

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

**Decision notice**

**Date:** 18 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 from Shepway District Council ("the Council") about a planning application relating to land at Princes Parade.
2. The Council informed the complainant that it did not hold some of the requested information, and refused to provide the remainder, citing EIR Regulations 12(4)(d) – material in the course of completion, 12(5)(d) – confidentiality of proceedings and 12(5)(e) – confidentiality of commercial or industrial information.
3. The Commissioner's decision is that the Council is entitled to rely on Regulation 12(5)(d) for that information within the scope of the request which is withheld.
4. No steps are required.

**Background to the request**

---

5. The Council is seeking to redevelop an area of land it owns at Princes Parade, Seabrook, Hythe for residential and leisure uses. In particular it

is seeking to build a new leisure centre (including swimming pool) on the site to replace the Council's over forty year old pool nearby.

6. On 7 February 2017 the Council's cabinet considered a report on the planning application to be submitted in respect of the development at Princes Parade. The cabinet resolved (amongst other things):-

*"That, should planning permission be granted, then the full business case and financial appraisal should be considered by Cabinet prior to any building work proceeding, subject to Cabinet's authority to do so".*

This decision has recently been affirmed by the cabinet on 19 July 2017.

7. The documents withheld in this case comprise a number of viability reports, which will be used to prepare the business plan and financial appraisal that will allow the cabinet to take a decision on whether to proceed with the project.

## **Request and response**

---

8. On 12 April 2017 the complainant wrote to the Council via the WhatDoTheyKnow website and requested the following information:

*"Please provide the following information via the WhatDoTheyKnow website:*

*1. Detailed cost estimates for building and running a leisure centre on Princes Parade as derived by the council or received from its contractors during the period to 1 Sept 2015 to 11 April 2017. The data being requested should include a breakdown of all cost elements for the leisure centre.*

*2. The assumptions made in deriving the above estimates.*

*Specific data being requested includes, without being limited to:*

*a. The so-called "back of the fag packet viability appraisal" (Email Tibbalds to SDC dated 12 Sept 2016 refers),*

*b. Abnormal costs, such as for moving the road, upgrading the existing road, and relocating the rising main (Email Tibbalds to SDC dated 12 Sept 2016 refers),*

*c. All Infrastructure costs (e.g. sewers and Sustainable Urban Drainage Systems),*

*d. All data provided by Savills relating to the Princes Parade project, including the high level viability assessment,*

*e. All data provided by cost consultants, Betteridge and Milson, relating to the Princes Parade project.*

*For the avoidance of doubt, please ensure that all the relevant information provided to the council by other parties in the form of email attachments, or using private email addresses or through any other indirect means, are included within your response. It is known, for example, that some of this data has been provided by contractors, who had access to the "box" facility used extensively by Tibbalds to exchange data with the council."*

9. The Council provided its response on 11 May 2017, in which it refused the request for information relating to the cost of running the centre (included in part 1 of the request) on the basis of EIR Regulation 12(4)(a) - it does not hold the information. In respect of the remaining information, the Council refused the request, citing EIR Regulations 12(4)(d) – material in the course of completion, 12(5)(d) – confidentiality of proceedings and 12(5)(e) – confidentiality of commercial or industrial information.
10. On 21 May 2017 the complainant requested an internal review of the Council's decision. He accepted that the Council did not hold information relating to the running of the centre and so did not seek a review of this part of the Council's decision, however asked for a review of the decision to refuse his request for the remaining information relating to the cost of building the centre.
11. The Council provided its internal review on 15 June 2017 and upheld its decision to refuse these parts of his request on the basis of EIR Regulations 12(4)(d), 12(5)(d) and 12(5)(e).

## **Scope of the case**

---

12. The complainant contacted the Commissioner on 5 July 2017 to complain about the way his request for information had been handled, and asked the Commissioner to encourage the Council to respond to his request fully.
13. The Commissioner considers that the scope of the case is whether the Council was correct in its decision to withhold information under EIR Regulations 12(4)(d), 12(5)(d) and 12(5)(e).

## Reasons for decision

---

### Regulation 12(5)(d) – confidentiality of proceedings

14. The Council provided the Commissioner with a copy of the withheld information and confirmed that Regulation 12(5)(d) applied to the entirety of the withheld information.
15. Regulation 12(5)(d) states that a public authority may refuse to disclose information if to do so would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
16. The first condition is that the proceedings in question are relevant to this exception. The proceedings in question in this case are the proceedings of the Council. The term 'proceedings' is not defined in the Regulations but the Commissioner considers it would cover the proceedings in question in this case, namely a Cabinet meeting at the Council to consider the development of Princes Parade.
17. The second condition that has to be satisfied when applying Regulation 12(5)(d) is that those proceedings are protected by confidentiality provided by law. The Council argued that the relevant statutory provisions are the Local Government Act 1972 ("LGA"), the Local Government Act 2000 and the Local Authorities (Executive Arrangements)(Meetings and Access to Information)(England) Regulations 2012 ("the 2012 Regulations"). At the time of the request the Council intended that the business plan and financial appraisal, which will be drawn from information contained in the withheld documents, would be considered by the Cabinet of the Council at a meeting. The meeting will therefore be a formal meeting of the Cabinet called and conducted in accordance with the statutory provisions and the Council's constitution.
18. The Council referred to Regulation 4(2) of the 2012 Regulations which states that the public can be excluded from the meeting of the executive (or cabinet) of the Council if:
  - "exempt information" as defined by section 100I and schedule 12A of the 1972 Act is likely to be discussed; and
  - The meeting passes a resolution to exclude the public.
19. One of the categories of exempt information relates to "the financial or business affairs of any particular person (including the authority holding that information)". The Council argued that the business plan and

financial viability, which will be based upon the withheld information, fall within this category, therefore confidentiality of proceedings are protected by law.

20. The complainant argued that in applying the above provision the Council has failed to recognise the over-riding qualification imposed by paragraph 9 of Schedule 12A of the LGA that applies in this case, namely that "*information is not exempt information if it relates to proposed development for which the local planning authority may grant itself planning permission pursuant to regulation 3 of the Town and Country Planning General Regulations 1992*". Neither therefore can it be classified as an exception under the EIR.
21. The complainant submitted that the Cabinet will be discussing a report relating to a planning application that the local authority will have submitted to itself. That meeting therefore cannot legally be held in private since, in accordance with the LGA (as amended), the information will not be 'exempt'. This reason for refusing release of the requested information is therefore not legally valid.
22. In response to the complainant's assertion, the Council agreed it is correct to say that information is not 'exempt' information if it relates to proposed development for which the local planning authority may grant itself planning permission pursuant to regulation 3 of the Town and Country Planning General Regulations 1992. It confirmed that any determination in relation to the planning application will be held in a public session of the Cabinet. However, the financial costs of building the centre are a separate matter and *can* be exempt information. Indeed, the Council has provided the Commissioner with a copy of the Cabinet minutes dated 7 February 2017 where it was resolved that "should planning permission be granted, then the full business case and financial appraisal should be considered by Cabinet prior to any building work proceeding.....". Furthermore, a report to the Cabinet dated 19 July 2017 affirmed this decision and stated that Cabinet will "take a decision on whether to proceed with the implementation of the project, later in the year, after the planning application has been determined".
23. Following her own guidance, the Commissioner is satisfied that the confidentiality of the proceedings in question is protected by law. On the basis of the submissions of the Council, the Commissioner understands that the Council meeting to make a determination on the planning application (where the Council is acting as the local planning authority) is distinct from any subsequent meeting to discuss the financial viability of the project (where the Council is in the role of applicant/developer of the site). In respect of the former meeting, the Commissioner agrees with the complainant that paragraph 9 of Schedule 12A of the LGA

would prevent the Council from claiming an exemption under the LGA. However, the 'proceedings' referred to by the Council relate to a separate meeting whereby the financial viability of the development will be considered prior to commencement of any building work.

24. The Commissioner agrees that paragraph 9 of Schedule 12A of the LGA would not be applicable to this meeting and so the exception under EIR Regulation 12(5)(d) can, in principle, apply in this case.
25. The important point to note here is that the exception, where applicable, protects the proceedings and not the information. The Council set out arguments as to why disclosure would adversely affect the confidentiality of the proceedings. It said that the meeting will discuss the business plan and financial viability, which will be drawn up from the information contained in the withheld documents, and councillors will be able to test the content of that report by questioning officers of the Council. The business plan and financial viability needs to be considered at a private meeting because release of the information would have an adverse effect on the commercial ability of the Council to achieve its proposals for the site. Disclosure of the withheld information in advance of the private meeting would adversely affect the confidentiality of the proceedings.
26. The Commissioner considers that the LGA and associated regulations sought to strike a careful balance between public access to information held by public authorities and protecting confidential proceedings to allow public authorities to make fully informed decisions, particularly if the information itself is confidential. The Commissioner is persuaded by the Council's arguments and is therefore satisfied the exception is engaged with respect to the withheld information.

*Public interest test*

27. Regulation 12(5)(d) is subject to the public interest test by virtue of Regulation 12(1). The Council can only rely on this exception where the public interest in doing so outweighs the public interest in disclosure. By virtue of regulation 12(2) a public authority shall apply a presumption in favour of disclosure when considering the balance of public interest.

*Public interest in factors in favour of disclosure*

28. The complainant's position is that the Council has repeatedly demonstrated an over-riding unwillingness to be transparent about the details of this project. He states the project is complex and of high risk (technically and financially); the local community have well founded concerns that the planned approach will fail to deliver the necessary

facilities and is likely to place Council tax money at risk. He says the public are seeking information to determine what financial provisions are being made to overcome these issues. He feels that the individual documents that act as inputs to the overall viability assessment contain key matters of detail that will advance the public understanding of the project by the public's experts.

29. The complainant advised that Princes Parade is a difficult landfill site, with strong heritage implications and a range of other technical issues which places this much used public amenity at risk of serious irreversible impact if the Council fails to "get it right". Withholding key data precludes the public from properly engaging in the planning process for an application that the Council plans to submit to itself. In view of this the complainant states that this project requires a high degree of transparency and the Council's refusal to exercise full transparency is unreasonable and not balanced by any evidence that the authority would sustain tangible damage if the information were disclosed.
30. The Council acknowledges a public interest in transparency and that the public wish to know how decisions are made and on what basis.
31. The Council recognises that proposals for Princes Parade have attracted opposition from some local residents and that a development of this scale and nature will be of interest to the public. The development will have lasting impact upon the character of the area and in the leisure centre; the Council will be constructing a facility that will entail a long term commitment in running it. In addition the Council will be devoting substantial resources both in terms of money and staff time to deliver the project.
32. Furthermore, the fact that the Council is both the applicant for planning permission and the local planning authority which will consider the application in this case reinforces the need for the Council's decision and processes to be transparent. Although the two roles are being kept separate the Council feels some will be suspicions that the Council will "bend the rules" to achieve its objectives.

*Public interest in maintaining the exception*

33. The Council has made reference to the Commissioner's own guidance which states that "the public interest must arise from the need to protect the proceedings that would be adversely affected by disclosure". The 2012 Regulations provide that the cabinet can lawfully exclude the public from meetings in defined circumstances. The Council contends that the Cabinet must be able to consider the business plan and financial appraisals in private. Disclosure of the documents would remove the

justification from excluding the public. The meeting would therefore be open to the public and disclosure of the information would adversely affect the Council's position and call into doubt its ability to deliver the project.

34. The information contains commercial information, which if revealed would be detrimental to the Council's interests. In addition the decision makers will need to discuss the development, exploring options and perhaps "thinking the unthinkable". The proposals are opposed by some and the decision makers need the "safe space" of confidentiality to discuss the issues.

*The Commissioner's conclusion*

35. The Commissioner recognises there is a compelling public interest in understanding as much as possible about how the Council has made decisions in this matter. She also recognises the complainant's arguments about the need for transparency, particularly in circumstances where the project involves developing a difficult site, at substantial cost (together with ongoing running costs) and at the expense of the public purse. Disclosure could serve the public interest in understanding how the Council is addressing this. The Council accepted that there was a public interest in the public knowing how it is reaching its decisions.
36. However, the Commissioner finds the Council's arguments in favour of the exception more compelling in this case. There is a public interest in maintaining the balance between public access and confidentiality of proceedings that is set out in the LGA. The Commissioner also understands that the matter, namely discussions and negotiations around the proposed development, was still live at the time of the request. Live discussions are, in the Commissioner's view, particularly worthy of greater confidentiality.
37. The need for confidentiality is important to many aspects of society including public administration and commercial activities. In the Commissioner's view, it should not be undermined lightly.
38. On balance, the Commissioner finds that there is some public interest in releasing information that would shed light on the Council's decision making processes. However, there is a weightier public interest in the Council having the opportunity to consider the information in question in confidential proceedings. The Commissioner finds that the exception provided by regulation 12(5)(d) can be maintained in the public interest in respect of the withheld information.

39. Having concluded that the Council is entitled to rely on regulation 12(5)(d) as a basis for withholding the information she has not gone on to consider the Council's application of EIR Regulations 12(4)(d) and 12(5)(e).

## **Right of appeal**

---

40. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**