

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

Decision notice

Date: 25 October 2016

Public Authority: East Devon District Council
Address: Council Officer
Knowle
Sidmouth
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant requested documents relating to the councils plan to build new offices for itself. Various documents were requested. The council disclosed some however other documents were withheld under Regulation 12(5)(e). The council argues that these contain the price bid for the land where the current council offices are situated, and estimated costs which the council has drawn together for the development of its new offices.
2. The Commissioner's decision is that the council has correctly applied Regulation 12(5)(e) to the costs assumptions and under the circumstances of the case the public interest rests in maintaining the exception in this case. He has however decided that the council was not correct to apply Regulation 12(5)(e) to the conditional price agreed with the developer, Pegasus, for the land.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the price that the developer is prepared to pay for the land from the cash flow documents which the council withheld.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. Following a previous request to the council, on 4 October 2015 the complainant wrote to the council and requested information in the following terms:

"Having looked through <http://eastdevon.gov.uk/media/939266/110...>

I would be grateful if you could provide me with the following documentation which is referred to in the above:

A number of supporting reports and spreadsheets that inform the above, including:

o 20130604 Knowle Energy Use and Maintenance Cost Analysis Report Final.pdf

o EDDC Office Accommodation – Rates Evaluations FY 14 15. Rev E 9 Feb 2015.xls

o Spatial analysis_Rev I-3,352 m2desk.pdf

o b1. Copy of 141029 DG EDDC New Offices – Order of Costs Rev A – 2776 m2 GIA – 2,776 m2 New Office.xls

o b2. Copy of 141029 DG EDDC New Offices – Order of Costs Rev J – 3352 m2 GIA – 3,352 m2 New Office.xls

o c1. EDDC Office Accommodation – Cashflow – Heathpark – 2,776 m2 New Office

BREEAM VG – Rev E – 3 December 2014.xls

o c2. EDDC Office Accommodation – Cashflow – Heathpark – 2,776 m2 New Office

BREEAM EX – Rev D – 3 December 2014.xls

o c3. EDDC Office Accommodation – Cashflow – Heathpark – 3,352 m2 New Office

BREEAM VG – Rev D – 3 December 2014.xls

o c4. EDDC Office Accommodation – Cashflow – Heathpark – 3,352 m2 New Office

BREEAM EX – Rev D – 3 December 2014.xls

o Annual Running Costs – Reference Scenario (+ Knowle Ess Reprs) Rev C – 27 1 15.xlsx

I would like these to be made available in their original electronic

versions and not in their scanned versions."

6. The council responded on 21 October 2015. It provided some information however it applied Regulation 12(5)(e) (commercial confidentiality) to the following documents:
7. It responded by providing a copy of some of the requested documents but refused to provide the following:
 - b1. Copy of 141029 DG EDDC New Offices – Order of Costs Rev A – 2776 m2 GIA – 2,776 m2 New Office.xls*
 - b2. Copy of 141029 DG EDDC New Offices – Order of Costs Rev J – 3352 m2 GIA – 3,352 m2 New Office.xls*
 - c1. EDDC Office Accommodation – Cashflow – Heathpark – 2,776 m2 New Office BREEAM VG – Rev E – 3 December 2014.xls*
 - c2. EDDC Office Accommodation – Cashflow – Heathpark – 2,776 m2 New Office BREEAM EX – Rev D – 3 December 2014.xls*
 - c3. EDDC Office Accommodation – Cashflow – Heathpark – 3,352 m2 New Office BREEAM VG – Rev D – 3 December 2014.xls*
 - c4. EDDC Office Accommodation – Cashflow – Heathpark – 3,352 m2 New Office BREEAM EX – Rev D – 3 December 2014.xls*
8. Following an internal review the council wrote to the complainant on 28 January 2016. It confirmed its decision that Regulation 12(5)(e) applied and withheld the information.

Scope of the case

9. The complainant initially contacted the Commissioner on 26 November 2016 to complain about the way his request for information had been handled. Initially however he had not waited 40 days for the council to complete its review of its initial decision. He therefore re-contacted the Commissioner on 3 April 2016 to ask the Commissioner to consider his complaint that the information had not been disclosed to him.
10. The Commissioner considers that the complaint is that the council has incorrectly applied Regulation 12(5)(e) to the information.

Reasons for decision

Is the information environmental information?

11. The complainant argues that the information does not relate to the environment and that the council should have responded under the FOIA.
12. The information relates to financial costs, agreements and cost assumptions on a plan to sell land to a developer with a view to building new council offices. It also contains information on the estimated costs of building the new offices. As such the Commissioner considers that the information falls within Regulation 2(c), as it is information on

"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 factors defined in (a) include:

"(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;"

14. The Commissioner therefore considers that the information is environmental information for the purposes of the EIR.

Regulation 12(5)(e)

15. Regulation 12(5)(e) of the EIR states 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.
16. The council argues that the cash flow documents reveal the price that a developer is prepared to pay for the land. The sale of the land is conditional upon planning approval which has not yet been secured and the wider disclosure of this detail, at this point in time, would seriously weaken its position since its contract with the developer is not yet unconditional.

17. Further to this the council argues that the documents also include a level of detail regarding build cost assumptions. It argues that the wider disclosure of this information would undermine tender negotiations and its ability to secure best value for money and best price. It said that it is about to commence negotiations with a company regarding its tender for the project which will involve it providing prices and also seeking information from subcontractors and suppliers. It said that releasing the information at this stage could influence the pricing which it achieves.
18. For the purposes of this decision notice the Commissioner has therefore considered the application of the exceptions split into the two arguments; a) the price paid for the land and b) costs assumptions/estimates. This does not specifically accord with individual documents from those withheld, however the emphasis of the arguments relate to all documents, or some sections within the documents which the council argues are the reasons for these documents being withheld. The vast majority of the withheld information relates to the cost assumptions.
19. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - The confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
20. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.

Is the information commercial or industrial in nature?

21. The council argued that the information is commercial information. It relates to the information on the sale of land, and budgetary assumptions on the costs of the development (for the purposes of seeking contractors and sub-contractors).
22. The Commissioner considers that the information relates to the sale and purchase of goods and services and is therefore commercial information.

Is the information subject to confidentiality provided by law?

Price bid for land

23. The council argues that the information is subject to contractual duty of confidentiality between it and the purchaser for the price bid for the land. It argues that it has entered into a contract which has not yet gone unconditional and effectively the deal may change or fall through should certain conditions not be met. For instance the council highlighted that one condition which has not yet been met is that planning permission has yet been provided for the development.
24. The complainant argues that as the council is effectively giving itself permission to go ahead with the project then it is not able to claim confidentiality for information relating to it. He provided examples of guidance stating that is the case. However the complainant appears to be referring to meetings held in private under section 12A of the Local Government Act 1972 rather than under the EIR. He may also be referring to the requirements under section 41 of FOIA that confidential information must have been provided to the authority by a third party. There is however no requirement under the EIR for information to have been provided to the authority by a third party as there is under the FOI Act. There is only a requirement that confidentiality must be provided by law.
25. The Commissioner asked the council to provide further information on how confidence is provided by law. The council provided the Commissioner with a term from its contract with Pegasus which states:

"37 Confidentiality

The terms of this agreement shall be confidential and neither party hereto shall, without the approval of the other, disclose the terms of this agreement to any third party (except for employees and professional consultants who have agreed to respect the confidential nature of this agreement) save for the purpose of complying with the requirements of this agreement or where disclosure is required by law or the rules of the Stock Exchange."
26. The Commissioner is satisfied that there is a contractual duty of confidence which both parties are subject to. Effectively this contractual term is designed to protect the interests of both parties, both Pegasus and the council, rather than simply a single 'confider'. This is important as it means that the council's interests can also be taken into account when considering the detriment which might occur should the information be disclosed.

27. This term makes sense given the conditional nature of the agreement – it is open to both sides to decide not to go ahead with the contract if certain conditions are not met, and so both sides have sought to protect their interests via the confidentiality clause.

Build cost assumptions/budgets

28. The building costs assumptions were drawn together by, or on behalf of the council. Paragraph 19 of the Commissioner's guidance on Regulation 12(5)(e), (which is available from https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf) states:

"In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute."

29. The Commissioner recognises the sensitivity of information on the cost assumptions (and therefore the budgets it has set aside) to complete the development. She considers that employees of the council would understand that a disclosure of that information, at this stage in the tendering process, would clearly be considered confidential by their employers and that they would understand that to be the case. They would also understand that they may be subject to sanctions from their employer should they disclose that information without permission to do so. The Commissioner therefore considers that the information is subject to confidentiality provided by law.

What would be the adverse effect of disclosing the information?

Price bid for land

30. Both parties have signed the contract including the confidentiality clause reported above, effectively creating a contractual duty of confidence which both are bound to. Additionally the price bid is effectively a negotiated agreement between the parties to sell the land for a given price provided that the agreed conditions are met.
31. The Commissioner's guidance on the application of Regulation 12(5)(e) states at paragraph 45 states that "If the information was jointly agreed or was provided under a contractual obligation of confidence or is

protected by a statutory bar, either party's interests could be relevant, depending on whose interests the confidentiality is designed to protect." The guidance is available at https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_in_dustrial_information.pdf.

32. The Commissioner considers that both parties were intended to benefit from the confidentiality term. The council can therefore include arguments regarding its own interests when considering the adverse effect to any economic interests which would occur though a disclosure of the information.
33. As regards the price bid for land the council argues that the contract is still conditional and that the conditions have not yet been met. It argues that the contract is contingent on planning permission being obtained and other relevant conditions. It said that planning permission is not definite and there are still options for either party to decide not to proceed. If that is the case then the site would need to be remarketed. If the purchase price was disclosed at this time this would seriously prejudice any further marketing exercise as bidders would know what price the council had accepted previously.
34. The council therefore argues that given the obstacles which remain before the agreement is finalised it considers that there is a substantial possibility of its own economic interests being adversely affected if the information were disclosed at this time.
35. It also considers that the effect would be that it would compromise its ability to discharge its legal obligation to obtain best value for disposal of land pursuant to the duty contained in section 123 of the Local Government Act 1972.
36. Having considered the arguments the Commissioner does not consider that the council has submitted arguments which reach the level required in order to engage this criterion in the exemption.
37. The land was sold subject to a condition that planning permission would be acquired for a specific development. The price paid reflects the profits which the developer has estimated it might make from the development should planning permission be granted. If planning permission is not granted then any future bids will also reflect the potential profits to bidders from buying the land, based again on the likelihood of receiving planning approval on the plans they have for the land and the estimated profits they would make.

38. Knowing the previous price bid by the developer, based upon an unsuccessful planning application, would not be particularly helpful - bids would take into account the previous planning refusal, the price of the land insofar as market the value, together with the prospects of obtaining planning permission designed to make a profit to the developer. In effect, the whole bidding process would take into account current conditions, including the previous failure to obtain planning permission and the specific reasons for that decision.
39. The Commissioner therefore considers that the council has failed to provide sufficient evidence of the adverse consequences of this particular information being disclosed. His decision is therefore that Regulation 12(5)(e) cannot apply to the information withheld on the basis it would disclose the current price bid for the land.

Build cost assumptions/budgets

40. The council argues that a disclosure of the information at the current time (i.e. before prices/costs etc are formalised) would have an adverse effect upon its economic interests.

"The documents also include a level of detail regarding build cost assumptions, the wider disclosure of which would undermine tender negotiation and our ability to secure best value for money and best price. We have reviewed this position as a result of the Commissioner's investigation but feel that any information released into the public domain at this time would influence pricing. We are about to commence negotiations with [name of company redacted] regarding their tender for the project which will involve them providing prices and also seeking information from subcontractors and suppliers. Clearly we would not want to release any information into the public domain which would influence their pricing."

41. From this the Commissioner understands that a disclosure would give details of the costs set aside by the council to complete particular parts of the contract. The Commissioner understands that the argument is that, if disclosed, contractors taking part in the tender would be unlikely to tender at substantially lower prices than those identified in the document in their bids to complete the task. This would effectively undermine the true market value of the task as bids would level around, or just under this point, and this would be likely to affect the council's ability to obtain best value overall for the project. The council also argued that this would significantly affect its ability to negotiate lower prices and make it very difficult to obtain best value.
42. The Commissioner is satisfied that there is likelihood that if this information were to be disclosed then this would affect prices submitted

by third parties for the contract(s). Although market forces would still require third parties to make competitive offers and this would be likely to reduce the figure overall, effectively a disclosure of the budget set aside for the particular tasks would inevitably lead to them being used as a starting point from which contractors seek to make their bids. If the information is not disclosed then market experience would inform each bidder for each task, and inevitably this may lead to a lower prices being bid. For this reason the Commissioner considers that the exemption in Regulation 12(5)(e) is engaged by this information.

43. As Regulation 12(5)(e) has been engaged the Commissioner must carry out a public interest test as required by Regulation 12(1)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest

The public interest in the information being disclosed

44. The central public interest in involved in the disclosure of the information relates to creating greater transparency over the issue of the development, its costs and the financial decisions and assumptions made by the council when making decisions on the project. An informed public can take a greater interest in, and better participate in decisions taken by public authorities on the public's behalf.
45. The council is effectively selling land on which its current offices are situated to a developer and moving into its newly built offices. As part of that sale of however there are additional plans for the developer purchasing the land to build a new development which requires planning permission. The council states that if this is not approved then the current agreement between the parties may fall through.
46. The council has said that its intention in moving offices is essentially to save money for taxpayers. It argues that staying in its current offices would ultimately be much more expensive over future years. (see the councils explanation of the project is provided at <http://eastdevon.gov.uk/moving-and-improving/moving-and-improving-all-you-need-to-know-about-the-office-relocation/what-are-the-main-reasons-for-relocating/#article-content>)
47. The council said that it is committed to transparency and said that it will make the information available as soon as it becomes less sensitive. It has publically committed to doing this on its website. Whilst this does not aid interested parties participating in the decision making of the council the Commissioner understands the arguments of the council in

terms of the prejudice to its ability to obtain best value for items and services should this information be disclosed whilst the issues are still uncertain and/or 'live'.

48. The costs of the move will have an impact upon council finances and potentially front line resources. There is therefore a public interest in knowing the assumed costs of the development in order to better understand how the council understood the development might affect its overall finances and resources, and whether this may have an effect upon frontline services.
49. The Commissioner accepts the complainant's argument that the public do not wish to be informed of a completed deal which they can have no effective response to. Effectively the only way to ensure effective public participation is to ensure that the public has access to all of the necessary information in order to make a judgement on the council's decision prior to it entering into contracts, or at the least, at a time when it is still able to change the decision to go ahead with the development. It can then make representations or lobby the council to change its course if it considers that the deal is not appropriate.

The public interest in maintaining the exception

50. The central argument for maintaining the exception lies in protecting the council's ability to tender and negotiate and obtain true market prices. As noted above, a disclosure of the assumed prices would be likely to affect the negotiations and would put the council at a disadvantage when negotiating final costs with the successful bidder and its subcontractors. Effectively if the offers were already below the council's estimated costs for a particular task then it would be difficult to negotiate to reduce these further with the successful tendering company – it would simply argue that it is aware that the bid was already below the budgeted value and so the council recognised the true value of the task. It could then refuse to reduce it further, particularly when it would be fairly aware that other companies would have been working to the same assumptions. This would ultimately affect the council's ability to obtain best value overall for the project.
51. The result of a failure to obtain best value would be a loss to the public purse from the development. The result of this would ultimately be that the development would ultimately cost the council more than it would otherwise. This affects the public purse
52. The complainant has raised the issue that the council is paying to move offices, and will effectively need to give itself planning permission to do so. The Commissioner notes that the planning approval is a separate issue insofar as the office move is concerned, and the council must

approve it based upon planning guidelines. It cannot take into account that it is effectively the applicant for the development and must make the decision independently of this. The Commissioner also notes that this is a relatively normal procedure where local authorities are also planning authorities and intend to develop areas.

Conclusions

53. There is a public interest in protecting the public purse, in this case this is balanced in this case against the public interest in allowing the public to scrutinise the council's decisions and financial assumptions about the project to develop new offices for itself. This latter aspect clearly raises the level of transparency which would be expected as the council could be seen to be spending public money on its own facilities, for its own purposes. It has argued that it needs to change offices as overall, doing so would save the public money compared to staying in its current offices. The public however cannot know whether this is true without further information being open for them to scrutinise.
54. The Commissioner accepts the complainant's point that there is more opportunity for the public to question the council's proposals and financial assumptions if the information is disclosed into the public domain. The Commissioner considers that the public interest in public participation in planning matters carries a significant amount of weight in favour of disclosure.
55. However, as regards the cost assumptions the intention of the council to tender in the future identifies a strong argument for the information being withheld at the time of the request. At the time that the request was received the council was preparing to tender for offers to carry out the work, and disclosing the information at that time would adversely affect its ability to obtain the best price for that work – it would have a real potential of detrimentally affecting the councils position in negotiating with contractors over the bids to carry out the work.
56. The Commissioner notes that the council has said that it will make information available as soon as its sensitivity wanes. Although she cannot order a disclosure of the information in the future, she agrees with the council that this would be an appropriate way of ensuring that the deal is transparent and the council accountable for its decisions and financial decision making over this issue.
57. The Commissioner is satisfied that the arguments of the council have merit, and that in the situation the balance of the public interest rests in the exception being maintained for this information.

Right of appeal

58. 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

59. 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.
60. 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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