

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

Decision notice

Date: 25 October 2016

Public Authority: East Devon District Council

Address: Knowle
SIDMOUTH
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant has requested information regarding the decision to award the contract for the development of the Knowle site in Sidmouth to PegasusLife. In particular he requested information about the bidding process. The council provided the majority of the requested information but withheld under regulation 12(5)(e) information regarding minutes of meetings and correspondence on the subject the decision to award the contract to PegasusLife.
2. The Commissioner's decision is that the council has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to the complainant.
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. On 26 November 2015 the complainant made the following request for information:

"I request information on the decision to award a contract to PegasusLife for the development of the Knowle site in Sidmouth, 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 on 11 January 2016. It provided information in respect of points 1-4 and withheld the information at points 5 and 6 stating that regulation 12(5)(e) applied as the matter was still live and the information was commercially confidential.
7. The council provided an internal review on 8 February 2016 in which it provided the information in respect of point 5 and maintained its original position on point 6.

Scope of the case

8. The complainant contacted the Commissioner on 3 April 2016 to complain about the way his request for information had been handled. In particular he complained that the council had refused his request on the grounds that the information was confidential.
9. The Commissioner considers the scope of the case to be to determine whether the council was correct to rely on regulation 21(5)(e) as a basis to withhold the requested information.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

10. The council has withheld a report produced by its agent, Savills, which produced a summary and recommendations of the bids submitted for development of the land at the Knowle. The Knowle currently houses the council's main offices, and its sale is part of the council's relocation project. The entire document has been withheld under regulation 12(5)(e) of the EIR.
11. 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*".
12. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
 - 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 economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

13. The information consists of the bids submitted by a number of parties for the development of the land. As well as the price they intend to pay for the land, the document contains other commercial information such as details of the bids and the council's agent's appraisal of the bids.
14. Having had sight of the information, the Commissioner is satisfied that it is of a commercial nature.

Is the confidentiality provided to protect a legitimate economic interest?

15. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence. In addition, in order to determine whether or not the information has the necessary quality of confidence the Commissioner

must be satisfied that the information is not trivial and is not in the public domain.

16. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
17. The council has stated to the Commissioner that the information in the report was submitted by the bidders on confidential grounds. It advises that the bidders would not have had a reasonable expectation that details of their bids would be made publically available.
18. In terms of shaping those reasonable expectation the council explained that the bids were submitted to the agent as part of a closed bidding process and each bidder would therefore have been under a reasonable expectation that the detail of their bid would not be made public. The council stated that for PegasusLife, confidentiality is also provided for in clause 37 of the contract.
19. In terms of the legitimate economic interests for which the confidentiality is designed to protect, the council has stated that disclosure of the information at this stage would harm the interests of the council and of PegasusLife. It has explained that the contract with PegasusLife is conditional on planning permission being granted for the proposed development. Therefore disclosure of the information would prejudice the council's ability to re-market the site and obtain best value in the event that planning permission is not granted and the contract is therefore not ratified. It has not provided further detail of how disclosure would have an adverse affect on the economic interests of PegasusLife.
20. The council considers that release of the information would seriously prejudice any further marketing exercise and would prevent it from achieving best value for the land as is required under the Local Government Act 1972.
21. The Commissioner advised the council that in order to engage regulation 12(5)(e) disclosure of the confidential information would have to adversely affect the legitimate economic interest of the person the confidentiality is designed to protect. This is confirmed by the Information Rights Tribunal in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011).
22. The council's submissions initially advised that the confidentiality was owed to the bidders, but the focus of its adverse affect arguments was primarily on its own economic interests, with some focus on the

economic interests of PegasusLife. The Commissioner therefore asked the council to supply further information regarding the economic interests of the parties to whom the confidentiality is owed. The council then provided some additional arguments in respect of the prejudice to its own economic interests and those of PegasusLife.

23. It has argued that if details of PegasusLife's bid was disclosed it would prejudice any future bidding process as other bidders would know the price the council accepted previously. It has also argued that if details of the unsuccessful bids were disclosed, together with the appraisal information within the report, then PegasusLife may look to renegotiate the price before the contract goes unconditional.
24. The council considers that there are very real and likely obstacles in the path before the contract becomes conditional, not least acceptable planning permission being granted and the financial side of the contract being ratified by the council. It therefore argues that there is a substantial likelihood that its own economic interests will be adversely affected should the information be released.
25. With regard to the bidders, the council explained that at the time of reviewing their response to the complainant, it contacted the bidders to determine if they would agree to the disclosure of their names. The council has advised that all bidders agreed to this. One bidder stated that it was content for an outline of its proposal to be disclosed, and one bidder categorically stated that no financial details relating to their bid should be disclosed. The council stated that irrespective of the views of the bidders, it considers that disclosure of the financial details of the bids would harm its own economic interests and threaten its ability to obtain best value for the site.
26. The Commissioner notes that despite being invited to specifically provide arguments regarding the adverse affect on the economic interests of the parties to whom the confidentiality is designed to protect, it has not done so. It has continued to state that it considers its own interests to be those affected by the disclosure of the information. There can be no breach of confidentiality in respect of the council's legitimate economic interests, as the confidentiality in this case is owed to the bidders, not to the council.
27. Consequently, the Commissioner must find that regulation 12(5)(e) is not engaged.

Right of appeal

28. 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

29. 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.
30. 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
Group Manager
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