiality is required to protect a legitimate economic interest. On this point the Council argued that to publish a list of unsuccessful bidders would potentially undermine the public sector procurement process, in which even the fact of submitting a bid can be a matter of sensitivity. It said that using the example of this particular case, the fact that a particular supermarket chain has an interest in a site is a piece of business intelligence that could be used to advantage by its competitors, for instance to submit a competing bid either to steal a march on their rivals or to inflate the price.
20. The public authority has not explained how this would be likely to occur. Indeed, it is unclear how a competitor might be able to "steal a march on its rivals" given that the contract had already been awarded to Doric Properties and that this part of the request only asks for the names of bidders rather than details of their bids, such as the value of any offers made. Under the EIR, a public authority must be able to show that disclosure would have an adverse effect. This test is more stringent than applying an exemption under the Freedom of Information Act because it must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect. With this in mind the Commissioner has reached the view that the Council has failed to demonstrate that any confidentiality that may exist is required to protect an economic interest of the unsuccessful bidders. Therefore the Commissioner has decided that the exception is not engaged on this basis.
21. The Council has also suggested that disclosure would damage the Council's interests. However, the Council had suggested that the confidence was owed to the bidders. In order to engage 12(5)(e) disclosure must adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. Therefore, if the Council has said that the confidence is owed to the bidders it can't then argue that the adverse effect is that which is caused to the Council unless it can show that the obligation of confidence also exists internally within the Council, i.e. its employees would be obliged to keep the information confidential. The Council has not provided any details to

support this line of argument. However, even if the Commissioner were to assume that such an argument could be made he is not satisfied that the confidentiality is required to protect an economic interest (of the Council). The Council's suggestion that disclosure may lead to collusion between the bidders is merely an assertion. The Council has shown nothing to suggest that this is a realistic possibility or how this may take place.

22. For these reasons the Commissioner has decided that as regards part 5 of the request, regulation 12(5)(e) is not engaged.

#### Part 6 of the request

23. The Commissioner has now gone on to consider the documents falling within the scope of part 6 of the request. As noted above, this constitutes 6 documents relating to the decision of the Council to award the contract to Doric Properties. These are summarised below:

- Minutes of a Council cabinet meeting 7 December 2012
- cabinet member decision 3 August 2011
- cabinet member decision 30 April 2012
- cabinet report, appendices and background paper 7 December 2012
- Doric's financial appraisal 11 December 2012.

24. The Council offered the following argument for withholding the information in the minutes of the 7 December 2012 Council meeting. It later suggested that this reasoning would also apply to the other documents.

*"...the contract is conditional, and one of the conditions for its fulfilment is that Doric must be able to assemble the entirety of the development site. This in turn will require Doric to acquire land. If the financial assumptions are made known, Doric's ability to negotiate land acquisition would be severely compromised. This in turn would endanger the whole project, which we consider would damage the interests of the council. As above, we do not consider it in the public interest that financial harm should come to the council."*

25. The Council argues that disclosure would adversely affect both its own interests and those of the developer, Doric. Again, the Commissioner has been left in a difficult position as the Council has failed to adequately explain the nature of the confidence which applies to the withheld information. Furthermore, the Council has sought to withhold all of the documents on the basis of regulation 12(5)(e) when it appears

that much of the documents contain relatively innocuous information which the Commissioner would expect is already public knowledge.

26. The Council had claimed that its agreement with Doric was subject to a confidentiality clause. However, the Commissioner was provided with nothing further on this beyond the following statement.

*"...the council's agreement with Doric includes a confidentiality clause, and that after consultation with Doric it has confirmed that disclosure of the financial aspects of the agreement would be damaging to the satisfaction of the conditions for the completion of sale".*

27. First of all the Commissioner would say that he is not satisfied that the exception can be engaged on the basis that disclosure would adversely affect the interests of the Council. This is because, as he noted above in respect of part 5 of the request, the Council has failed to explain how the information is confidential to itself. In order to engage the exception disclosure must adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
28. To the extent that a duty of confidence is owed to Doric and disclosure would adversely affect its interests, the Commissioner would be prepared to accept that the information is confidential if it can be shown that the information is covered by the confidentiality clause. However, as the Commissioner has already noted the Council has not provided any details of the confidentiality clause or any other explanation as to why the information is considered to be subject to a duty of confidence. Moreover much of the withheld information does not directly relate to the Council's agreement with Doric, but rather the Council's agreement with a previous developer. Therefore for some of the information, notably the Cabinet member decisions, the Commissioner is not satisfied that the Council has demonstrated a duty of confidence is owed to Doric.
29. In any event, were the Commissioner to accept that a duty of confidence is owed to Doric for some of the information, he would take the view that the Council has failed to evidence how that confidentiality is required to protect an economic interest of Doric. This is because, it is unclear how disclosure would compromise Doric's 'ability to negotiate land acquisition' which was the only reason given for withholding the information.
30. In conclusion, the Council has not provided a satisfactory explanation of its reasons for applying the regulation 12(5)(e) exception. Therefore, the Commissioner must find that the exception is not engaged.

## Right of appeal

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31. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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 .....**

**Pamela Clements**  
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**Information Commissioner's Office**  
**Wycliffe House**  
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