

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

Date: 25 April 2012

Public Authority: Warrington Borough Council
Address: Town Hall
Warrington
WA1 1UH

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposal to develop Peel Hall, an area in Warrington. The Commissioner's decision is that Warrington Borough Council (the "Council") has correctly refused to disclose information covered by the scope of the requests under regulations 12(4)(e) and regulation 12(5)(e) of the EIR. The Commissioner does not therefore require the Council to take any steps as a result of this notice.

Background

2. The requested information covers pre-planning application discussions regarding the proposal of Satnam Investments Ltd (the "developer") to develop Peel Hall, a greenfield site.
3. The pre-planning application discussions were being undertaken at a time when several sites were being promoted by other land owners under the Local Development Framework (LDF). The LDF process seeks to identify land that would be suitable to meet the planned needs of the Council in terms of residential, employment, amenity and infrastructure uses over a planned period.

Request and response

4. On the back of earlier correspondence with the Council, the complainant wrote to the Council on 19 August 2011 and requested information in the following terms –

1. *All documents including (but not limited to) letters, internal notes, memoranda and other records relating to, referring to, or discussing (either individually or collectively) Peel Hall, Satnam Investments and Winwick Athletic FC;*
2. *Copies of any emails between officers, officers and councillors, or between councillors relating to, referring to, or discussing (either individually or collectively) Peel Hall, Satnam Investments Ltd and Winwick Athletic FC;*
3. *Copies of any emails between*
 - (i) *officers and/or councillors and Satnam Investments Ltd, and;*
 - (ii) *between officers and/or councillors and Winwick Athletic FC.*
5. The Council acknowledged the request on 31 August 2011. It went on to explain that, due to the volume of information that needed to be considered, it would need to extend the timescale in which to respond to 40 working days pursuant to regulation 7(1) of the EIR.
6. On 17 October 2011 the Council provided its substantive response to each of the requests, enclosing some of the requested information. However, the Council claimed that it was not obliged to disclose information covered by requests 2 and 3(i) under regulations 12(4)(e) (internal communications) and 12(5)(e) (confidentiality of commercial or industrial information) of the EIR respectively. (The Commissioner notes that the Council incorrectly cited 12(5)(f) rather than 12(5)(e) as the relevant exception, a point that was addressed and remedied at the internal review stage).
7. An internal review was requested by the complainant on 25 October 2011 and the University responded on 9 December 2011. The internal review considered the Council's reliance on regulations 12(4)(e) and 12(5)(e) and concluded that the exceptions had been correctly applied to the outstanding information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the Council's application of regulations 12(4)(e) and 12(5)(e) as grounds for withholding information. In particular, she argued that the Council had not given sufficient consideration of the public interest test attendant to the application of the exceptions.

9. During the course of the Commissioner's investigation the Council identified a limited number of emails that it considered were technically subject to the requests and could be released. In light of the disclosure, the Commissioner has discounted these records from the scope of his decision.
10. It has also become apparent that the Council holds additional information covered by the scope of request 1. There is, the Commissioner would like to stress, no suggestion that the Council had deliberately misinformed the complainant when it stated that she had been provided with all the information pertaining to the request. The Council has also assured the Commissioner that there are no other relevant documents that, for whatever reason, had not been addressed in its earlier submissions.
11. Having visited this additional information in the context of the request, the Council has decided that the information is also subject to regulation 12(5)(e); advancing the same reasons for withholding information as those put forward in respect of the information covered by request 3(i).
12. The application of regulation 12(5)(e) to this information has therefore been absorbed into the Commissioner's consideration of the broader question of whether the Council was entitled to withhold information in response to the requests.

Reasons for decision

13. The Council has decided that the information requested by the complainant represents environmental information and therefore the appropriate access-regime is the EIR rather than FOIA.
14. The complainant has not voiced any disagreement with the Council's decision to process the requests under the EIR. Similarly, the Commissioner is satisfied that the EIR applies, considering that the requested information is on a measure, namely the proposal to develop land, which will ultimately affect the state of the elements of the environment. As such, it would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR.
15. The Commissioner has therefore gone on to consider in turn the Council's application of regulation 12(4)(e) and regulation 12(5)(e) of the EIR.

Regulation 12(4)(e) – internal communications

16. Regulation 12(4)(e) states –

“For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications.”

17. The Commissioner has had sight of the withheld information and observes that it comprises of internal communications relating to discussions about the development. The Commissioner is therefore content that that the exception is engaged.
18. The next step for the Commissioner is to assess the public interest test attached to the exception.

Public interest arguments in favour of disclosure

19. The Commissioner recognises that there is an express presumption in favour of disclosure under the EIR. This emphasis reflects the potential importance of environmental information to the public. Further, the Commissioner will always attach some weight to the general principle of transparency. Ultimately, transparency should equate to accountability and may help the public to trust and participate in the decisions taken by a public authority.
20. Over and above the public interest in the general principle of transparency, however, there is also in this case a particular public interest in the withheld information because of the subject matter of the request.
21. The Commissioner understands that at the time of the request it was common knowledge that discussions about the Peel Hall site had taken place, although details of the proposal were limited. The proposal has already courted some local controversy¹, with concerns being raised, for example, about the problems of accommodating the extra traffic created by the development.
22. In addition, it has been argued that the greenfield land of Peel Hall should be preserved in an effort to compensate for the high pollution levels present in the area due to its proximity to the M62 motorway.
23. The problems of pollution in the vicinity are demonstrated by the designation of the motorway network in the vicinity of Warrington as an Air Quality Management Area (AQMA) – a measure imposed when an area exceeds national objectives on air quality. AQMA No. 1 covers a 50

¹http://www.warringtonguardian.co.uk/yoursay/letters/9508282.Peel_Hall_site_not_right_for_development/ (the article post-dates the request but is included for illustrative purposes).

metre continuous strip on both sides of M6, M62 and M56 motorway corridors, due to potential exceedances of the annual nitrogen dioxide objective.²

24. The Commissioner has little doubt that there is a serious, and significant, public interest in being kept informed of any proposed development of Peel Hall, with the arguments in favour of the disclosure of the Council's internal communications two-fold.
25. Firstly, the release of the Council's internal discussions on the project could allow the public to better understand how the Council was approaching and managing any proposed development. Disclosure could therefore have the effect of either assuaging a member of the public's anxiety about the proposal or stimulate further debate on the plans for the site, both of which have an inherent value.
26. Secondly, and arising from first point, the Commissioner considers it is possible that disclosure of the information at this point may allow a member of the public more time in which to prepare for a challenge to the proposal should it advance to a public consultation.
27. The Commissioner realises that underpinning both arguments is the knowledge that where a proposal to develop land previously reserved as greenspace is put forward, it is normally on the premise that the redevelopment will better serve the local area. This issue will grow in importance as the pressure on authorities to provide adequate housing and amenities similarly increases.
28. The Commissioner understands that there will not be a clear consensus between the competing interests that will try to stake their claim on the remaining areas of greenspace – whether this is the interest promoting preservation of the space, or the interest that advocates development.
29. The Commissioner would therefore accept that, as far as possible, a public authority should be open about what discussions were taking place in respect of projected plans that could influence or shape the LDF process. Irrespective of whether such openness will placate the various interests, the Commissioner considers that it will help demonstrate that the public authority is seeking to involve the local community in matters that could have a real effect on them.

Public interest arguments in favour of maintaining the exception

² http://aqma.defra.gov.uk/aqma-details.php?aqma_id=64

30. Inherent in the exception provided by regulation 12(4)(e) is the argument which says that a public authority should be afforded private space for staff, in which issues can be considered and debated away from the hindrance of outside external comment and interference.
31. Yet, while recognising the importance of protecting a public authority's thinking space, the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure once a decision has been made and, accordingly, the need for space in which to operate is no longer required by a public authority.
32. In this case the Council has argued that at the time of the request it had not made, nor was it in the process of making, a formal decision on the Peel Hall development. Instead, the withheld information refers to pre-application discussions relating to a "speculative development proposal which may or may not come to pass and which ultimately may bear little similarity to any final application. The public will have full opportunity to be involved in the issues following receipt of any formal planning application."
33. To demonstrate the need for, and importance of, pre-application discussions, the Commissioner has been referred to the advice of the Office of the Deputy Prime Minister (now the Department for Communities and Local Government) contained in "Planning Policy Statement 1: Delivering Sustainable Development" (2005)³. Specifically, paragraph 13 of the advice states –

"Pre-application discussions are critically important and benefit both developers and local planning authorities in ensuring a better mutual understanding of objectives and constraints that exist. In the course of such discussions proposals can be adapted to ensure that they better reflect community aspirations and that applications are complete and address all the relevant issues. Local planning authorities and applicants should take a positive attitude towards early engagement in pre-application discussions so that formal applications can be dealt with in a more certain and speedy manner and the quality of decisions can be better assured."
34. The Commissioner sees no reason to doubt the sincerity of the Council to carry out an appropriate public consultation should the proposal be

³<http://www.communities.gov.uk/documents/planningandbuilding/pdf/planningpolicystatement1.pdf>

formally submitted. Therefore, unless and until an application is formally received, a strong argument exists which says that the Council should be given space in which to discuss and reflect on the evolving issues raised during the pre-application stage. Further, particular care must be taken where the information being considered, ie the proposal, has been provided by a third party, the developer, on the assumption that it would be kept confidential.

Balance of the public interest arguments

35. The Commissioner understands that the issues at the heart of the case are important, not least because they reflect an increasingly common situation in many urban areas.
36. In respect of Peel Hall, the Commissioner perceives there is a significant movement to protect the space, which will add weight to the public interest arguments in favour of disclosure. Ultimately, the proposed development will, if built, have a significant effect on the local community. The release of the information could potentially help the public understand how the Council was approaching the pre-application discussions and ease any concerns about the possibility that decisions were being made behind closed doors.
37. However, the Commissioner is conscious of the need for a public authority to have space in which to debate what is, in essence, a 'live' issue.
38. As demonstrated by the advice of the Office of the Deputy Prime Minister, the pre-application stage allows proposals to be "adapted to ensure that they better reflect community aspirations and that applications are complete and address all the relevant issues." To disclose evidence of a public authority's internal thinking on the proposal while it was still in the course of completion, and therefore subject to change, may result in adverse reactions from the public. This could then in turn result in better options, or ways of refining the proposal, not being considered because of the adverse reaction generated by the premature disclosure.
39. Moreover, the Commissioner has borne in mind that according to the Council there are statutory requirements incumbent on it to publish details of plan documents and to publicise and consult on planning permissions once a formal application has been presented. This means that the public will be given an opportunity to have their voice heard on what is, no doubt, an important development issue.
40. Taking into account these factors, and the weight attached to the various arguments, the Commissioner has found that the public interest favours maintaining the exception.

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

41. Regulation 12(5)(e) of the EIR states –

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

42. Breaking down the requirements of the exception, the Commissioner considers that the withheld information must satisfy the following conditions in order for regulation 12(5)(e) to be engaged –

- The information is commercial or industrial in nature.
- The information is subject to confidentiality provided by law.
- The confidentiality is provided by law to protect a legitimate economic interest.
- Disclosure would adversely affect the confidentiality.

43. The Commissioner addresses each of these conditions below.

Is the information commercial or industrial in nature?

44. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

45. The withheld information relates to a development proposed by an organisation working in a commercial sphere for the purposes of profit. The Commissioner is therefore satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

46. The Council has argued that confidentiality is provided by the common law of confidence. The test of confidence involves the consideration of the following key questions –

- Does the information have the necessary quality of confidence?
- Was the information shared in circumstances importing an obligation of confidence?

47. When approaching these questions, the Commissioner has been mindful that under regulation 12(5)(e) there is no need for the information to have been obtained by the public authority from another. Instead, the exception can also cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party.
48. As grounds for demonstrating that a duty of confidentiality existed at the time of the request, the Council has pointed to the fact that some of the withheld information is marked as 'confidential'. The Commissioner, though, does not consider protective markings to be absolute evidence of the sensitivity of information. He has therefore gone on to consider the nature of the disputed information itself.
49. The information consists of streams of correspondence between various interested parties. The Commissioner notes that the contents of some of these communications are relatively anodyne when considered in isolation. However, the Commissioner considers that any attempt to separate the information into, say, significant and non-significant headings, would be an artificial device. Instead, he has viewed each of the streams of correspondence as a whole.
50. In this context, the Commissioner acknowledges that the information is clearly not trivial, relating as it does to a development proposal, and is not in the public domain. Furthermore, the Commissioner notes that the only reason why the information was communicated was to facilitate pre-application discussions about the proposal.
51. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence and was shared in circumstances importing an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

52. The Council believes that the confidentiality is designed to protect the legitimate economic interest of the developer.
53. Where a third party's economic interests are considered to be at stake, the Commissioner does not believe it is appropriate to take into account speculative arguments which are advanced by a public authority. Instead, the arguments should clearly reflect the concerns of the third party.
54. The Council has advised that it consulted with the developer in respect of the disputed information and provided the Commissioner with what the Council stated were the responses of the developer. While there is no clear evidence that suggests the submissions were indeed the views of the developer, the Commissioner has seen no reason to doubt the provenance of the information.

55. The Commissioner has been informed that its pre-application discussions with the developer about Peel Hall were taking place at a time when several other sites were being promoted by land owners under the LDF. The Commissioner accepts that disclosure at this stage would reveal constraints or weaknesses in the plans, which could be exploited by the developer's competitors and therefore create an uneven playing field.
56. Based on this explanation, the Commissioner has decided that there is a legitimate economic interest, namely that of the developer, which is being protected by the duty of confidentiality.

Would the confidentiality be adversely affected by disclosure?

57. The Commissioner observes that disclosure of confidential information into the public domain would inevitably harm the confidential nature of the information by making it publicly available, and will also inevitably harm the legitimate economic interest that has already been identified. As a consequence, the Commissioner will find that confidentiality is adversely affected by disclosure where each of the three conditions considered above have been met.
58. Even where regulation 12(5)(e) of the EIR is found to be engaged, though, the EIR stipulates that information should only be withheld where the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner has therefore gone on to consider the public interest test connected to the application of the exception.

Public interest arguments in favour of disclosure

59. The Commissioner observes that Directive (2003/4/EC), which gave rise to the EIR, was founded on the principle that disclosure of environmental information contributes to, among other things, more effective participation by the public in environmental decision-making.
60. As stated, there will also be a particular public interest in the subject of the request in this case because of the possibility that the development will have a significant impact on the local community. It is therefore clear that there will be considerable weight attached to the argument which says that the disclosure of the disputed information will help the public engage with the Council about plans that could ultimately affect them.
61. On this point, the Commissioner considers that a public authority should be accountable, and also be seen to be accountable, to the population it serves. There is, then, an emphasis on public authorities to be transparent in planning matters.

Public interest arguments in favour of maintaining the exception

62. There will, the Commissioner understands, always be a level of public interest in preserving commercial confidences. However, he considers that this factor should not be overstated. In essence, any commercial organisation wanting to work with a public authority, as well as the public authority itself, should be aware that information relating to a project may need to be disclosed under the EIR. The Commissioner will therefore require specific arguments to justify why the confidence should be upheld.
63. The Council has placed considerable importance on the claim that disclosure would prejudice the economic interests of the developer by allowing its competitors to take advantage of the provisional plans. The Commissioner accepts that, in the circumstances of the case, there is a public interest in maintaining the confidence so as to allow the pre-application discussions with the developer to proceed unhindered.

Balance of the public interest arguments

64. When weighing up the public interest arguments, the Commissioner has again been mindful of the fact that allied with the real and substantial public interest in the records relating to the planning proposal is the EIR's presumption in favour of disclosure.
65. However, the Commissioner is satisfied that this interest is off-set by the knowledge that a formal planning application has yet to be submitted by the developer. If and when it is received, the Commissioner is aware that the public will have an opportunity to consult with the Council about the proposal and air any concerns about the development itself. It is the opinion of the Commissioner that this consultation period would be the proper forum in which the public could participate in and potentially shape any decision made by the Council.
66. To return to the advice of the Office of the Deputy Prime Minister, pre-applications discussions can benefit both public authorities and developers, not least by making sure that the development framework being operated, in this case the LDF, is understood. To disclose the disputed information before the parties have had an opportunity to consider and refine the proposal would, in the Commissioner's view, stunt the planning process. This is because it would invite the public to speculate and campaign on issues that had yet to be finalised.
67. In addition, the Commissioner accepts that the release of information containing details of the proposal would give competitors in the LDF process enough information to allow them to exploit any weaknesses in the plans and, in so doing, potentially stop the proposal from becoming fully realised. This would, in turn, impinge on the integrity and effectiveness of the pre-application discussions.

68. Weighing up these considerations, the Commissioner has found that, while the issue is not necessarily clear-cut, the public interest does favour the maintaining of the exemption.

Right of appeal

69. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

70. 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.
71. 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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