

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

Decision notice

Date: 17 February 2015

Public Authority: Canterbury City Council
Address: Council Offices
Military Road
Canterbury
CT1 1YW

Decision (including any steps ordered)

1. The complainant has requested recorded information relating to the sale of two parcels of land at the St John's Lane Business Car Park Canterbury.
2. The Commissioner's decision is that Canterbury City Council is entitled to withhold the information which the complainant seeks in reliance on Regulation 12(5)(e) of the EIR.
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. On 2 July 2014, the complainant wrote to Canterbury City Council ("the Council") and requested information in the following terms:

"1. All documents and communications to and from any party relating to the sale of, or agreement to sell, the piece of land that forms St John's Lane Business Car Park Canterbury.

2. All documents and communications to and from any party relating to the sale of, or agreement to sell, the piece of land that lies at the junction of St John's Lane and Castle Street, Canterbury and is currently used as a road/residents parking bays/small piece of grasses open space.

Please include documentation of meeting notes and phone calls relating to this proposed sale.”

5. The Council responded to the complainant's request on 29 July 2014, advising him that it holds the information he had requested but that the 'figures' he seeks are exempt from disclosure under the Freedom of Information Act by virtue of section 43 – where the information is commercially confidential.
6. On 16 August the complainant wrote to the Council to point out that his request was for all communications regarding the sale of the land he had identified. The complainant made clear that he had not asked for the 'financial numbers'. He also disputed the Council's reasons for withholding the information and he referred to decisions made by the Information Commissioner which supported his position in respect of completed contracts which do not compromise future dealings. The complainant also referred to an email sent to him by an officer of the Council which states, "a decision was made by the Council to sell this land in 2013. The Council will not therefore be dealing with any other parties in this matter".
7. On 25 September the Council wrote again to the complainant having reconsidered his request. The Council advised the complainant that it still considered the information he seeks to be exempt from disclosure by virtue of section 43 of the FOIA. The Council stated, "... we cannot provide you with any copy documentation of the commercial transaction, which is confidential, commercially sensitive and contracts are not yet in any form of completion and are still being negotiated".

Scope of the case

8. The complainant contacted the Commissioner on 9 October 2014 to complain about the way his request for information had been handled.
9. The Commissioner's investigation of this matter was initially focussed on whether the Council is entitled to rely on section 43 of the FOIA to withhold the information sought by the complainant.

Reasons for decision

10. During the course of the Commissioner's investigation the Council determined that the requested information fell to be considered under the Environmental Information Regulations 2004, rather than under the FOIA. Consequently the Council determined that the information

requested by the complainant was exempt from disclosure by virtue of regulations 12(5)(e) and 12(5)(f) of the EIR. The following notice concerns the Commissioner's decision in respect of the Council's amended position.

11. Regulation 2(1) of the EIR defines what constitutes 'environmental information'. Subsections (a) to (c) state –

'(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 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.'

12. 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 European Parliament and Council Directive 2003/4/EC, which the EIR enact.

13. The Council supplied the Commissioner with the withheld information relevant to the complainant's request. The papers reviewed by the Commissioner comprise the Council's entire file relating to the proposed development and includes records of confidential discussions about it. The Commissioner has listed some – though not all, of the 'types' of information contained in the file:

- Internal emails and emails passing between the Council and the potential developer and his representatives
- Draft contract and site plans created for various planning purposes
- Confidential notes of Council meetings – some with notes and annotations
- Draft and complete representations made by officer of the Council

14. Having reviewed the withheld information, the Commissioner's opinion is that it constitutes environmental information. The information relates to

the sale of land which is owned by the Council and its future development. The land consists of a small car park and an adjacent second parcel of land. The Commissioner therefore finds that the information falls to be considered under the EIR.

Regulation 12(5)(e) – prejudice to the confidentiality of commercial information

15. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
16. When assessing whether this exception is engaged the Commissioner will consider the following points:
 - 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?

Is the information commercial or industrial in nature?

17. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
18. The Council considers that the information is of a commercial nature as it relates to a commercial activity – namely the sale of a small car park and a second small parcel of land. These two parcels of land adjoin land owned by a developer who seeks to purchase them.
19. The Commissioner accepts that the information is commercial nature as it relates to an area of the Council's business activities and that the sale of the land has commercial implications for both the Council and the developer.

Is the information subject to confidentiality provided by law?

20. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law; including where the confidentiality is imposed under a common law duty of confidence, by a contractual obligation or by statutory provision.

21. Here, the Council asserts that the confidentiality of the requested information is provided by virtue of a contractual obligation which carries an express duty of confidence between the parties.
22. The Council has assured the Commissioner that the information has not been placed into the public domain and remains confidential, and further, that the sale of the car park has not yet been completed. Consequently the withheld information relates to a current negotiation which remains at a very sensitive stage.
23. This being so, the Council asserts that both its commercial interest, and those of the developer, would be prejudiced by the disclosure of the information requested by the complainant.
24. Taking this into account the Commissioner is satisfied there is a duty of confidence associated with the information sought by the complainant. He is further satisfied that the withheld information was imparted in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

25. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. 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.
26. The Council has argued that it is both its own commercial interests that would be prejudiced by disclosure as well as those of the potential developer.
27. Under the EIR the test is whether the confidentiality is designed to protect the legitimate economic interests of the person(s) who the confidentiality is designed to protect.
28. The Council has explained to the Commissioner that the sale of the land would allow the developer to demolish part of his existing property and build an additional property on the car park land.
29. The development would provide for alternative access to properties that currently have right of way (under licence) over the car park; and it would retain rear access to the site for up to 12 properties, which would otherwise have been lost.
30. In addition to securing development of this land – by combining the developers own landholding and demolishing part of his existing

property, the Council believes it will achieve its long-held planning and Townscape aspiration to return the street pattern in the area to its pre-second World War position.

31. On the basis of the Council's submissions, the Commission is satisfied that the confidentiality of the information sought by the complainant is required to protect the economic interests of both the Council and the proposed developer.
32. The Commissioner has taken in account the current on-going nature of the negotiations for the sale of the parcels of land. This leads him to find that the sensitivity of the information sought by the complainant remains high.
33. The Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact on the Council's and the proposed developer's commercial interests. He finds that disclosure of the requested information would adversely affect the Council's ability to negotiate with the developer and for the Council to achieve the best value for the land in question. This in turn could adversely affect the Council's tax paying constituents. The Commissioner therefore accepts that disclosure of the withheld information would prejudice the commercial interests of the Council.

Would confidentiality be adversely affected by disclosure?

34. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the Council and the developer. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest test

Public interest arguments in favour of disclosing the information

35. The Commissioner will always give weight to factors which favour the disclosure of information which would increase the public's understanding of the actions taken by the Council and of the processes by which it makes its decisions. Such disclosure of information increases transparency and provides accountability of public authorities.

36. The Council recognises and respects the Commissioner's position and accepts that disclosure of the information to the public would promote openness and transparency, and further, that disclosure would assure the public in knowing that it has acted appropriately.

Public interest arguments in favour of withholding the information

37. The Council has advised the Commissioner that there was no tendering process relating to the sale of the two parcels of land. The usual procedure in cases such as this is for a confidential report to be made to the Council's Executive. Having secured the Executive's agreement, the normal land disposal procedure is waived. This procedure took place on 12 September 2013 and is referred to in paragraph 82 of the publicly available minutes. A confidential report was submitted in respect of this agenda item but was not disclosed to the public as it 'relates to the financial business affairs of the Council and other persons...'
38. The Council's Townscape and planning aspirations – referred to at paragraph 28 above, flow from the Canterbury and District Local Plan Preferred Option Consultation of June 2013 and an earlier document from 1995. The 2013 preferred option states –
- "Where the historic street pattern has been lost or damaged the City Council will seek its restoration where appropriate."
39. The Council asserts that should this contract fail, it would need to tender the site for an alternative developer and scheme and, should disclosure of the requested information occur, this would likely depress the values offered by the market and therefore be prejudicial to its commercial interests.
40. The Council strongly asserts that the developer has provided it with confidential and commercially sensitive information – which he was not obliged to provide, which has enabled the Council to demonstrate that the contract meets its Best Value considerations.
41. Ordinarily the Council would not be privy to this information and the developer has clearly stated that it is private and confidential and disclosure would adversely affect his commercial interests.
42. The Council asserts that the on-going 'live' nature of the negotiations is sensitive and will remain so for a period after the contract is made. Disclosure of the requested information, at this time, could jeopardise the success of the proposed transaction.

Balance of the public interest arguments

43. The Commissioner considers that those arguments which favour maintaining an exception must always be inherent in the exception itself. Here, the interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
44. In this case, there is a particular public interest in the subject of the request, as it involves the redevelopment of part of Canterbury town centre and this is likely to impact a significant number of local residents and businesses. The Commissioner therefore finds some public interest which favours the disclosure of the requested information.
45. He will always attach significant weight to the argument that disclosure of withheld information will help to engage the public and ensure transparency: He does so in this case; particularly where the proposed scheme will affect the existing 'under licence' rights of way of residents, and where the land in question is owned by the Council itself. He finds that there is a particular need for the Council to be open to scrutiny and assure the public that there is no maladministration or wrong-doing. Nevertheless the Commissioner also recognises there are counter arguments.
46. Here, the Council has advised the Commissioner that discussions were held with local residents in respect of their access licences and further, that payments have been made to these residents which ensure their rights in perpetuity. These discussions have only involved those parties who would be directly affected by the proposals and the information available to the wider public.
47. The Commissioner accepts that there is a public interest in allowing public authorities the time to discuss and negotiate on financial matters away from public scrutiny so as to allow for all options to be considered and the best value to be obtained.
48. The Commissioner recognises that disclosing information where the negotiation process is still 'live' could have a detrimental impact on the interests identified in the exception. The Commissioner therefore considers that it would not be in the public interest to disclose information which could damage the public authority's commercial interests and its negotiating position in relation to this scheme and potential future schemes.
49. The Commissioner is minded to give greatest weight to the fact that the proposed sale and development of the parcels of land involve further negotiations with external parties. He accepts the argument that it

would be detrimental to the Council's position for these external parties to have possession of the requested information prior to an agreement being reached in respect of the proposed sale.

50. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching this decision he has placed considerable weight on the fact that at the time of the request discussions on funding were still live and there was an expectation of confidentiality.
51. The Commissioner's decision is that the Council is entitled to withhold the requested information in reliance of Regulation 12(5)(e). In view of this decision he has not gone on to consider the Council's alternative application of Regulation 12(5)(f).

Right of appeal

52. 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

53. 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.
54. 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
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