

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

Date: 23 March 2017

Public Authority: Southend-on-Sea Borough Council
Address: Civic Centre
Victoria Avenue
Southend-on-Sea
Essex SS2 6ER

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed Seaway Car Park development in Southend-on-Sea. Southend-on-Sea Borough Council (the "Council") initially refused to provide it under section 43 of the FOIA. At internal review, it reconsidered the matter under the EIR. It provided some information but withheld the remainder under 12(4)(d) (material in the course of completion), regulation 12(5)(d) (confidentiality of proceedings) and regulation 12(5)(e) (confidentiality of commercial information).
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(5)(d) and regulation 12(5)(e) as its basis for withholding the remaining information. However, it contravened its obligations under regulation 5(2) and regulation 14(2) of the EIR when it failed to provide a refusal to the request within 20 working days.
3. No steps are required.

Request and response

Background

4. The Commissioner understands that at the time of the request, there was considerable proposed development in Southend-on-Sea area. There appear to be two major proposed developments. The first is the development of Seaway Car Park which is the subject of the information in this complaint. The second is the development of a new stadium for

Southend Football Club. According to the Club's own website, the latter is still under consideration.¹ At the time of the request, this was understood to be at the Fossett's Farm area.² However, the Club's website does not currently specify a proposed location.

5. On 17 February 2016, the complainant requested information of the following description:

"We have been instructed to make a request ... for the disclosure of the information listed below with regard to the Council's decision(s) ("the Decision(s)") to appoint a preferred developer and enter into an agreement for lease, lease and/or development agreement with Turnstone Southend Lt, in relation to land on the east side of Herbert Grove, Southend-On-Sea known as Seaway Car Park and registered at Land Registry with title number EX818873 ("the Site") [.] The disclosure of such information will be in the wider public interest as (among other matters) development of the Site and conduct of the process leading up to the Decision(s) potentially significantly affect businesses and residents within the Council's area.

We enclose for your reference a copy of the minutes of the Cabinet dated 6 January 2014 from the Council's website, an official copy of the Land Registry entry for title number EX818873 and a copy of an email letter from the Council's Corporate Director for Corporate Services to our client dated 31 March 2015 ("the Letter").

1. Any report(s) or written record(s) relating to the Council's Decision(s), including in particular any report(s) compiled in respect of consultation between the Corporate Director for Corporate Services and the relevant elected member(s), including those compiled pursuant to the Council's Standing Order 46.1.(c)(iii) or 46.2, in support of the Council's decision, reported at a meeting of the Cabinet dated 6 January 2014, to enter in to an Agreement for Lease and Sale with Turnstone Southend Limited;

2. The identity of the elected member(s) consulted for the purpose of the Decision(s);

¹ <http://www.heritagepridebelief.co.uk/new-stadium/>

²

http://www.eveningtimes.co.uk/news/14280742.Could_free_parking_be_introduced_for_Southend_High_Street/

3. The Agreement for Lease and Sale date 10 December 2014 between (1) the Council and (2) Turnstone Southend Limited, which does not appear to have been filed at the Land Registry;
 4. Any Lease between the Council and Turnstone Southend Limited or any such draft lease or heads of terms for the lease;
 5. And development agreement or contract(s) between (1) the Council and (2) Turnstone Southend Limited or any other party concerning the Site, or any such draft development agreement or contract(s) or heads of terms for the same; and
 6. Any property expert's valuation report and independent surveyor's certification regarding best consideration in respect of the Site as referred to in the Letter."
6. On 30 March 2016, the Council responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following FOIA exemption as its basis for doing so:
- section 43 (commercial interests exemption).
7. The complainant requested an internal review on 13 May 2016. The Council sent them the outcome of its internal review on 11 July 2016. It revised its position. It explained that it held seven documents within the scope of the request and identified them. It made a further disclosure from that bundle but argued that the remainder was environmental information. The request was, in its view, caught by the EIR. It argued that the withheld information was exempt under EIR regulation 12(4)(d) (material in the course of completion), regulation 12(5)(d) (confidentiality of proceedings) and regulation 12(5)(e) (confidentiality of commercial information). It also acknowledged that it responded out of time.

Scope of the case

8. The complainant contacted the Commissioner on 28 August 2016 to complain about the way their request for information had been handled. They have disputed whether the information is environmental and the Council's assertion that it is not required to disclose the requested information.
9. The complainant is a legal team acting on behalf of another person and therefore will be referred to as "they".
10. The Commissioner has first looked at whether the information is environmental. She has found that it is environmental information for

reasons set out below. Having concluded that the information is environmental and is subject to the EIR, the Commissioner has looked at whether the Council is entitled to rely on the following EIR exceptions that it had cited as its basis for refusing to provide the withheld information:

- regulation 12(4)(d)
- regulation 12(5)(d)
- regulation 12(5)(e).

11. The Commissioner has also looked at whether the Council has complied with its timeliness obligations under the EIR.

Reasons for decision

Environmental information

12. The complainant has disputed whether the information is environmental. They argued that the "environmental information" was narrowly defined and would not refer to all of the information. The Commissioner has therefore considered whether the requested information is environmental and therefore which access regime, the EIR or FOIA, is the correct legislation to apply.

13. Environmental information is defined in regulation 2(1) of the EIR:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(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, affecting or likely to affect the elements of 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;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
14. In the Commissioner's view, the information is clearly 'on' a measure, namely the proposed development of land known locally as the Seaway carpark. This is a proposed activity which is likely to affect that land. Therefore, the Commissioner has concluded that the information is clearly environmental information by virtue of regulation 2(1)(c).
15. In reaching this view, she has had regard for her own published guidance.³
16. The Council provided the complainant with a list of the information which, in its view, was caught by the scope of the request.
- (1) Letter from SSBC⁴ to [named councillor] dated 24 November 2014 with attachments.
- (2) Heads of Terms for the development of Seaway Car Park into a leisure-led development, approved by SSBC Cabinet on 8 January 2013.
- (3) Report of the Corporate Director Support Services to Cabinet on 8 January 2013 relating to Seaway Car Park.
- (4) Agreement for Lease and Sale between SSBC and Turnstone Southend Limited dated 10 December 2014.
- (5) Parent Company Guarantee dated 10 December 2014.
- (6) Report by Savills LLP to SSBC on Seaway Site, 19 June 2013.
- (7) Letter from Savills to SSBC dated 4 November 2014.
17. It disclosed all of item 1 and most of item 7. It cited the EIR exception from disclosure at regulation 12(5)(e) in respect of all of the items from those numbered 2, up to and including the withheld portion of 7. It said that item 2 was also excepted from the duty to disclose it upon request

³ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

⁴ This is the "Council".

under regulation 12(4)(d) and that it was excepted from its duty to disclose item 3 under Regulation 12(5)(d).

Regulation 12(5)(d)

18. Regulation 12(5)(d) states that a public authority may refuse to disclose information if to do so would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
19. The first condition is that the proceedings in question are relevant to this exception. The proceedings in question in this case are the proceedings of the Council. The term 'proceedings' is not defined in the Regulations but the Commissioner considers it would cover the proceedings in question in this case, namely a Cabinet meeting at the Council to consider the development of Seaway car park.
20. The second condition that has to be satisfied when applying regulation 12(5)(d) is that those proceedings are protected by confidentiality provided by law. The Council argued that by virtue of Part VA of the Local Government Act 1972 ("LGA"), the confidentiality of proceedings were protected by law. Following her own guidance, the Commissioner is satisfied that the confidentiality of the proceedings in question is protected by law.⁵
21. The important point to note here is that the exception, where applicable, protects the proceedings and not the information. The Council set out arguments as to why disclosure would adversely affect the confidentiality of the proceedings. It said that the LGA and associated regulations sought to strike a careful balance between public access to information held by public authorities and protecting confidential proceedings to allow public authorities to make fully informed decisions, particularly if the information itself is confidential. The Commissioner is persuaded by these arguments and is therefore satisfied the exception is engaged with respect to item 3.

Public interest test

22. That said, regulation 12(5)(d) is subject to the public interest test by virtue of Regulation 12(1). The Council can only rely on this exception

⁵ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf (see paragraphs 15 and 16)

where the public interest in doing so outweighs the public interest in disclosure. By virtue of regulation 12(2) a public authority shall apply a presumption in favour of disclosure when considering the balance of public interest.

Public interest in factors in favour of disclosure

23. The complainant stressed the disproportionality of the Council's refusal coupled with a compelling public interest in disclosure given the significance of the proposed development and its impact on small businesses in the area as well as service users in general. The potential loss of convenient parking facilities would be likely to deter customers from using the small businesses currently located in the area.
24. They argued that disclosure would answer any suspicion of wrong doing and their allegation that public procurement rules had not been followed – specifically, they raised concerns about whether there had been an open competition for bids to develop the site in accordance with EU procurement requirements.
25. The Council acknowledge a public interest in the public knowing how its local governing body makes decisions. Where the public knows in real time what information the Council is looking at, it can “controvert it more effectively, which itself can lead to better decision making”.

Public interest in maintaining the exception

26. For obvious reasons, the complainant did not submit any arguments on this point, nor did the Commissioner require them to.
27. The Council argued the following:
 - The public interest was better served by maintaining “the careful balance crafted by Parliament for the conduct of local government proceedings by Part VA of the [LGA]”.
 - It was important that the Council could make decisions from a wide range of sources without external sources “drying up”.
 - It was in the public interest to maintain trust and confidence in the Council's decision making process. Disclosure would inhibit this.
 - There would be an adverse effect on the quality of decision making contrary to the public interest.

The Commissioner's conclusion

28. The Commissioner recognises there is a compelling public interest in understanding as much as possible about how the Council has made

decisions in this matter. She also recognises the complainant's arguments about the potential for negative impact on local businesses where customer parking options are affected by disclosure. The Commissioner acknowledges widespread reports that independent high street businesses across the country are struggling. Disclosure could serve the public interest in understanding how the Council is addressing this. The Council accepted that there was a public interest in the public knowing how its local governing body was reaching its decisions.

29. However, the Commissioner finds the Council's arguments in favour of the exception more compelling in this case. There is a public interest in maintaining the balance between public access and confidentiality of proceedings that is set out in the LGA. The Commissioner also understands that the matter, namely discussions and negotiations around the proposed development, was still live at the time of the request. Live discussions are, in the Commissioner's view, particularly worthy of greater confidentiality.
30. The need to be able to trust third parties with confidences is important to many aspects of society including public administration and commercial activities. In the Commissioner's view, it should not be undermined lightly.
31. On balance, the Commissioner finds that there is some public interest in releasing information that would shed light on the Council's decision making processes. However, there is a weightier public interest in the Council having the opportunity to consider the report in question in confidential proceedings. The Commissioner finds that the exception provided by regulation 12(5)(d) can be maintained in the public interest in respect of item 3.
32. Having concluded that the Council is entitled to rely on regulation 12(5)(d) as a basis for withholding item 3, she has excluded this report from further consideration in this case. She notes that the Council has also sought to rely on regulation 12(5)(e) in relation to this information.

Regulation 12(5)(e)

33. Regulation 12(5)(e) 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.
34. 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.

Is the information commercial or industrial in nature?

35. 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.
36. The council confirmed that the information relates to the proposed sale or lease and development of land. The information under consideration here is items 2 – 7 (in part) and excludes item 3 for the reasons outlined above.
37. Having considered the council's position and referred to the withheld information the Commissioner is satisfied that the information relates to a commercial activity, namely the sale or lease and development of Council owned land in the specified location.

Is the information subject to confidentiality provided by law?

38. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute. 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.
39. Having read the withheld information, the Commissioner is satisfied that the information has the necessary quality of confidence imposed by the common law of confidence. It is not trivial and is not in the public domain. She is also satisfied that the withheld information was shared with the Council in circumstances creating an obligation of confidence. The parties who gave the information to the Council clearly expected that the Council would treat it in confidence as part of its decision making processes.

Is the confidentiality provided required to protect a legitimate economic interest and would that confidentiality be adversely affected by disclosure?

40. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to

establish that, on the balance of probabilities, some harm would be caused by the disclosure.

41. The Commissioner's guidance notes that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.⁶
42. The key point here is that the question of how Seaway car park might be developed was ongoing at the time of the request. The terms of any negotiation with third parties outside the proposed developer could easily be adversely affected by disclosing what the proposed developer had agreed with the Council. The Commissioner notes that development of Fossett's Farm (see Background above) was also under consideration at the time of the request. Clearly, any third party (outside the proposed developer of Seaway car park) would have greater scope to play one developer off against the other having sight of the likely terms of the Seaway car park development. Any proposed developer of Fossett's Farm would also be able to offer third parties contract terms which might draw them away from the Seaway car park development using the extra information disclosure would give them. The Commissioner is satisfied that disclosure would adversely affect the legitimate economic interests of the proposed developer of Seaway car park in this way. In reaching this view, the Commissioner has taken into account submissions made by the proposed developer of Seaway car park regarding this specific request.
43. Similarly, it would adversely affect the legitimate economic interests of the Council itself because it shows that working with the Council can create an unbalanced playing field for commercial activity such as the one described above. This would make it more difficult for the Council to bring in proposed developers for other work, should other projects of a similar nature be under consideration in the future.
44. The Council explained to the Commissioner that it would be prepared to reconsider the question of disclosure once "the Agreement for Sale or Lease is unconditional".

⁶ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

45. In light of the above, the Commissioner is satisfied that the Council is excepted from its duty to disclose items 2 – 7 (part that remains withheld) excluding item 3 by virtue of regulation 12(5)(e).

Public interest test

46. However, regulation 12(5)(e) is subject to the public interest test by virtue of regulation 12(1). The Council can only rely on this exception where the public interest in doing so outweighs the public interest in disclosure. By virtue of regulation 12(2) a public authority shall apply a presumption in favour of disclosure.

Public interest in factors in favour of disclosure

47. The complainant's arguments for disclosure have been set out above where the Commissioner has considered the application of regulation 12(5)(d). Its arguments as to the potential for an adverse economic effect on local businesses are particularly pertinent here.
48. It also argued the importance of transparency to counter any allegations of wrongdoing. It asserted that proper procurement procedures may not have been followed although the Council has refuted this.
49. The Council acknowledged what it called a "considerable public interest" in the public knowing how a public authority makes its decisions and what information it looks at when doing so.

Public interest in maintaining the exception

50. As above, the complainant did not submit any arguments on this point, nor did the Commissioner require them to.
51. The Council reiterated its arguments regarding the importance of protecting confidential information and being seen to do so. Failure, on its part, to do so would be contrary to the public interest. It had also explained to the complainant that the district auditor was able to check whether the Council were achieving best value for money and were complying with its legal obligations as regards procurement. It asserted that mechanisms other than EIR disclosure were in place to check the Council's financial activity.

The Commissioner's conclusion

52. The Commissioner accepts that the undermining of a relationship of trust will have significant weight when it relates to how that particular relationship of trust serves the public interest. The Commissioner acknowledges that the Council was, at the time of the request, not the only organisation in the local area looking at substantial redevelopment. Making public, at this stage, the commercial details of one

redevelopment may well undermine effective negotiations with companies who are considering commercial involvement in the development. This is, in the Commissioner's view, contrary to the public interest in ensuring the best value for public money in the negotiations. Undermining the negotiating ability of a private contractor in the proposed development of the car park would not serve the public interest.

53. The Commissioner entirely accepts that the redevelopment of the car park area has caused controversy in the local area. Local businesses, in particular, are unconvinced as to the benefit for them. The Council may well have work to do in gaining the support and/or approval of local businesses and other interested parties.
54. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in their understanding of how public authorities make their decisions and in turn enables trust in public authorities.
55. The Commissioner also accepts that disclosure could add to the public's understanding of the discussions between the parties and the commercial terms being considered for the proposed development. However, this is not, in the Commissioner's view, sufficiently compelling in the circumstances of this case, to outweigh the public interest in protecting the confidentiality of this process.
56. At the time of the request, the terms of any agreement on development were yet to be fully finalised. The Council considers that there is substantial public interest in it being able to successfully complete commercial negotiations. The Council asserts that withholding the requested information is particularly important at a point in time when the information relates to a live development project which is not subject to a settled contract. Disclosure would significantly weaken the Council's negotiating position in today's competitive commercial environment.
57. When weighing the need for transparency and accountability against the requirement for the Council to maintain the confidentiality of commercial negotiations in the circumstances of this case, the Commissioner has decided that greater weight must be given to those factors which favour maintenance of the exception. In reaching this view, she has given particular weight to the timing of the request. Therefore, the Commissioner's decision is that the Council is entitled to rely on regulation 12(5)(e) to withhold the information in question. She finds that the public interest favours maintaining the exception and that the withheld information to which this exception has been applied should therefore not be disclosed.

58. In view of the Commissioner's conclusion above, it is not necessary for her to consider the Council's additional reliance on Regulation 12(4)(d).

Regulation 5(2) - Duty to make environmental information available on request and regulation 14(2) – Refusal to disclose information

59. Regulation 5(2) of the EIR states that information should be made available:

"as soon as possible and no later than 20 working days after the date of receipt of the request".

60. In this case the request was not answered until 28 working days after receipt. The Council therefore breached regulation 5(2) in this regard.
61. In accordance with regulation 14(2), any public authority wishing to withhold information in response to a request, is required to provide the requester with a refusal notice stating that fact within 20 working days after the date of the request. The Council failed to do so in this case resulting in a breach of regulation 14(2) of the EIR.

Right of appeal

62. 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

63. 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.

64. 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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