

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

Date: 23 March 2018

Public Authority: Poole Borough Council
Address: Civic Centre
Poole
BH15 2RU

Decision (including any steps ordered)

1. The complainant has asked Poole Borough Council to provide him with the Viability Appraisal associated with planning application APP/17/00379/P. The Council determined that parts of this document should be withheld in reliance on Regulation 12(5)(e) of the EIR on the grounds that the information is commercially sensitive and subject to an expectation of confidentiality.
2. The Commissioner's decision is that Poole Borough Council has properly applied Regulation 12(5)(e) to the withheld information and the Council is therefore entitled to withhold that information.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 25 June 2017, the complainant wrote to Poole Borough Council and requested information in the following terms:

"In respect of planning application APP/17/00379/P, please provide: a) a copy of any Viability Appraisal and any supplements to such documents submitted by the applicants or their agents or advisers in support of the application, and b) a copy of any independent assessment or professional advice commissioned or received by the Council in respect of such Viability Appraisal, and c) a copy of any policy or procedure adopted by the Council in respect of commercially sensitive information

e.g. in a viability appraisal presented in support of a planning application.”

5. The Council responded to the complainant’s request on 18 August, advising him that, having consulted the applicants, the Council considered the Viability Assessment to be excepted from disclosure under 12(5)(e) of the EIR – Confidentiality of Commercial or Industrial information. The Council confirmed that it did not hold any independent assessments or professional advice and that Council Policy or Procedure relating to commercially sensitive information was contained in paragraph 5.9 of its Affordable Housing SPD.
6. On 24 August, the complainant asked the Council to conduct an internal review.
7. The Council wrote to the complainant on 26 September to advise him of its final decision. In respect of the withheld Viability Assessment document, the Council determined that it was not appropriate for it to refuse to provide the whole document. This is because it contains information which is already in the public domain via the Council’s website.
8. Nevertheless, because the document contains profit projections and current trading, the Council determined that this information should be redacted in reliance on Regulation 12(5)(e). The Council advised the complainant that it had consulted with the applicant and the applicant had agreed the redactions from the Viability Assessment. The Council also provided the complainant with an indication of its public interest considerations.

Scope of the case

9. The complainant contacted the Commissioner 30 September 2017 to complain about the way his request for information had been handled.
10. The complainant made clear to the Commissioner that his complaint “relates solely to the Viability Assessment”. In the light of this, the Commissioner decided that the focus of her investigation would be to determine whether the Council is entitled to rely on Regulation 12(5)(e) of the EIR to withhold the information redacted from the Viability Assessment which the Council disclosed to the complainant following its internal review.

Reasons for decision

Regulation 12(5)(e) – confidentiality of commercial or industrial information

11. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the 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. For the 12(5)(e) exception to be appropriately applied, the Commissioner considers that the following conditions need to be met:
 - The information must be commercial or industrial in nature;
 - It must be subject to confidentiality which is provided by law;
 - That confidentiality must protect a legitimate economic interest; and;
 - The confidentiality be adversely affected by the disclosure of the information.
13. The Council has provided the Commissioner with an unredacted copy of the Viability Assessment in order to identify the information which the Council considers should be withheld in reliance on section 12(5)(e). To support its application of this exception, the Council has made the following representations to the Commissioner:

The Council's representations

14. The Council argues that the Viability Assessment contains commercial information about the business of three hotels involved in application APP/17/00379/P. Specifically, the withheld information concerns occupancy rates, futures business forecasts, on-going business costs and sales and rentals paid by other business.
15. The Council assures the Commissioner that none of the withheld information is provided elsewhere in the public domain. The Council asserts that the withheld information is commercial in nature.
16. The Council argues that the withheld information is subject to the common law duty of confidence and it has drawn the Commissioner's attention to reference 1.2 in the document which is entitled 'Confidentiality'. Here the author states that the document contains commercially sensitive information which is provided on a strictly private and confidential basis for the purpose of agreeing “the final terms within the section 106 agreement”, and that it should not be placed in the public domain.

17. The council's position is that there is a clear expectation on the part of the document's author that the assessment would and should remain confidential.
18. The Council has advised the Commissioner that it has consulted with the relevant third parties in respect of disclosure of information. The information provided as part of the internal review reflected this consultation, taking into account as appropriate the views of the third parties.
19. The outline application was submitted to the Council in order to determine whether or not the proposed development would be acceptable prior to the submission of a full application.
20. The Viability Assessment confirms that one hotel and land will be sold with outline permission for residential use in order to enable the re-development of two other hotels.
21. The Council argues that the Viability Assessment contains details of future business performance and forecasts which, if published, will prejudice the current owner's interests in obtaining a competitive sale price.
22. The assessment has been compiled by an internationally known provider of real estate services. Should the Council be required to disclose the Viability Assessment, this company's methods in projecting and forecasting would also be released, thereby giving competitors an insight into how this company conducts its business.
23. Additionally, some of the redacted information relates to sale and rental prices paid by other businesses, including local businesses, in order to provide some comparisons.
24. The Council informed the Commissioner that application APP/17/00379/P has generated a high level of public interest. The Council believes there is a strong likelihood that disclosure will result in a potential purchaser of the land remodelling the information giving them an unfair advantage which will affect the current owner's ability to participate in a competitive market for the sale of the hotel.
25. In addition, the Council believes that disclosure would also provide insight into the methods used by the real estate provider.
26. The Commissioner has considered the nature of the withheld information and why it was provided to the Council. The Commissioner finds the withheld information to be commercial in nature and that it was provided to the Council with an explicit expectation that it should remain private and confidential. The Commissioner readily accepts that the confidentiality of the withheld information is designed to protect the

economic interests of the owner of the sites and the forecasting methods of the company which provided the information.

27. The Commissioner agrees with the Council that the confidentiality associated with the withheld information would be adversely affected should it be disclosed into the public domain by virtue of this request under the Freedom of Information Act. For the foregoing reasons, the Commissioner considers that Regulation 12(5)(e) is engaged and consequently the Commissioner must now consider whether the public interest favours disclosure of the requested information or its continued withholding.

The public interest test

28. The Council's reliance on 12(5)(e) is subject to a consideration of the public interest test. Under Regulation 12(1)(b) a public authority may refuse to disclose environmental information if, in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
29. Under Regulation 12(2) a public authority shall apply a presumption in favour of disclosure.
30. The Commissioner considers that weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. Such disclosures assist the public in their understanding of how public authorities make their decisions and in turn they are likely foster greater trust in public authorities.
31. In many circumstances the disclosure of recorded information may allow greater public participation in the decision making process.
32. The complainant asserts that the figures redacted from the disclosed Viability Assessment is essential information which will allow the public to properly understand the "enabling" nature of the developments and to determine that it is genuinely needed, i.e. there are no other solutions or financing options available to the Owner/Developer.
33. In this case, the Council acknowledges that disclosing the full assessment would enable the public to more fully participate in the planning process, in a matter where there is significant interest in a potential development which is likely to have significant impact on local residents.
34. The question of whether application APP/17/00379/P breaches the Local Plan and Policy relevant to the area is one which might be relevant to the public interest. In this case it is not. This is because the application is still subject to officer scrutiny and is expected to be amended before

any decision is made. The Council points out that, when the time comes, officers will assess the revised proposals against the Local Development Plan and other material considerations. The same is true in respect of how the proposed development will affect the natural environment, as again, the Council makes the point that any revised proposals will need to be thoroughly assessed and full consideration given to material considerations.

35. The complainant argues that application APP/17/00379/P concerns three sites which need to be considered on their own merits. This argument relates more to the planning process itself rather than whether the withheld information should be disclosed under the Environmental Information Regulations. Notwithstanding this, the Council's position is that applicants are entitled to submit whatever application they wish.
36. In this instance the application involves three separate sites which are in the same ownership. The application seeks to demonstrate that development of the three sites will deliver the long-term future for the sites by way of providing a new hotel and new housing.
37. The complainant has also expressed his fear that the Council will fail to consider all of the objections raised about the proposed development. The Council points out that this concern is about the planning process and not the release of information under the EIR. Nevertheless, the Council has assured the Commissioner that all objections will be considered at the appropriate time where they relate to material considerations. These considerations will be set out in a subsequent Committee Report and any recommendation will identify how they have been taken into account.
38. The Council also points out that reports submitted to the Planning Committee are published on the Council's website as part of the application documentation as a record of the Committee minutes.
39. The complainant argues that the application would fail if it was solely for the development of the Haven site. This is because the Owners/Developers have stated in their application that it is an "enabling development" to fund the development of the hotels on the other sites.
40. Again, this argument concerns the planning process and not the release of information under the EIR. The Council has not received any application which solely relates to the Haven site and therefore it cannot predetermine whether such a proposal would fail. The Council rightly points out that each proposal/application is considered on its own merits.
41. The complainant has drawn the Commissioner's attention to the First-Tier Tribunal decision in *Greenwich v ICO EA/2014/0122*. In that case,

the tribunal decided upon full disclosure of the Viability Assessment due to the importance of the issues locally and the scale of the development.

42. When asked to comment about the relevance of the Tribunal's decision, the Council pointed out that the Greenwich case concerns a full application for the re-development of council owned land and therefore it involves that council's interests. In this case, application APP/17/00379/P concerns the development of private land and the withheld information relates to the developer's commercial interests.
43. The Council points out that the information already disclosed to the complainant, together with the information published on the its website about affordable housing, allows the public to fully assess the scale of the proposed development.
44. Counterbalancing these factors is the fact that the withheld information forms part of a Viability Assessment which is not yet associated with a full planning application. Indeed, the matter is still subject to public consultation. The Council has received a large number of representations about the proposed development, including those made by the requester.
45. The Council points out that the proposed development relates to private land and it argues that disclosure would lead to reluctance amongst developers to provide sensitive commercial information for future assessments. The result of this would be to impair the Council's ability to fully consider all of the facts associated with an application and this would lead to less robust decisions which would not be in the public interest.
46. In the Council's opinion, it would be unfair to release information about third party businesses which are not part of the hotel ownership and also private residential sales where owners have indicated they do not wish for purchase prices to be made public.
47. The Council has not yet provided a decision to the application and consideration of this is still ongoing.
48. The amount of interest in the proposed development is significant as and this cannot be ignored when considering the public interest. However, the Commissioner notes that the Council has already released key information and goes a long way in meeting the public interest in this matter. This is especially true in respect of information concerning affordable housing. In this regard the Commissioner agrees with the Council that it has disclosed sufficient information from the viability assessment to satisfy the public interest.

49. If the information is disclosed in full, there would be a risk to the developer/owner's economic interests relating to their intention to sell the hotel and land and the re-development of existing hotels.
50. The outline application has not yet been determined and concerns the sale and development of private land. At this stage the Council's involvement is to consider the application and the Commissioner agrees with the Council that disclosure of the redacted information will undoubtedly affect the developer's ability to negotiate a competitive sale price to enable re-development elsewhere. Likewise, she accepts the Council's assertion that disclosure of commercially sensitive information concerning the rent payments of other businesses would also be detrimental to those businesses.
51. The Commissioner acknowledges that, by its nature, the planning process is designed to be a "public" process which offers a significant degree of transparency which serves the public interest. In this case, the application has yet to be determined and given that the nature of the development it is likely to change prior to the Council's decision.
52. In the Commissioner's opinion a significant amount of information has already been released by the Council which has been used by the public to make better informed responses to the public consultation. The Commissioner considers that the information which the Council has disclosed has gone a long way in satisfying the public interest in this matter. She considers that these disclosures have diminished the weight of the public interest which favours the disclosure of information which is inherently commercially sensitive and which, is disclosed, would very likely result in significant prejudice to the interests of the developer.
53. Having balanced the relevant public interest factors associated with the withheld information, the Commissioner has decided that greater weight must be given to the continued withholding of the redacted commercially sensitive information. Consequently the Commissioner's decision is that Poole Borough Council has properly applied Regulation 12(5)(e) to the information it is withholding from the complainant.

54. Right of appeal

55. 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

56. 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.

57. 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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