

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

Decision notice

Date: 7 January 2015

Public Authority: Waverley Borough Council
Address: The Burys
Godalming
Surrey
GU7 1HR

Decision (including any steps ordered)

1. The complainant has requested correspondence including emails, agendas, minutes and telephone notes between Waverley Borough Council and Crest Nicholson relating to the Brightwells development scheme. The Council disclosed much of the correspondence but continued to redact information on the basis of section 40, 41 and 43 of the FOIA. The Commissioner considered the request should have been treated as a request under the Environmental Information Regulations 2004 ("EIR") and that regulation 12(5)(e) of the EIR was engaged for all of the withheld information.
2. The Commissioner's decision is that the balance of the public interest favours maintaining the exception and the Council has therefore correctly withheld the information.

Request and response

3. On 11 April 2014, the complainant wrote to Waverley Borough Council ("the Council") and requested information in the following terms:

"Further to our recent email correspondence, this is a fresh request, under the Freedom of Information Act, in relation to the East Street/Brightwells scheme and based on the admissions in Cllr Adam Taylor-Smith's email to me dated April 4, which I forwarded to you on April 7, in which he stated that "there is ongoing dialogue with Crest and I recently attended an excellent and productive meeting at their HQ."

I wish to request any relevant information held about discussions and meetings in 2014 between Waverley Borough Council and Crest Nicholson, concerning this development scheme, including emails exchanged between the two parties arranging meetings, any attached agenda for discussion, notes of any telephone calls referring to such meetings or similar records of contacts relevant to the scheme."

4. The Council responded on 19 May 2014. It stated that there was ongoing dialogue with Crest Nicholson regarding the Brightwells development. The Council considered any information relating to this to be exempt on the basis of section 41 and 43 of the FOIA.
5. Following an internal review the Council wrote to the complainant on 18 June 2014. It confirmed that all information it held within the scope of the request related to funding and that it upheld its decision to withhold information on the basis of the cited exemptions.

Access regime

6. The Commissioner firstly considered if the requested information was environmental information within the meaning of regulation 2 of the Environmental Information Regulations 2004 ("EIR"). The information that has been withheld is information about the funding for a development scheme.
7. Regulation 2(1)(c) states that environmental information is:

"any information in any material form on:
 - a. 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;"*
8. The Brightwells scheme is a scheme to redevelop parts of Farnham. As such it is likely that any information on this scheme is information on a measure affecting one of the elements of the environment as the scheme will change the land in the area. The Commissioner accepts there may be some information within the correspondence which is not, in isolation, environmental information but he has considered this within the context of the information as a whole and as this is all correspondence on the Brightwells scheme between the developer and the Council, the Commissioner considers all of the withheld information is environmental information.

Scope of the case

9. The complainant contacted the Commissioner on 19 June 2014 to complain about the way her request for information had been handled. The complainant queried whether all the discussions would have related to funding as there were other issues of relevance to the development such as construction and relocation. The complainant was of the view that if there was other content to the discussions the exemptions may not be as relevant for withholding information.
10. During the course of the Commissioner's investigation the Council confirmed that it did not hold any agendas, telephone notes or contact notes relevant to the Brightwells scheme. Therefore the withheld information consisted of emails between parties discussing the development scheme. The Council accepted that some of the information within these emails could now be disclosed and provided redacted copies to the complainant. Information continued to be withheld on the basis of section 41, 43 and, in two cases, 40(2).
11. As the Commissioner considers the information to be environmental information and the Council has not provided arguments as to what exceptions it would apply if the case was considered under the EIR; the Commissioner has considered the information withheld under section 41 and 43 of the FOIA as being similarly withheld on the basis of regulation 12(5)(e) of the EIR.

Reasons for decision

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

12. The withheld information in this case consists of emails between the Council and Crest Nicholson or its solicitors, and internal emails within the Council on the funding of the Brightwells scheme. Some of the emails contain detailed financial breakdowns whilst others contain more general discussions on timescales and high level discussion on different funding options.
13. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
14. When assessing whether this exception is engaged the Commissioner will consider the following points:

- 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?

Is the information commercial or industrial in nature?

15. 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 a profit.
16. The Council considers that the information is of a commercial nature as it relates to a commercial activity – namely securing funding with a third party investor to undertake a major redevelopment project. The withheld information consists of confidential discussions on the funding options and timescales to allow the Council to obtain the best negotiated deal possible.
17. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity with a commercial gain for the development partners.

Is the information subject to confidentiality provided by law?

18. With regard 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.
19. The Council has explained that the information obtained from third parties relates to the funding of the Brightwells scheme. This information carries an express duty of confidence as it was of a commercial nature and there was an agreement between the parties that the information being discussed within the correspondence was to be kept confidential.
20. The Commissioner considers the Council is therefore relying on the information being subject to the common law duty of confidence. In establishing whether this is the case the Commissioner has taken into account the commercial nature of the discussions as well as the fact that the information was not trivial in nature as it related to a significant redevelopment project in its early stages. The Commissioner notes the information had not previously been made available and was disclosed

in circumstances where there is an implied duty of confidence due to the nature of the discussions and the parties involved.

21. Taking this into account the Commissioner is satisfied there is a common law duty of confidence, particularly where the information discussed in correspondence is related to funding options and provides a more detailed breakdown of potential costs. As such he is satisfied that the remaining withheld information was imparted in circumstances importing an obligation of confidence.

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 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.
23. The Council has argued that it is its own commercial interests that would be prejudiced by disclosure. Under the EIR the test is whether the confidentiality is designed to protect the legitimate economic interests of the person who the confidentiality is designed to protect, which in this case is the Council.
24. The Council explained at the time of the request it was in discussions in an attempt to obtain the best funding deal possible to fund the Brightwells scheme. Disclosure of the information relating to the basis for seeking a funding deal with third party investors would place the Council at a commercial disadvantage because the Council needs to be in a position to negotiate the best possible deal. The Council considers the basis on which it agrees its funding principals needs to remain confidential as if it were to come into the possession of potential funders they may seek to gain a financial advantage and, in turn, this would harm the Council's ability to secure the best financial deal for the Brightwells scheme.
25. To justify this proposed prejudice further, the Council has explained that there are campaign groups who have been active in lobbying the Council, Crest Nicholson and the Local Enterprise Partnership to withdraw from the scheme. The Council considers that disclosure of information on the funding of the scheme runs the very real risk of being used by campaign groups to put pressure on partners to the scheme and future lessees of the Brightwells development. For this reason the Council argues that the adverse impact on its commercial

interests is more than just a speculative argument and there is a strong possibility that harm would occur.

26. The Commissioner has also taken account of the timing of the request; it was received at a time when the Council was still involved in negotiations and discussions about funding. As such the commercial sensitivity of the information contained in the correspondence was high.
27. Taking this into account as well as the arguments put forward by the Council, the Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact on the Council's commercial interests, particularly its ability to negotiate with third parties to achieve the best value funding and to operate in a competitive environment. This would harm the legitimate interests of the Council and as such the Commissioner accepts that disclosure of the withheld information would prejudice the commercial interests of the Council.

Would confidentiality be adversely affected by disclosure?

28. As the first three elements of the test 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. 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 test

Public interest arguments in favour of disclosing the information

29. The Council does not consider there are public interest arguments in favour of disclosing information which is confidential and may result in a breach of the common law of confidence. However, the Council does acknowledge the general public interest in the disclosure of information which increases transparency in the way in which public authorities operate. The Council considers it is important for the public to have the opportunity to scrutinise the decision-making process in respect of the funding of the Brightwells scheme but at an appropriate time in the process.
30. The complainant has argued that the Brightwells scheme will have a large impact on Farnham town centre, including major redevelopment, changes to roads, construction and demolition of certain buildings. As such there is a strong public interest in the disclosure of information

which would enable the public to be reassured that the Council has handled the matter impartially and thoroughly.

31. The complainant has also cited the decision of the Information Tribunal¹ which related to a planned development by Bristol City Council. In this case the Council owned the site to be developed and the Tribunal found that this "*gave rise to a need for 'particular scrupulousness' on the part of the Council*". In this case the Council also owns part of the land which is part of the proposed development.
32. The complainant has also cited the National Planning Policy Framework (NPPF) which sets out the government's vision of how planning authorities should handle planning matters and states that "*local planning authorities should aim to involve all sections of the community in the development of the local plans and in planning decisions.*" The complainant therefore considers there is a need for the withheld information to be disclosed to enable the community affected by the proposed development to understand and participate in the Council's decision-making.

Public interest arguments in favour of withholding the information

33. The Council has argued that disclosure of the withheld information at this time would not be in the public interest as it would not be the appropriate time to open up discussions for public scrutiny of funding decisions. The Council states there will be opportunities for the public to scrutinise the Council's decision regarding funding of the Brightwells scheme once the funding agreement has been reached in principal and the Council's elected Councillors are asked to determine whether to proceed with funding on that basis. To disclose the information before this point would not be in the public interest as it would have an adverse effect on the funding discussions and the ability of the Council to effectively negotiate the best possible funding for the project.
34. The Council has stated that it has a Development Agreement with Crest Nicholson in relation to the development of the Brightwells scheme and disclosure of the withheld information would reveal commercially sensitive and confidential information which is subject to an express obligation of confidence under that Agreement. Therefore disclosure of the information would undermine the confidence that third parties have in the Council, affecting its negotiating position and its ability to obtain funding on the best terms. This would not be in the public interest.

¹ EA/2010/0012

Balance of the public interest arguments

35. The Commissioner has considered all these 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.
36. There is a particular public interest in the subject of the request in this case as it involves the redevelopment of Farnham town centre. This is likely to impact on a large number of local residents and businesses and therefore there is a public interest in the disclosure of any information relating to this scheme. The Commissioner usually attaches weight to the argument that disclosure of withheld information will help to engage the public and ensure transparency. He does so in this case but he also recognises there are counter arguments.
37. The Council has stated it does intend to provide the public with the opportunity to scrutinise the funding decisions at the point when it asks its Councillors to determine whether the funding option should be approved. The Commissioner accepts that the timing of the request is a factor when considering the public interest in disclosure; in this case the request was made at a point when discussions about funding were ongoing and the information was very sensitive and subject to implied, and in some cases, express expectations of confidentiality.
38. The Commissioner accepts that there is a public interest in allowing public authorities the time to discuss and negotiate on financial matters away from public scrutiny so as to allow for all options to be considered and the best value to be obtained.
39. The Commissioner recognises that disclosing information about funding whilst the process was still 'live' and funding arrangements were still being decided could have a detrimental impact on the interests identified in the exception. He does not consider it would be in the public interest to disclose information which could damage the public authority's commercial interests and its negotiating position in relation to this scheme and potential future schemes. This argument is further strengthened by the fact that campaign groups have previously lobbied potential funders and partners to the Brightwells scheme.
40. The Development Agreement between Crest Nicholson and the Council is important as it contains an express obligation of confidence. The Commissioner apportions some weight to this. Although it is not a legislative requirement for the Council to keep information confidential, the existence of the Development Agreement does require the Council to

keep commercially sensitive information confidential and there is a strong public interest in maintaining the confidentiality provided by law.

41. That being said, the Commissioner is mindful of the previous decisions of the Tribunal that where the Council in question owns part of the land which is being developed there is a particularly pressing need to be open to scrutiny to assure the public there is no misadministration or wrongdoing. This does add weight to the public interest in disclosure.
42. The Commissioner does accept that there is always a public interest in ensuring that public authorities are transparent and able to demonstrate they are acting appropriately and in the best interests of the public. It is important that public authorities are accountable for the decisions they make and the money they spend and generate.
43. 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 fact that at the time of the request discussions on funding were still live and there was an expectation of confidentiality, particularly in relation to commercially sensitive information discussed as part of funding options.
44. The Commissioner does accept that development schemes which plan to make significant changes to town centres do have an impact on local residents and communities and public authorities should be open and transparent about proposals. In this case, his decision is based on the fact that the specific information in question relates to funding options and not necessarily the development plans and has been made at a time when decisions had not yet been made. The Commissioner would expect the Council to be open and transparent as the Brightwells scheme progresses to allow for public scrutiny and input into the development and the Council has stated it does intend to provide opportunities for this to occur.
45. Therefore, the Commissioner is satisfied that, in response to this request at this time, the Council correctly withheld the information and he has determined the regulation 12(5)(e) exception was engaged and provided a basis for this.

Right of appeal

46. 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

47. 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.
48. 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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