

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

Decision notice

Date: 5 July 2012

Public Authority: Telford & Wrekin Council
Address: Civic Offices
PO Box 215
Telford
TF3 4LF

Decision (including any steps ordered)

1. The complainant requested financial details associated with the sale of the existing Civic Offices site and the cost of building new accommodation. Telford & Wrekin Council ('the Council') disclosed some information but withheld the sale price of the Civic Offices site under section 43 of the FOIA. During the Commissioner's investigation, the Council sought to rely on regulation 12(5)(e) of the EIR. The Commissioner's decision is that the Council has correctly applied regulations 12(5)(e) to the requested information. He does not require any steps to be taken.

Request and response

2. On 11 August 2011, the complainant wrote to the Council and requested information in the following terms:

"Under the FOI Act I wish to be told how much the old council offices have been agreed to be sold for and the estimated cost of building the now abandoned new offices".
3. The Council responded on 8 September 2011. It provided some information relevant to the estimated cost of building new offices, and withheld the selling price of the existing Civic Offices site under section 43 of the FOIA.

4. On 12 September 2011 the complainant requested an internal review of the Council's handling of his request.
5. The Council provided the outcome of its internal review on 26 September 2011. It released some additional information relevant to the estimated cost of building new offices, but maintained that the selling price of the existing Civic Offices site was exempt under section 43 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the Council should disclose the selling price of the existing Civic Offices site ('the selling price').

Reasons for decision

Was the information environmental?

7. There are separate rights of access relating to information that meets the definition of "environmental information" set out in regulation 2 of the EIR. Information that is "environmental" should be considered under the EIR, not the FOIA.
8. The Council originally processed the complainant's request for information under the Act and considered the selling price to be exempt under section 43 of the Act. However, the Commissioner considers that the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR.
9. The Commissioner has determined that the requested information would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

"'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 on—
(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."

10. The Commissioner considers that the phrase “any informationon” should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
11. In September 2008, the Council announced that it was seeking bidders for the development of a piece of land, which at that time accommodated the Council's Civic Offices. At a Cabinet meeting on 9 March 2009¹ (agenda item CB-165), it was resolved that authority be given to negotiate and enter into a conditional contract with the preferred bidder for the sale of the Civic Offices site. On 11 March 2009 the Council announced its decision to sell the site to Asda Stores. The Council subsequently entered into a Conditional Sale Agreement ('the Agreement') with Asda Stores and McLagan Investments Limited on 14 August 2009, which confirms the agreed selling price.
12. In reaching a view as to whether the requested information constitutes environmental information, the Commissioner notes that the purpose of the sale of the land in question was to help fund the Council's move to another office(s) and to help it redevelop/regenerate the town centre. The press release issued by the Council in March 2009 relating to the sale also included a number of references that suggest the sale was conditional on development/redevelopment of the land, for example:
 - “the proposed sale.....is an important part of the Council's ambitious regeneration programme to Transform Telford Town Centre”.
 - “ASDA will now prepare their proposals for the Civic Offices site and it is anticipated that they will submit a planning application in the coming months. The proposals could include a mixed use development, which may incorporate residential, retail and offices”.
 - “Property Communications Manager at Asda Chris Marlow said ‘We are delighted to have been chosen as the successful bidder for the regeneration of the Civic Offices site’”.

¹ <http://www.telford.gov.uk/apps/demservice/DisplayDocument.asp?type=pdf&ref=10964>

13. Having viewed a copy of the Agreement, the Commissioner notes that it contains a number of conditions which need to be satisfied in order for the sale to proceed. Some of the conditions relate to development of the land. Based on the fact that the Agreement is conditional on redevelopment of the land in question, the Commissioner is satisfied that the Agreement constitutes environmental information, as defined by Regulation 2(1)(c). This is because it is information on (concerning, relating to, or about) a measure which is likely to affect the elements of the environment as set out in regulation 2(1)(a); in particular land and landscape. Whilst he accepts that a monetary figure itself, viewed in isolation, may be considered not to be environmental information, given the context here and all the circumstances relating to the sale, the Commissioner is satisfied that the selling price constitutes environmental information and the correct access regime is therefore the EIR.

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

14. During the course of the Commissioner's investigation, he wrote to the Council to advise that, in his view, the request should have been handled under the EIR. He asked the Council to reconsider the case under the EIR. Whilst the Council did not necessarily agree that the requested information was environmental information, it stated that it believed the information to be exempt under regulation 12(5)(e) of the EIR.
15. Regulation 12(5)(e) 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?
 - Would the confidentiality be adversely affected by disclosure?
16. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

17. 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. The Council has applied regulation 12(5)(e) to the selling price of land on which its existing Civic Offices were situated. As stated earlier in this notice, the Council entered into an Agreement for the sale. The Agreement is a commercial document which sets out the terms for the sale and development of the land in question. In view of this, the Commissioner is satisfied that, as it relates to a business activity for commercial gain, the information is commercial in nature. He therefore considers that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

18. In relation to this element of the exception, the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. There is no need for the information to have been obtained from another party as is the case with section 41 of the FOIA.
19. The Council has argued that the confidentiality in this case is imposed under contractual obligation. The confidentiality clause contained within the Agreement binds parties into keeping confidential certain terms contained within the agreement.
20. The Commissioner accepts that the circumstances and contractual terms under which the information was agreed between the Council and the other parties involved in the Agreement were sufficient to create an obligation of confidence.
21. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law in view of the contractual relationship between the Council, McLagan Investments Limited and Asda Stores Limited.

Is the confidentiality required to protect a legitimate economic interest?

22. The Commissioner considers that to satisfy this element of the exception, 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 Information Tribunal, the Commissioner interprets "would" to mean "more probable than not".

23. The Council argues that the confidentiality is designed to protect the legitimate economic interests of itself, Asda Stores Ltd and McLagan Investments Limited ('the Developers'). The Council considers that, as the Agreement for sale is a conditional one, disclosure would have an adverse effect on its own position and that of the Developers.
24. In respect of any prejudice caused to a third party, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, the Council provided detailed submissions from Solicitors acting on behalf of the Developers. The Developers argue that disclosure would adversely affect their economic interests for the following reasons:
- Asda currently has a store at Telford, employing around 350 staff. The Agreement contains issues regarding the timing of the closure of the existing store, and opening of the new store, which are commercially sensitive. Disclosure may impact upon obligations under relevant employment legislation and would compromise Asda's position in any negotiations on employment issues at the proposed new store.
 - Disclosure of the Agreement has implications for Asda's rights under relevant landlord and tenant legislation and would prejudice its position in any negotiations with its existing landlord.
 - The Agreement deals with issues which would impact on the construction of the new Council offices, and consequently, vacant possession of the existing civic office site. The timing of vacant possession of the existing civic office site will have an impact on the timing and cost of the Developers entering into construction contracts for the new store.
 - The terms on which Asda enter into transactions for the purchase of any property are considered to be of the utmost commercial sensitivity. Disclosure would undermine its position in negotiations for other sites (both in terms of landlord and tenant and commercial negotiations).
 - Asda considers disclosure of the confidential information contained in the Agreement and supporting documents, to be an actionable breach of confidence, which it would pursue.
 - Asda considers that disclosure would be a breach of its human rights under Article 1 Protocol 1 ECHR in accordance with recent decisions in the Court of Appeal case R(Veolia ES Nottinghamshire Limited) v

Nottinghamshire County Council [2010] EWCA CN 1214 and the First Tier Tribunal (Information Rights) case of Staffordshire County Council v Information Commissioner (Sibelco UK Limited) EA/2010/0015.

25. The Council argues that the sale was a high value contract with major implications for both parties and disclosure would have an adverse effect with the potential to cause serious delay or even cancellation of the contract, with substantial financial implications for the Council and the Developers. The Council acknowledges that there has been some speculation in the media about the selling price. However, the Council has confirmed that it has not released the information as it considers the information to be commercially sensitive, particularly as the Agreement contains a number of conditions, which if not met, could result in the Agreement being terminated.
26. The Commissioner has considered the arguments put forward by the Council and by the Developers and accepts that the requested information consists of information which, both now and at the time of the request, was of significant commercial value and which, if disclosed, would cause harm to the legitimate economic interests of the Council and the Developers. The Commissioner has also taken into account the fact that the Agreement is dependent on a number of conditions being satisfied.

Would confidentiality be adversely affected by disclosure?

27. As the first three elements of the test cited at paragraph 15 of this notice have been established the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the Council and the Developers. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest arguments in favour of disclosing the information

28. The complainant is of the view that, it is in the public interest for the selling price to be publicly available as it involves public money. He is of the opinion that the issue of this particular sale and development was a factor which was influential in the recent local election campaign.

29. The Council accepts that there is a public interest in disclosure of the requested information as it would increase the transparency and accountability of its decisions.

Public interest arguments in favour of maintaining the exception

30. The Council states that the contract price (ie the selling price) is subject to a confidentiality clause within the Agreement. The Developers have indicated that disclosure of any information in breach of the confidentiality clause would be considered actionable and would be pursued.
31. The Council has placed weight on the fact that the Agreement contains a number of conditions that needed to be satisfied. It argues that disclosure would have an adverse effect on both the Council itself and the Developers (as referred to in paragraph 24 of this notice).
32. The Council is of the view that any information on factors that would affect the land are not included in the Agreement, but rather would be dealt with under the planning regime, and information would be publicly available as part of the planning process. The Council is also of the view that disclosure of the requested information would not:
- (a) bring to light any information affecting public safety;
 - (b) assist in allowing individuals to understand decisions made by the Council affecting their lives;
 - (c) facilitate accountability and transparency in the spending of public money;
 - (d) further the understanding of and participation in debate of issues of the day.

Balance of the public interest arguments

33. The Commissioner has considered the above arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
34. There is a particular public interest in the subject of the request in this case because the development will have a significant impact on the local community. The Commissioner accepts that the development is a matter of significant local public interest, both in terms of the relocation of the Asda store and the relocation of the new Council offices. 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. The Commissioner does not, therefore, accept the Council's arguments outlined at paragraph 32(b) to (d) above. He considers that disclosure of the withheld information would to some extent meet these public interests.

35. However, the Commissioner has taken into account the fact that the actual Agreement, was subject to a number of conditions, including the submission of a planning application and approval being given for the development. The Commissioner accepts that any environmental impact of the development would be assessed as part of the planning process. The Commissioner notes that a formal planning application had been submitted by the Developers and approval given. However, the planning approval was the subject of an on-going legal challenge by a third party. The Commissioner therefore accepts that, at the time of the request, all of the conditions within the Agreement had not been satisfied and the Agreement remained "conditional".
36. On 1 June 2012, the Council advised the Commissioner that negotiations were still on-going with the Developers in respect of satisfying the relevant conditions within the Agreement and were unlikely to be concluded until the end of 2012. The Council confirmed that, once the negotiations and the sale was concluded, the selling price would be a matter of public record via the Land Registry.
37. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching this decision, he has placed considerable weight on the conditional nature of the Agreement and the fact that, at the time of the request, not all conditions within with the Agreement had been satisfied.

Right of appeal

38. 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

39. 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.
40. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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