

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 November 2016

Public Authority: Babergh District Council

Address: Corks Lane
Hadleigh
IPSWICH
IP7 6SJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the viability of a development at Wolsey Grange. Babergh District Council disclosed some information and withheld other information under the exceptions for commercial confidentiality and the interests of the information provider (regulation 12(5)(e) and regulation 12(5)(f) of the EIR).
2. The Commissioner's decision is that Babergh District Council:
 - failed to complete an internal review in time and breached regulation 11(4) and,
 - failed to demonstrate that regulation 12(5)(e) and regulation 12(5)(f) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld 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 21 January 2016, the complainant wrote to Babergh District Council (the "council") and requested information in the following terms:

"Re Wolsey Grange Planning Application B/15/00993 Hearing on 25th November 2015 With reference to the above, please tell me what information the council holds which gave rise to the planning officer stating at said meeting that the scheme was unviable at 350 houses but viable at 475 with only 20% affordable housing rather than the mandated 35%."

6. The council responded on 19 February 2016 and disclosed information to the complainant.
7. Following an internal review the council wrote to the complainant on 11 August 2016. It stated that it was withholding additional information under the exceptions for commercial confidentiality and the interests of the information provider (regulation 12(5)(e) and regulation 12(5)(f) of the EIR).

Scope of the case

8. On 22 August 2016, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information under regulation 12(5)(e) and regulation 12(5)(f) of the EIR.

Reasons for decision

Regulation 11 – internal review

10. Regulation 11(4) of the EIR requires public authorities to notify an applicant of the outcome of an internal review within 40 working days of the date of receipt of a review request.
11. In this case the complainant submitted their request for review on 5 March 2016 and the council's review decision was issued, after the involvement of the Commissioner, on 11 August 2016.

12. In taking over 100 working days to complete its internal review, the Commissioner finds that the council breached regulation 11(4) of the EIR.

Regulation 12(5)(e) – commercial confidentiality

13. The council has withheld parts of a viability assessment which was supplied by DVS Property Specialists (DVS) in relation to the viability of a proposed development by Taylor Wimpey (the “developer”).
14. 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”.
15. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

16. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
17. The council has explained that the withheld information comprises of figures relating to the possible development of large area of land (63.44 acres gross) on the outskirts of Ipswich. The council has confirmed that

the information relates to the costs associated with developing the site, including the proposed building of some 400-plus homes¹.

18. Having considered the council's submissions and the withheld information the Commissioner has concluded that the information is commercial in nature and satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

19. 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.
20. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
21. 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.
22. The council has stated that the information in the viability assessment was marked "private and confidential" and provided by Taylor Wimpey to DVS. It explained that DVS reviewed the information and reported its findings to the council, again marked "private and confidential".
23. The council has stated that, at the time it shared the information, it did not advise the developer that, as a public authority, the information could be subject to disclosure under the EIR. It explained that the developers, therefore, acted on the basis that the information were being treated as provided in confidence.
24. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it consists of details of costs and valuations associated with a large potential development. In addition to this, the council has confirmed that the information is not in the public domain and the Commissioner is satisfied that this is the case.

¹ <https://www.taylorwimpey.co.uk/proposed-developments/england/suffolk/ipswich/chantry-vale>

25. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, he is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

26. 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.
27. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

28. In this case the council has argued that disclosure would result in adverse effects to the legitimate economic interests of the developer and the council.

The interests of the developer

29. In relation to the developer's legitimate interests, the council has stated that it *"...provided the council with information they would not have given without the assurance of confidentiality. They have used their expertise and obtained outside quotes for the development of the Wolsey Grange site."*
30. The council has argued that the withheld information is "very detailed" and its release would *"...damage the economic interests of Taylor Wimpey to negotiate future costs with third partners/parties for other sites."*
31. In relation to the council's reference to the expertise involved in the generation of the information, the Commissioner considers that the relevance of this fact to the engaging of the exception is unclear. That information has been generated by experts does not automatically mean that its disclosure would result in adverse effects to a party's legitimate

economic interests. As the council does not expand upon this point in its submissions the Commissioner has rejected it as an argument.

32. The council's second grounds for invoking the exception are that disclosure of the information would damage the developer's ability to negotiate with third parties. However, again, the council does not explain what form this damage would take and how disclosure would cause it to come about.

The council's interests

33. In relation to its own legitimate economic interests, the council has stated that it has an interest in maintaining the confidence of the information because it wants to see the development go ahead. It has stated that *"...the development will provide new homes and jobs within the district, which in turn generates a more thriving district creating income for the council, local businesses and residents."*
34. The Commissioner understands that the council considers that the development will benefit its economic interests. However, she notes that it has not set out how disclosure of the information would be more likely than not to prejudice this goal.
35. Whilst the council has set out how the development would potentially benefit its interests, having reviewed its submissions the Commissioner can find no reference to the adverse effects, specifically the damage to this legitimate economic goal/interest which disclosure would cause. The Commissioner considers that it is not self-evident from the slight arguments provided by the council that disclosure would result in some harm and, in the absence of further clarification, she does not accept that disclosure would result in adverse effects to the council's legitimate interests.
36. Having considered the council's submissions and referred to the withheld information the Commissioner considers that it is not obvious from an analysis of the information in isolation that disclosure would result in adverse effects to the legitimate economic interests of the developer. She also considers that the submissions she has received from the council do not clearly identify specific adverse effects and link these effects to specific withheld information nor do they explain the causal link between disclosure and any ensuing adverse effects. The Commissioner considers that the lack of clarity in the council's submissions suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.

37. The Commissioner considers that the council's arguments, whilst identifying possible effects, fail to make these effects sufficiently concrete and fail to identify the causal link with the withheld information. The Commissioner considers that it is for public authorities to fully explain the relevant causes and effects and it is not her role to generate arguments on their behalf. In any event, the Commissioner considers that the council has been given ample opportunity to provide evidence and arguments in support of its position.
38. As the Commissioner considers that it has not been shown that disclosure would result in adverse effects to either parties' legitimate economic interests, it follows that the confidentiality in this case would not be harmed by disclosure of the information.
39. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Regulation 12(5)(f) – interests of the person who provided information to the public authority

40. Regulation 12(5)(f) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - (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 these Regulations to disclose it; and*
 - (iii) has not consented to its disclosure.*
41. The purpose of the exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. The Information Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273, 25 April 2012) considered that the exception can be broken down into the following five-stage test:
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - Has the person supplying the information consented to its disclosure?
 - In all the circumstances, does the public interest in maintaining the exception outweigh the public interest?
42. With regard to the first stage of the test, the Commissioner's guidance on regulation 12(5)(f) explains that the threshold necessary to justify non-disclosure, because of an adverse effect, is a high one². The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
43. The Commissioner's guidance goes on to state that in considering whether there would be an adverse effect in this context, a public authority needs to identify harm to the third party's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause the harm. There is no requirement for the adverse effect to be significant, as the nature and severity of the harm will be reflected in the consideration of the public interest test. The public authority must, however, be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
44. In its internal review the council stated that disclosing the information would adversely affect the developer's (the information provider) interests. The council stated that the adverse effects that disclosure would cause are commercial in nature, specifically:
- The severe weakening of the developer's abilities to negotiate costs effective and best value arrangements with other commercial organisations in respect of Wolsey Grange;
 - the severe weakening of the developer's abilities to tender on an equal footing for future development schemes;

² https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

- the severe weakening of the developer's abilities to negotiate on other sites within the eastern region.
45. In providing these grounds the council neither linked each effect to specific elements of withheld information nor provided any explanation as to why, on the balance of probabilities, it considered disclosure would directly cause the identified harm.
 46. The Commissioner provided the council with further opportunities to justify its position during her investigation but the council did not expand upon its reasoning in this regard.
 47. The paucity of detail means that the Council's submissions do little to support the position that the first stage of the test is satisfied. The Commissioner considers it likely, however, that the nature of the adverse effect envisaged by the Council is likely to share some characteristics with the adverse effects cited in the application of regulation 12(5)(e) of the EIR.
 48. In relation to regulation 12(5)(e), the Commissioner found that the council had failed to demonstrate that disclosure of the withheld information would have an adverse effect. By extension, therefore, the same or similar arguments will not carry weight in terms of the application of regulation 12(5)(f).
 49. As the council has failed to demonstrate how the generic arguments it has supplied are applicable in this specific case the Commissioner has concluded that the suggested adverse effects have not been shown to be real, actual and of substance and it has failed to show that this stage of the exception is engaged.
 50. As the council has failed to demonstrate that disclosing the information would result in adverse effects to the developer's interests the Commissioner has not gone on to consider the other stages in the exception and has concluded that the exception is not engaged.

Right of appeal

51. 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

52. 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.
53. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF