

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

Date: 16 January 2018

Public Authority: Vale of White Horse District Council
Address: 135 Eastern Avenue
Milton Park
Milton
OX14 4SB

Decision (including any steps ordered)

1. The complainant requested information relating to a planning application for development in West Bay, Botley. She specifically asked for information regarding viability submissions. The council supplied some redacted information and said that the exception under regulation 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR") applied. This exception concerns commercially sensitive information. It said that the public interest did not favour disclosure. The complainant asked the Commissioner to consider whether the council had correctly withheld the information. The Commissioner's decision is that insufficient evidence was supplied to support the use of the exception and the Commissioner has therefore found that regulation 12(5)(e) was not engaged. The Commissioner has found breaches of regulations 5(1) and 5(2) of the EIR.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant, namely the withheld information from the following documents:

All the figures in the Adams Integra report
The figures on pages 6, 7, 8 and 10 of the Savills report
Figures from the Appendix on the 1st three pages of the PDF (sections 2.1, 3.0 and 4.0 of the Memorandum from Matt Davis to Stuart Walker dated 24 May 2016).
3. 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

4. The complainant requested information from the council in the following terms:

"I ask for information to Mace's Viability Submission for planning application P16/02468/FUL for development at West Way Botley. You have already provided Mace's submission itself (dated march 2016), but I request any further related documents including, but not limited to:

Correspondence with and reports prepared by any advisors or consultants to the Vale, for example DTZ or Cushman and Wakefield; Correspondence with Mace or their agents; Details of meetings with advisors or consultants on this subject, including, but not limited to, agendas and attendees and any records of these meetings and correspondence related to the meetings".
5. The council responded on 1 August 2016. It said that it had identified relevant information consisting of email correspondence, a Project Proposal by Adams Integra and the Viability Appraisal Report by Adams Integra. It said that it had redacted this information to remove commercially sensitive information.
6. The complainant replied on 12 December 2016 referring to an information tribunal decision, *Mr Jeremy Clyne v the Information Commissioner and the London Borough of Lambeth* (EA/2016/0012). She said that in view of this ruling she would be grateful if the council would release the information from the three named documents:

- Savill's Viability Submission report
 - Viability Submission Addendum
 - Adams Integra Viability Appraisal report
7. The council responded on 12 January 2017. The council said that the exception under regulation 12(5)(e) of the EIR applied and the public interest did not favour disclosure.
 8. The complainant requested an internal review on 16 January 2017, explaining that she was not persuaded that the information had been correctly withheld.
 9. The council completed its internal review on 13 March 2017. It said that it was willing to disclose some additional information but the majority of the information remained exempt.

Scope of the case

10. The complainant contacted the Commissioner 28 July 2017 to complain about the way her request for information had been handled. She asked the Commissioner to consider whether the council had correctly withheld the information. The complainant agreed for her complaint to be limited to the following information:
 - All the figures in the Adams Integra report
 - The figures on pages 6, 7, 8 and 10 of the Savills report
 - Figures from the Appendix on the 1st three pages of the PDF (sections 2.1, 3.0 and 4.0 of the Memorandum from Matt Davis to Stuart Walker dated 24 May 2016).

Reasons for decision

Regulation 12(5)(e) – Confidential commercial information

11. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest and would it cause harm?
 - Would the confidentiality be adversely affected by disclosure (if the information was disclosed this would automatically occur)

12. Generally, it will be obvious that the information is commercial. The information requested is viability information relating to a planning application submitted to the council for redevelopment (reference 16/V0246/FUL). The council has explained that the withheld information is commercial information regarding the redevelopment of a run-down shopping centre site. The withheld information describes financial assumptions made by Savills (UK) Ltd regarding viability on behalf of its client MACE group. The aim of the assessment was to identify what level of affordable housing, if any, could be delivered within the proposed redevelopment of the Botley Centre whilst allowing the project to remain financially viable.
13. A separate report from Adams Integra was commissioned in order to provide assurance to the council that the developer had made reasonable assumptions regarding the local market. The council explained that the figures redacted from this document are all taken from the Savills documents.
14. The Commissioner considers that the withheld information is undoubtedly commercial in nature given the background described.
15. The second assessment to make is whether the information may be described as "confidential". The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. If the argument being made relates to the common law of confidence, the tests to be applied are similar to those relevant to section 41 of the Freedom of Information Act 2000. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
 - Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
16. The Commissioner notes that the Savills viability submission contains the following statement:

"This is a private and confidential report to Value of White Horse District Council (the Council) which contains commercially sensitive information. All information and evidence provided in this submission must be treated in strict confidence and must only be provided to persons directly involved in reviewing the information on behalf of the Council in light of determining the affordable housing and S106 package on the Site. Any data or information supplied to the Council must not be made available or provided to any persons or organisations without explicit agreement

by the Client. The Council must inform the Client of any persons that may have a conflict of interest in relating to viewing the submission and the confidential nature of the information contained within”.

17. The council also provided to the Commissioner details of its consultation with Savills about this particular request in which Savills confirms that the information was provided to the council as part of the negotiation process on the basis that it was expected by both parties that certain information would be held in confidence by the other.
18. In view of the above, the Commissioner accepts that the information clearly has the necessary quality of confidence. It is not trivial and it is not already in the public domain. It was certainly shared in circumstances importing an obligation of confidence which was made explicit.
19. The Commissioner considers that to rely on this exception, the disclosure 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. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the First-Tier Tribunal (Information Rights), the Commissioner interprets “would” to mean “more probable than not”.
20. The council argued that the disclosure of the information would prejudice the commercial interests of the developer. The Commissioner will not accept speculation about prejudice to the interests of third parties. The Commissioner expects public authorities to provide evidence that its arguments genuinely reflect the concerns of the relevant third parties. This is in line with the decision by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* (EA/2006/0014). In this case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air, but as the arguments expressed only represented the council's own thoughts on the matter rather than any concerns expressed by Ryan Air itself, and the Tribunal therefore rejected the arguments made.
21. The council supplied written evidence to the Commissioner demonstrating that it had consulted Savills about the request. Savills' arguments are represented by the following statements:

“The reports contain commercial information in the form of financial values that relate to what we have budgeted for site assembly in terms of payments to other site owners and estimated rental values. They were provided to the Council as part of the negotiation process on the

basis that it was expected by both parties that certain information would be held in confidence by the other.

The ICO clearly recognises that legitimate economic interests can 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 disclosure which would otherwise result in a loss of revenue or income. Inevitably if we make site owners and potential owners and potential partners aware of our target rents and values then that will give them critical information on our expectations that will negatively affect the offers we receive. This will adversely affect our negotiations, the resultant values and the viability of the scheme, all of which are legitimate economic interests.

I should also remind you that our planning permission requires, in effect, a portion of any profit over a certain level to be paid to the Council to contribute to affordable housing. This is another legitimate economic interest. If the values referred to above become public then the successful commercial outcome of the negotiations will definitively be prejudiced, by providing third parties with an unfair advantage over the Botley Development Company by preventing contracts from being negotiated on a level playing field. This will reduce the amount of money available to contribute to affordable housing...".

22. The council also argued that the disclosure would prejudice its own commercial interests. It said that the council had contracted with the developer to sell the land for redevelopment of the shopping centre. It said that the contract had not yet been completed and while negotiations are continuing, disclosure of the commercial information would not only place the developer at a disadvantage but would endanger the sale of the land by the council, thus also damaging the council's economic interests.
23. The complainant said that she did not find the council's arguments convincing. She said that the values referred to as "target rents and values" are generic values which any one would be able to find out by comparison of the market values achieved elsewhere. The complainant also explained that she was not persuaded that release of the information would cause commercial prejudice by causing the land sale deal to fall through. The complainant highlighted that whatever expectation of confidence had been set between the parties, the fact is that it is not possible to contract out of the council's obligations under the EIR. The complainant added that it seemed highly unlikely that the developer would have reneged on the deal given the stage that the plans had got to by the time of the request i.e. planning permission was in place and the development was due to commence soon.

24. Firstly, it is helpful in this case to understand some background information relating to the general and specific circumstances. In terms of general background, the Commissioner has found a case heard before the First-Tier Tribunal (Information Rights) helpful. In *Mr Jeremy Clyne v the Information Commissioner and the London Borough of Lambeth* (EA/2016/0012), the tribunal received expert evidence on the subject of viability assessments. It is worth highlighting some of the points that came out of that evidence to shed light on the present circumstances. It was explained that local authorities generally have a policy to seek the maximum reasonable affordable housing to be provided, having regards to the circumstances of each site. The developer's commercial objective on the other hand is likely to be to seek to minimise the provision of affordable housing. If more than a particular amount of residential units has to be given over to affordable housing, the developer will say that the scheme is not viable. To assess viability, the developer makes assumptions about the projected final selling prices and costs of the scheme. A scheme may perform better than originally projected, generating a surplus. A council will likely seek to negotiate a mechanism so as to apply the surplus to affordable housing. It was explained that viability assessments were almost always only valid on the day they were written. They relied on the inputs where both the housing market and building costs changed quickly.
25. Affordable housing is accommodation intended for occupation by lower income householders. It can be rented, owner occupied or held as shared ownership. The broad thrust of central government planning policy is that local planning authorities should ensure that new residential development makes provision for the needs of a range of household types, including lower income families. The council's Local Plan explains that the council will seek 35% affordable housing on all sites capable of net gain of eleven or more dwellings.
26. This specific case relates to a development known as the Botley Centre. A planning application was submitted (reference 16/V0246/FUL) to the council and it was validated on 18 February 2016. It concerned the existing council owned West Way shopping centre and adjacent sites not owned by the council. The development involves the demolition and redevelopment of the existing shopping centre and adjacent buildings to include residential accommodation. An earlier planning application for the comprehensive redevelopment of the Botley Centre was met with a significant level of local opposition and was unanimously refused at committee in December 2014.
27. In the *Clyne* tribunal case, the tribunal found that the council had been wrong to refuse full disclosure of a developer's viability assessment and their independent viability review pursuant to a request under the EIR. The tribunal found that regulation 12(5)(e) was engaged and was satisfied that confidentiality was provided to protect legitimate economic

interests and that the confidentiality would be adversely affected by the disclosure. The tribunal commented:

"...[disclosure] may conceivably attract attention which the developer may then have to invest time in dealing with, and may provide competitors or those involved in future negotiations with information that could be of some interest and value to them albeit we consider that it would be highly unlikely to affect negotiation outcomes to the detriment of the developer. We are persuaded here by Mr Joyce who explained that developers tended to be very secretive about pricing schedules. We would accept that where confidentiality protects a legitimate economic interest, disclosure causes an adverse effect for the developer because it would be by disclosing the confidential information, albeit, we consider the adverse effect to be limited in extent. We accept the Council's arguments here that from a commercial perspective a risk of harm has an effect on financials or the way the business is run and as such is harm itself".

28. The tribunal went on to conclude that the public interest did not favour withholding the information, and that the public interest in disclosure in fact vastly outweighed arguments for maintaining the exception.

29. As raised by Savills, the Commissioner's published guidance states at paragraph 38:

"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 the loss of revenue or income".

30. It is worth noting that the Commissioner is not bound by previous decisions either by herself or the tribunal. For the exception to be engaged, the Commissioner considers that some harm must be shown to legitimate economic interests and that must meet the threshold of being more probable than not.

31. The council and the developer have argued that if site owners and potential partners are made aware of target rents and values then that will give them critical information on BDC's expectations that will negatively affect the offers received. They also argue that disclosure would prejudice the developer's ability to negotiate the best terms on a fair and level playing field.

32. In the *Clyne* case, it was notable that a significant amount of detail was provided about the individual figures redacted from the reports in order to assist the tribunal in reaching its decision. The council and the developer in this case have not attempted to discuss the specific nature

of the redactions and why the information would more probably than not cause the commercial prejudice described i.e. negatively affect offers received. Although the complainant continued to assert that some of the information being withheld was “generic”, there was no attempt to describe the specific sensitivity associated with the redacted material.

33. The Commissioner has considered the withheld information. She notes that it is largely concerned with sale and rental values, construction costs and the associated profit margins. In *Clyne*, the tribunal considered similar information to that being withheld in this case. On construction costs, the tribunal said that it had been made clear that data in viability assessments became very rapidly outdated. No attempt was made by the council or the developer to engage with how relevant the figures were at the time of the request and how relevant they would be likely to be in future negotiations. In relation to construction costs, the tribunal considered that it was unlikely that competitors would choose to align their tenders with figures in the viability assessment. The assumption is that they would submit independent and competitive tenders at the time.
34. In relation to rental and sale values, the tribunal considered that this was unlikely to affect negotiation because the developer could hold out for whatever value they thought the local market would bear for the space. Neither the council nor the developer offered any specific argument that would suggest that these conclusions should not apply in the present case. Details about profit are clearly linked to the other figures so unless a clear case is made out for those figures being withheld, the Commissioner cannot see how this information could be withheld either.
35. The withheld information includes figures about proposed land sale values. No specific argument was made about how likely it is that disclosure of this information would cause commercial harm and in what way, since the sums are referred to as having been agreed, albeit that the Commissioner understands that the sales have not yet completed. It is also notable that a planning application had been submitted and approved, and matters were at a fairly advanced stage by the time of the request. It seems unlikely that there would be significant commercial harm given the advanced stage of the proceedings.
36. As a result of the limited engagement, the Commissioner considers that neither the developer nor the council have shown in the circumstances of this case that the disclosure of this information would more probably than not negatively affect any offers made and cause commercial harm in this way. Moreover, the Commissioner was not prepared to accept the council’s argument that the disclosure of this information would prejudice the sale of the council’s land. The Commissioner found the complainant’s arguments more convincing in this respect, specifically

that the developer would not have been likely to renege on the deal given the advanced stage of the application. No attempt had been made to rebuff the complainant's argument in this respect. The Commissioner was not prepared to accept that this particular risk met the threshold of being "more probable than not". Overall, the Commissioner was not satisfied that the council had persuasively shown that regulation 12(5)(e) was engaged.

Public interest test

37. Given that the Commissioner was not convinced that the exception was engaged, it is not necessary to consider the public interest test. However, in the circumstances, the Commissioner would like to make some brief comments.

38. Both the developer and the council in this case made the surprising statement that the public interest in disclosure of this information could be described as "none or very limited". There is always some public interest and further the background to viability assessments and this particular case would suggest that the public interest is particularly weighty.

39. The Commissioner notes the tribunal's comments in the *Clyne* case that:

"There is much importance in transparency of viability assessments and reviews in allowing the public to interrogate the reasons a developer is unable to fulfil the core policy strategy on...affordable housing (subject to viability). The EIR objective is to allow the affected community to have relevant information in time to participate effectively in environmental decision-making..."

In this case, the level of affordable units fell significantly below that level...there is a strong public interest in understanding why the policy in general is falling short of its targets. Redacting data would not provide the full picture..."

40. In the present case, there is the same pressing public interest in understanding the decision made about affordable housing. Indeed it is arguably a stronger case because the proposal does not include any affordable housing. It was notable that in the council's submission to the Commissioner there was no specific engagement on the strong public interest surrounding affordable housing and how planning policy relates to this. There was indirect mention of the fact that the council's policy had since changed and it seems that the council would now disclose viability assessments. Although the Commissioner would not go as far as to say that a general "policy" should be encouraged since each case should be considered on its own merits, it is fair to say that this reflects a strong understanding within the council of the strong public interest in

disclosure of viability assessments in general which was not reflected in the council's response.

Procedural issues

41. Regulations 5(1) and 5(2) of the EIR require that environmental information should generally be made available upon request and within 20 working days. This did not happen on this occasion so the Commissioner has found breaches of these regulations.

Right of appeal

42. 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

43. 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.
44. 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

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