

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

Decision notice

Date: 5 August 2013

Public Authority: Wirral Council
Address: Wallasey Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant requested a copy of an independent viability assessment report in relation to a planning application for a site on Ingleborough Road, Birkenhead. The public authority disclosed some information from the report and withheld the remainder on the basis of the exception at regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the public authority was entitled to withhold the remaining information in the report on the basis of regulation 12(5)(e).
3. The Commissioner however finds the public authority in breach of its obligations under regulations 5(2) and 11(4) of the EIR.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 5 November 2012¹, the complainant wrote to the public authority and requested information in the following terms:

'I would like to have your response please to the following 2 questions relating to [Named Person] within the Authority's Department of Regeneration, Housing & Planning.

1. What hospitality has the above Officer (and his line manager) declared as having been received by them within the last 5 years and from whom?

2. In his report to the Planning Committee on 25 October 2012 in respect of Planning Application reference OUT/12/00824, [Named Person] wrote the following on page 11, 6th paragraph,

"a viability assessment has been submitted by the applicant, which has been independently assessed on behalf of the Council"

My request is, to know who the independent party that is referred to was and to see a copy of that advice.'

6. The public authority responded on 6 December 2012. It explained that it did not hold information within the scope of Part 1 of the request because neither [Named Person] nor his line manager had declared hospitality from anyone within the last five years. In terms of Part 2 of the request, the public authority informed the complainant that the independent party was Kinnear Miller Associates (Quantity Surveyors). It disclosed some information from the *'conclusions and significant findings'* section of the report by Kinnear Miller Associates and withheld the remainder of the information (i.e. the rest of the report by Kinnear Miller Associates which includes the viability assessment) on the basis of the exemption at section 43 FOIA (commercial interests).
7. Following an internal review (which was requested on 10 December 2012) the public authority wrote to the complainant on 20 February 2013. It explained that the request should have been dealt with under the EIR because the requested information is *environmental information* within the meaning in regulation 2(1)(c) of the EIR. The public authority
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¹ Received electronically by the public authority on 12 November 2012.

however maintained that the withheld information withheld was exempt from disclosure but this time on the basis of the exception at regulation 12(5)(e) of the EIR (confidentiality of commercial information).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He provided details of the background to his request as follows.
9. Tranmere Rovers Football Club (TRFC) applied for planning permission to build upon former school playing fields at Ingleborough Road, Birkenhead. The application relied heavily on a parallel planning proposal by TRFC to develop replacement playing fields at another site, owned by the public authority a few miles away at Carr Road (Woodchurch facilities). The site at Carr Road is meant to be re-developed with funds released from the sale of Ingleborough Road. The anticipated proceeds of sale of the Ingleborough site were at the time, £5million.
10. During the course of the investigation, the public authority disclosed additional information – a letter dated 28 September 2011 attached to the report.
11. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold the remainder of the information in the report by Kinnear Miller Associates² on the basis of the exception at regulation 12(5)(e) of the EIR.

Reasons for decision

Applicable Access Regime

12. Before considering the applicability of the exception relied on, the Commissioner would like to state (for the avoidance of doubt) that he accepts the disputed information is *environmental information* within the meaning in regulation 2(1)(c) of the EIR. He specifically finds that it is
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² Hereinafter referred to interchangeably as 'the report' or 'the disputed information'

information on plans and activities likely to affect the elements referred to in regulation 2(1)(a) of the EIR.

Regulation 12(5)(e)

13. Information is exempt on the basis of regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Therefore, in order to engage the exception, the following four requirements must be met:

- The information is commercial or industrial in nature,
- Confidentiality is provided by law,
- The confidentiality is protecting a legitimate economic interest, and
- The confidentiality would be adversely affected by disclosure.

Is the disputed information commercial or industrial in nature?

14. The public authority submitted that the report is commercial in nature because it relates to its commercial activities and that of TRFC. Both parties are engaged in contractual negotiations with respect to a proposed section 106 agreement. It also submitted that the report relates to the commercial activity of the independent assessor, Kinnear Miller Associates.

15. A section 106 agreement is a term commonly used to refer to an arrangement between local planning authorities and an applicant within the terms specified in section 106 of the Town and Country Planning Act 1990. It enables local planning authorities and applicants to negotiate and agree obligations without the rigorous controls of planning conditions.

16. The Commissioner accepts that report is commercial in nature because it relates to the commercial activities of the public authority and TRFC.

Confidentiality provided by law

17. The public authority submitted that it owed a common law duty of confidence to TRFC in respect of the disputed information and that it also owed a similar duty of confidence to Kinnear Miller Associates in respect of the independent assessment provided.

18. The complainant explained that the financial budget difficulties of the public authority and TRFC have been well documented in the media. It

was therefore not possible to see how disclosure of the disputed information would reveal any information not already revealed by the press or contained in the information accompanying the planning application.

19. Where there is no evidence of a contractual or statutory obligation of confidence, the Commissioner will consider whether the confidentiality element in the exception at regulation 12(5)(e) was, in the circumstances, imposed by common law. The key questions to consider are: Does the information have the necessary quality of confidence and was the information shared or provided in circumstances creating an obligation of confidence? The report relates to ongoing contractual negotiations between the public authority and TRFC. It is a detailed appraisal of the value of the site at Ingleborough Road and therefore linked to negotiations regarding the proposed section 106 agreement. The report is based on TRFC's own viability assessment (which as far as the Commissioner understands had not been made public) of the site. The information relates to a potential agreement likely to affect the commercial interests of both parties and therefore possesses the necessary quality of confidence. The Commissioner has seen no evidence to suggest that the disputed information is already in the public domain as alleged by the complainant. In view of these circumstances, the Commissioner accepts that there is an implied obligation of confidence on the public authority not to disclose the report given the likely effect it would have on the negotiations as well as on the commercial interests of TRFC. A duty of confidence is owed to TRFC because the report is based on its own viability assessment on the site. Disclosing the report is therefore likely to reveal information which TRFC considers commercially sensitive.
20. However, he does not accept the view that the public authority owed a similar obligation of confidence to Kinnear Miller Associates, the independent assessors. The relationship between the public authority and the independent assessor in the circumstances was quite different from that with TRFC. As far as the Commissioner understands, the independent assessor is not involved in negotiations with the public authority or TRFC in relation to the planning application. It was contracted by the public authority to provide an independent view on the viability assessment submitted by TRFC. The report does not appear to contain information about the independent assessors which they might consider confidential or commercially sensitive.

The confidentiality is protecting a legitimate economic interest

21. To satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of TRFC and the public authority.
22. The public authority explained that given the contents of the report, its disclosure would have affected negotiations regarding a section 106 agreement. TRFC would have become reluctant to deal with the public authority out of fear that their commercially sensitive information could be made public in the middle of negotiations. It was for this reason that TRFC objected to the disclosure of both the independent assessment report and its own viability assessment report.
23. Given that the report is based on TRFC's viability assessment, the Commissioner accepts that disclosure would harm the legitimate economic interests of TRFC. It would reveal commercially sensitive information relating to TRFC. The Commissioner also accepts that ongoing section 106 negotiations would be affected if TRFC no longer had confidence in the public authority protecting its commercial information. As mentioned, section 106 agreements are based on negotiations between parties outside the strict controls of planning conditions. Therefore, in order for the negotiations to succeed, one would expect the parties need to have some level of trust in each other and be open to exercising a certain degree of flexibility. Therefore, if TRFC no longer has confidence in the public authority, the negotiations are unlikely to be successful. This would affect the public authority's ability to negotiate more favourable terms and consequently harm its own economic interests.
24. In view of the above, the Commissioner accepts that the confidentiality is protecting the legitimate economic interests of TRFC. He also finds that the confidentiality is protecting the legitimate economic interests of the public authority because it would adversely affect its commercial interests if TRFC and other similar organisations are reluctant to conduct business with the public authority out of fear that their commercially sensitive information could be revealed in the middle of negotiations.

The confidentiality would be adversely affected by disclosure

25. The Commissioner considers it is inevitable that this element will be satisfied once the first three elements of the exception are satisfied. Disclosure of confidential information would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests identified above.

26. The Commissioner therefore finds that the public authority was entitled to engage the exception at regulation 12(5)(e).

Public Interest Test

27. Regulation 12(5)(e) is subject to a public interest test. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the disputed information.

Complainant's arguments

28. The complainant's public interest arguments for disclosure are summarised below.
29. Disclosure would further the understanding of, and participation in debate relating to the planning permission. It would facilitate the accountability and transparency of the public authority in relation to the decision to approve the planning application and the expenditure of public funds.
30. The complainant explained that the application relied heavily on a parallel planning proposal by TRFC to develop replacement playing fields at another site, owned by the public authority a few miles away at Woodchurch. Given that the site at Ingleborough Road was valued at £5million, he does not consider this to be feasible. He elaborated as follows:

'On 14 March 2013 Wirral Council Cabinet received a report from....its Asset Management team, advising it on the release of Restrictive Covenant preventing the use of Ingleborough Road for anything other than playing fields....In the report, reference is made to the proposals for which the planning consent had been granted but it is clear that the value of work to be undertaken on the facilities at Woodchurch [on the Carr Road site] is clearly understood by both parties to be £2.5million. This is in marked contrast to the £5million price tag for the same work which was laid before Planning Committee as justification for the non-provision of affordable housing on the Ingleborough Road site. This would suggest that either TRFC were using two sets of differing feasibility costings in their two separate negotiations with Planning and Asset Management Officers or that the same figures were being used in both discussions...It may therefore be even more clearly understood why the information contained in the Kinnear Miller Associates report will throw light on this important question...'

31. The complainant provided the Commissioner with copies of two emails he had received from Sport England following a freedom of information request in which the cost of the proposed works at Woodchurch is estimated to be £2.5million. However, he also provided the Commissioner with copies of pages from TRFC's '*Supporting Planning Statement*' (part of its planning application) in which he claims that the Club considered the cost would be over £5million and not the £2.5million estimated by the public authority's officers. He therefore argued that the conclusion (in the independent report by Kinnear Miller Associates) that there was no scope for affordable housing on the Ingleborough site was because the public authority had accepted TRFC's cost estimate for the proposed work.

Public authority's arguments

32. If organisations become reluctant to provide it with commercially sensitive information in the future, it would undermine the ability of the public authority to fulfil its role and that would not be in the public interest.
33. Disclosing the disputed information (specifically the independent assessment) whilst in the middle of ongoing negotiations would also not be in the public interest as it would weaken the public authority's bargaining position.
34. In terms of the specific allegations by the complainant, the public authority took the view that the complainant was confusing information contained within the Planning report of 25 October 2012 (i.e. the report laid before the Planning Committee) and the Asset Management report of 14 March 2013. It explained that the planning permission was approved on the basis of a '*linked development*' at Woodchurch which would provide improvements to the Woodchurch facilities from the Ingleborough receipt (i.e. from the sale of the site at Ingleborough Road). This was to be secured by the completion of a section 106 agreement which would secure the development of the Woodchurch facilities. The section 106 has not yet been completed and will not until such time as it is clear proposals for the development and maintenance of the Woodchurch site are agreed. The planning permission is subject to the completion of the section 106 agreement and therefore planning permission for the Ingleborough site will not be released until the agreement is completed. The public authority was however clear that £5million was not the '*price tag*' for the Woodchurch works. It was the anticipated proceeds of sale of the Ingleborough site. There are two separate feasibility costing – one for the affordable housing and the other for the Woodchurch development.

35. The public authority further explained that the independent assessment (i.e. the report by Kinnear Miller Associates) referred to in the Planning Report concluded that based on a land acquisition value of £5million of the Ingleborough site, affordable housing was not viable. The proposed section 106 agreement will require a further viability assessment to be carried out at the time of sale of the land. The independent assessment was only with regards the viability of affordable housing on the Ingleborough site. In other words, it only considered whether affordable housing was viable given the expected value of the land. *It did not consider or recommend whether the development at Woodchurch was feasible.*
36. The public authority's explanation in relation to the information contained in the Asset Management report is reproduced in the confidential annex to this notice at the public authority's request. It explained that the matters discussed in the report are currently subject to external legal advice being sought by the public authority.

Balance of the public interest

37. The Commissioner agrees that disclosure would shed light on the reasons for the public authority approving the planning application and consequently make it more accountable. This would be in the public interest, especially in light of the complainant's allegations regarding the feasibility of the proposals for which the planning permission was approved.
38. However, this has to be balanced against the public interest in protecting commercially sensitive information. In the circumstances of this case, the Commissioner has to also consider whether there is indisputable evidence to suggest maladministration as alleged by the complainant because that would also be a significant factor in deciding where the balance of the public interest lies.
39. The Commissioner considers that the public interest in protecting the disputed information which is commercially sensitive to both the public authority and TRFC is significant in this case. There is also a strong public interest in ensuring that the ongoing negotiations between the public authority and TRFC are not jeopardised. The Commissioner also accepts that there is a strong public interest in ensuring that the public authority is able to continue to fulfil its role by not damaging the confidence that organisations have in its ability to protect their commercially sensitive information especially in the middle of ongoing negotiations.

40. In view of the explanation provided by the public authority which the Commissioner considers reasonable, he does not believe that the allegations made by the complainant significantly increase the public interest in disclosing the disputed information regardless of its commercial sensitivity. The complainant is specifically questioning the feasibility of the proposals upon which the planning permission was approved. However, from the public authority's explanation, it would appear that the estimated cost of the works at Woodchurch is not £5million as alleged by the complainant or at the very least not the estimate the public authority has accepted for the proposed works at Woodchurch. More importantly, the Commissioner agrees that the independent assessment (which he has seen) was not to specifically consider the feasibility of the proposed works at Woodchurch in light of the determined value of the site on Ingleborough Road. Therefore, the public interest in disclosing the disputed information for that particular reason does not significantly weaken the public interest in protecting the information for the reasons already mentioned above.
41. The Commissioner notes that emails provided by the complainant do suggest that £2.5million was considered by the public authority to be the estimated cost for the proposed works at Woodchurch. It is not conclusive from the evidence provided that TRFC's estimate for the same works was over £5million. However, the fact that TRFC's estimate may have been different does not support the complainant's position per se. The independent report (i.e. Kinnear Miller Associates report) did not consider the viability of the proposed works at Woodchurch. The public authority is clear that £5million is not the cost of the proposed works. The public authority is also clear that the planning permission would not be released for the Ingleborough site until the completion of negotiations in relation to the works at Woodchurch.
42. The Commissioner therefore finds that, on balance, the public interest in maintaining the exception at regulation 12(5)(e) outweighed the public interest in disclosure.

Procedural Breaches

43. A public authority is required by virtue of regulation 11(4) to notify an applicant of the outcome of its internal review within 40 working days.
44. The complainant requested an internal review on 10 December 2012 and the public authority notified him of the outcome on 20 February 2013. The Commissioner therefore finds the public authority in breach of regulation 11(4).

45. A public authority is required by virtue of regulation 5(2) to disclose information within 20 working days following a request subject to the application of other provisions in the EIR.
46. The Commissioner finds the public authority in breach of regulation 5(2) for failing to disclose the letter of 28 September 2011 within 20 working days of the complainant's request.

Right of appeal

47. 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

48. 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.
49. 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

Alexander Ganotis
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