

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

Date: 27 November 2017

Public Authority: St Edmundsbury Borough Council
Address: West Suffolk House
Western Way
Bury St Edmunds
Suffolk
IP33 3YU

Decision (including any steps ordered)

1. The complainant has requested information relating to the West Suffolk Operational Hub. St Edmundsbury Borough Council refused the request, citing the EIR exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that St Edmundsbury Borough 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 requested 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.

Background

5. The West Suffolk Operational Hub (WSOH) is a proposal by Forest Heath District Council, St Edmundsbury Borough Council and Suffolk County

Council (the "partner councils") to co-locate waste and street scene services infrastructure on a single site in Bury St Edmunds¹.

6. A public consultation in relation to the proposed WSOH was launched in December 2015 and in March 2017 a planning application was submitted to St Edmundsbury Borough Council by the partner councils².

Request and response

7. On 22 March 2017 ,the complainant wrote to St Edmundsbury Borough Council (the "council") and requested information in the following terms:

"This e-mail requests sight of the detail behind the figures presented to Cabinet in this document in June 2016:

(SEBC Cabinet 14JUN16 West Suffolk Operational Hub)

Paragraph 6.3 projects that the Hub will produce annual savings and income of £412,500. Paragraph 6.13 lists nine areas which make up this projection. I would like to see the detailed figures behind it.

Paragraph 6.11 states that "Capital costs are largely based upon estimates provided by a Quantity Surveyor engaged to support the project. These estimates have been calculated using a site design for Hollow Road Farm dating from April 2015." Figure 4 shows a "West Suffolk capital cost" of £16,116. I would like to see the detailed figures behind that number."

8. The council responded on 10 April 2017. It stated that it was withholding the information under the FOIA exemptions for prejudice to commercial interests (section 43(2)) and for information intended for future publication (section 22).

¹ See:

<https://democracy.westsuffolk.gov.uk/documents/s14480/CAB.SE.16.024%20West%20Suffolk%20Operational%20Hub.pdf>; and
<https://www.westsuffolk.gov.uk/bins/wsoperationalhub.cfm>

² https://planning.westsuffolk.gov.uk/online-applications/files/956F6C61500F93E9313A1F59A085B8AA/pdf/DC_17_0521_FUL-APPLICATION_FORM-1228593.pdf

9. Following an internal review the council wrote to the complainant on 26 May 2017. It stated that it had reconsidered the request under the EIR and confirmed that it was withholding the information under the exception for commercial confidentiality – regulation 12(5)(e).

Scope of the case

10. On 26 May 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information under regulation 12(5)(e) of the EIR.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

12. The withheld information comprises a consultant's (appointed by the partner councils) construction cost estimate report and associated spreadsheet which constitute the background information identified in the request.
13. 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".
14. 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?

15. The council has confirmed that the information relates to potential costings for delivery of the West Suffolk Operational Hub (the "Hub").
16. The Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

17. 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.
18. 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.
19. 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.
20. The Commissioner notes that the information was generated by a third party at the request of the council and others. The council has stated that the information is not trivial and has not been placed in the public domain. It has confirmed that the information has been discussed by officers and members of the council on a confidential basis and in accordance with their role within the project for decision making purposes.
21. 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 relates to a significant potential development.
22. 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, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

23. 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.

24. 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".
25. The council has stated that disclosure of the information would harm the partner councils' legitimate economic interests. It has stated that the future development of the Hub is dependent upon a commercial agreement being reached with a suitable contractor. It has confirmed that the withheld information sets out its initial thinking and costings, which it considers are only preliminary until a tendering process is completed. The council has argued that disclosing the information would adversely affect a competitive tendering process between suppliers bidding for the work.
26. In further submissions to the Commissioner the council has stated that disclosure of the information *"...could be damaging if they were to fall into the hands of our contractor or their subcontractors at this very critical juncture before final costs are fixed and agreed"*.
27. The Commissioner is mindful of the general principle that, prior to the awarding of a contract or the completion of a tendering exercise, information which might reveal a party's "hand" in any negotiations might be of value to prospective bidders or competitors. This, however, is a generic truism which, where considered applicable, must be fleshed out with details of the specific elements of information which would be of value and how access to it would allow third parties to change their behaviour to the detriment of the party to whom confidence is owed. The Commissioner does not consider it self-evident that information relating to an ongoing process should always be withheld.
28. The Commissioner makes it clear that she will give public authorities one chance to set out their final position in relation to a request. In this case, the Commissioner approached the council for additional clarification and gave the council a further opportunity to provide details of the adverse affects which it considered disclosure would cause.

29. The Commissioner considers that the submissions she has received from the council do not identify any 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. As noted above, she understands that, in general, information identifying speculative conclusions or potential approaches might be “sensitive” before decisions have been made, however, the council has not provided details of the actual harm which disclosure would cause, it has simply stated that harm would be caused to a process without detailing the form this would take.
30. The Commissioner considers that the lack of clarity in the council’s submissions suggests that the council does not properly understand what the effects of disclosure would be and has also struggled to meet the evidential and explanatory burden set by the exception. The absence of any reference to specific elements of the withheld information and the potential harm that disclosure would cause also suggests to the Commissioner that the council has sought to withhold the information on a general or blanket basis.
31. Where information is being withheld, the Commissioner considers that it is for public authorities to fully explain the relevant causes and effects that are relevant to the engagement of an exception 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.
32. In this instance, the Commissioner has decided that the council has failed to demonstrate that disclosure would adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.
33. As she has found that the exception is not engaged the Commissioner has not gone on to consider the public interest in this case.

Right of appeal

34. 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

35. 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.
36. 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