

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

Date: 21 September 2017

Public Authority: Shepway District Council
Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information on Shepway District Council's ("the Council's") decision to enter into a collaboration agreement with Cozumel Estates Limited to develop a new town. The Council provided information including the Development Agreement but redacted some information from this on the basis of regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the regulation 12(5)(e) exception is engaged and the public interest favours maintaining the exception. She requires no steps to be taken.

Request and response

3. On 15 February 2017, the complainant wrote to the Council and requested information in the following terms:

"Please could you provide me with any recorded information held by SDC on

- *The record of the decision taken along with reasons for the decision*

- *Details of alternative options, if any, considered and rejected*
- *The date the decision was taken*
- *The title of the officer recording the decision and the reasons for the decision.*

To enter into a Collaboration agreement with Cozumel Estates Ltd (a British Virgin Island Registered company in a known secrecy and low tax jurisdiction), and the agreement itself."

4. The Council responded on 15 March 2017. It stated that the decision to enter into the agreement was taken by the Council's cabinet and provided a link to the minutes. The Council also provided an extract explaining the reasoning behind the arguments considered in reaching this decision and confirmed no alternative options were considered. The Council provided the agreement but redacted some information on the basis of regulation 12(5)(e) as it was considered to be commercially confidential.
5. Following an internal review of the decision to redact parts of the Initial Collaboration Agreement the Council wrote to the complainant on 13 April 2017. It stated that it upheld the decision to withhold the information from the Agreement by virtue of the exception from disclosure at regulation 12(5)(e) of the EIR.

Scope of the case

6. The complainant contacted the Commissioner on 19 April 2017 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the Council has correctly applied the provisions of regulation 12(5)(e) to withhold information from the Initial Collaboration Agreement.

Reasons for decision

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

8. The withheld information in this case is information from the Initial Collaboration Agreement between the Council and Cozumel Estates Limited ("Cozumel") relating to the proposed development of a new town. The Council purchased land at Otterpool Manor Farm so is the local planning authority and substantial landowner of part of the

proposed land to be used. Cozumel is the owner of the former Folkestone Racecourse which also lies in the area of the proposed new town. The information withheld from the Agreement is information relating to specific clauses and objectives in the Agreement.

9. 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.
10. 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?
11. The Commissioner considers that the withheld information is environmental information within the meaning of regulation 2(1)(c) of the EIR. She considers that the information is on measures, plans and activities likely to affect the state of the elements and factors mentioned in regulations 2(1)(a) and (b) EIR.
12. The complainant has argued the information is information on emissions and therefore regulation 12(5)(e) cannot be relied upon as a basis for withholding the information. Regulation 12(9) will only apply where information is directly linked to emissions. The withheld information is limited detail on options considered as part of the Development Agreement which are not widely known to the public. The Commissioner does not consider this to be, in itself, information on emissions and does not accept that regulation 12(9) excludes the Council from applying the regulation 12(5)(e) exception in this case. She has therefore gone on to assess the Council's use of this exception.

Is the information commercial or industrial in nature?

13. 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.

14. The Council considers the information is of a commercial nature as it relates to a commercial activity – namely negotiations with landowners to facilitate the proposed new development. The Council argues the information that is being withheld from the Agreement is commercial in nature as it relates to the ability of the Council to achieve its objective of securing a commercially viable comprehensive development of the Otterpool site and achieving a commercial return from the development.
15. 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?

16. 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.
17. The Council has explained that there is a confidentiality clause in the Agreement – clause 15. However, the Council also points to clause 20 which states that it cannot contract out of its obligations under the FOIA. However, it still considers that there is a binding confidentiality clause covering the withheld information and that therefore the confidentiality is provided by law and that clause 20 does not affect this.
18. The Commissioner considers the Council is relying on the information being subject to a common law of confidence. As it points out, clause 20 states that any confidentiality clauses do not prevent information from still being considered under information access regimes. That being said, the inclusion of a confidentiality clause does demonstrate the information in the Agreement carries an implied duty of confidence with it. The Commissioner has also taken into account the commercial nature of the information between the Council and its development partner as well as the fact the information is not trivial in nature as it relates to a significant development project in its early stages. The Commissioner notes the information has not previously been made available and information provided that fed into the Agreement was done with an implied duty of confidence due to the nature of the Agreement.
19. Taking this into account the Commissioner is satisfied there is a common law duty of confidence, particularly where the information relates to the consideration of options and obligations. As such she 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?

20. 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.
21. The Council has argued that it is its own and Cozumel's 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 and Cozumel.
22. The Council explained that Cozumel were consulted about the request and confirmed they were strongly of the view their economic interests would be harmed by disclosure. It argued that disclosure would seriously compromise its ability to effectively and competitively negotiate options to purchase land in and around the area and engage in other negotiations for the purpose of its business interests.
23. At the time of the request negotiations on options were in progress. The Council states these negotiations were intended to be confidential and the options which are primarily the subject of the withheld information are part of achieving a commercially viable comprehensive development as well as an acceptable commercial return. Therefore disclosing this information could prejudice the commercial interests of all parties involved.
24. To justify this proposed prejudice further, the Council has explained that the proposals have not been without controversy in the local area. If ambitions regarding options were known it could affect the way negotiations are approached and even the willingness of potential partners to enter into negotiations at all. Not only this but both the Council and Cozumel would be placed at a disadvantage if the extent of their proposals is known as negotiations would take place where third parties would have information they would not otherwise have known.
25. The Commissioner has also taken account of the timing of the request; it was received at a time when the Council and Cozumel were still involved in negotiations and discussions about options. As such the commercial sensitivity of the information was high.
26. 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 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 and Cozumel as development partners.

Would confidentiality be adversely affected by disclosure?

27. 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. She 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

28. The Council recognises there is a significant interest in the major development of a new town. It also recognises the proposals are controversial and unpopular with certain parts of the local community. It highlights the fact it is acting in two capacities – as the local planning authority and a landowner – and this could be seen as a conflict of interest; there is consequently a greater degree of transparency needed.
29. The complainant has pointed out there is a statutory duty to record decisions as set out in Regulation 7 of The Openness of Local Government Bodies Regulations 2014. The complainant considers disclosing this information would demonstrate the Council is complying with this statutory duty and this would be in the public interest.
30. The complainant also highlighted a number of decisions of the Information Tribunal to support his position that disclosing the information would not result in any harm to any of the parties involved.
31. He also argues that the site and its proposed development has produced emissions and will create emissions in the future and the Agreement directly relates to the proposed development. There is a public interest in information which shows the full development plans when this will impact on emissions.
32. The complainant believes the price paid by the Council for the land holding was above the normal rate for agricultural land and it is also widely known that it intends to build a new town on this land. He

therefore argues it is not reasonable to argue that disclosing the redacted information would affect the negotiating position of the Council as third parties from whom the Council and Cozumel may want to purchase additional land would already be aware the Council paid over the odds for land.

Public interest arguments in favour of withholding the information

33. The Council argues that it is in the public interest that it is able to function effectively in a commercial environment. As a public authority it is necessary to be able to negotiate the best possible financial deals to protect the public purse and provide the best possible service.
34. The Council is also of the view that the public interest in transparency around the Otterpool Park development has been met by the disclosures already made and the information it has made public.
35. Finally, the Council believes disclosing this information would undermine its relationship with Cozumel as a development partner of the Council. The Council considers it may affect its future relationships with development partners as disclosure could lead to reluctance to share confidential information.

Balance of the public interest arguments

36. The Commissioner has considered all these arguments. She 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.
37. There is a particular public interest in the subject of the request in this case as it involves the proposed development of a new town. This is likely to impact on a large number of individuals who live in areas close to the proposed Otterpool Park as well as impacting on the farm and other land which has been bought and will be used for the development. Therefore the Commissioner recognises the public interest in the disclosure of any information relating to this development. The Commissioner usually attaches weight to the argument that disclosure of withheld information will help to engage the public and ensure transparency. She does so in this case but she also recognises there are counter arguments.
38. The Commissioner accepts 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 the Council states options were still being considered. Although the decision to go ahead with the development

appeared to have been finalised the Council was still discussing the finer details of this with Cozumel. The Council has disclosed the majority of the Agreement in recognition of the need to be as transparent as possible on a major project with implications for the local area. The information it continues to withhold is not substantial but is only that which the Council considers to be most sensitive and most likely to have a commercial prejudice to its continued negotiations and future negotiations with third parties.

39. The Commissioner accepts that there is a public interest in allowing public authorities the time to discuss and negotiate on matters away from public scrutiny so as to allow for all options to be considered and the best value to be obtained.
40. The Commissioner recognises that disclosing this information whilst the issue still 'live' and options were still being evaluated could have a detrimental impact on the interests identified in the exception. She 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.
41. The Agreement does contain 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 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.
42. That being said, the Commissioner is mindful of the previous decisions of the Information 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.
43. 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.
44. 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 she has placed considerable weight on the fact that at the time of the request discussions about options were still live and there was an expectation of

confidentiality, particularly in relation to commercially sensitive information discussed as part of this.

45. The Commissioner does accept that the development of a new town that will impact on local residents and communities will require public authorities to be open and transparent about proposals. In this case, her decision is based on the fact that the specific information in question that is being withheld is related to the discussion of specific options and objectives and does not assist in explaining how the Council decided to go ahead with the plans in general but may instead have a detrimental impact on the Council's ability to secure best financial deals going forwards.
46. Therefore, the Commissioner is satisfied that, in response to this request at this time, the Council correctly withheld the information and she has determined the regulation 12(5)(e) exception was engaged and provided a basis for this.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Jill Hulley
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