

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

Decision notice

Date: 6 March 2019

Public Authority: Basingstoke and Deane Borough Council
Address: Civic Offices
London Road
Basingstoke
Hampshire
RG21 4AH

Decision (including any steps ordered)

1. The complainant has requested information regarding the redevelopment of Basingstoke Leisure Park.
2. The Commissioner's decision is that Basingstoke and Deane Borough Council correctly relied upon regulations 12(5)(b) and 12(5)(e) to withhold some of the requested information. The Commissioner finds that the council have breached regulation 5 of the EIR in relation to one item of information however she finds, on the balance of probabilities, that it does not hold any further recorded information in scope of the request. The council changed its response at the internal review stage and in response to the Commissioner's investigations, therefore the Commissioner finds that the council failed to issue an adequate refusal notice and thus breached Regulation 14 of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation: disclose the stage 1 evaluation matrices.

Request and response

4. On 8 January 2018 the complainant requested information from Basingstoke and Deane Borough Council ('the council') in the following terms [numbering added by ICO]:

"Under the Freedom of Information Act 2000 and the Environmental Information Regulations, please provide us with the following documents in full:

[1] The full suite of original procurement documents from the original procurement undertaken in 2013 including but not limited to the Invitation to Negotiate and all appendices such as draft contract and documentation relevant to the scope and character of the development.

[2] The evaluation matrices produced for all bidders which resulted in NRR being appointed preferred bidder in the original procurement including the criteria used to score bidders and the sub-criteria. In particular we wish to know what weight was placed in the original procurement on the nature of the retail offering.

[3] Any and all Council documents produced which describe the project as offered by NRR, both prior to the April 2016 decision and since then, specifically dealing with changes to the project as advertised.

[4] The current draft Development Agreement and appendices as the Council intends to sign with NRR."

5. The council responded on 6 February 2018 and provided some information within the scope of the request but refused to provide the remainder. Specifically in relation to each item the council:

[1] provided documents "Basingstoke Leisure Park Brochure (Invitation to Submit Outline Proposals" and the "Invitation to Submit Detail Proposals (ISDP) including Outline Heads of Terms";

[2] referred to information in the documents provided in [1];

[3] refused the request citing the exception at EIR regulation 12(4)(b) – manifestly unreasonable

[4] refused the request citing the exceptions at regulation 12(5)(e) – commercial confidentiality, and regulation 12(4)(d) – unfinished documents.

6. Following an internal review the council wrote to the complainant on 10 August 2018, regarding each item it:
 - [2] provided a copy of the Invitation to Submit Detailed Proposals ("ISDP") evaluation of the supplier New River Retail ("NRR") and stated that at this stage NRR were the only bidder;
 - [3] advised that *"NRR submitted a revised scheme. Legal advice was sought on this and this information is subject to legal professional privilege and exempt under Regulation 12(5)(b). The matter of the revised scheme was discussed by Cabinet on 12 April 2016, the report for which can be found on the council's website"* (link provided);
 - [4] maintained its original position, citing regulations 12(5)(e) and 12(4)(d).
7. Following the Commissioner's investigation the council identified that it holds further information in scope of [2], being the *"Evaluation Commentary from ISDP, Stage 2 of the procurement exercise which contains the Council's detailed comments on the evaluation of the NRR bid."* The council stated it originally considered the scope of question [2] to be focussed only on the scores, criteria, sub-criteria and weightings of the evaluation. The council's position is that the exemption at regulation 12(5)(b) – legal privilege, applies to all the information in the *"Evaluation Commentary"* and also that regulation 12(5)(e) – commercial confidentiality, applies to part of the information.

Scope of the case

8. The complainant contacted the Commissioner on 26 June 2018 to complain about the way his request for information had been handled. Specifically *"the repeated refusal to disclose information requested in this matter, most notably the Development Agreement... and also documents relevant to the original procurement process which should also be in the public domain to allow proper scrutiny of the Council's decisions."*
9. The complainant confirmed that although item [1] was not covered in the internal review, the complaint includes this element of the request.
10. The complainant maintains that the council have not provided all information, or given adequate refusal notice for items in scope of [2] and [3].

11. The complainant disputes the council's application of regulation 12(5)(b) to withhold information in scope of [3].
12. The Commissioner has previously reached a decision regarding item [4] the "*Development Agreement*." In Decision Notice FER0722834¹ the Commissioner found that the exception at regulation 12(5)(e) is engaged in respect of the withheld information. She also found, with due consideration of the timing of the request in relation to the commercial negotiations, that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception. The Commissioner upholds the decision made in FER0722834 in relation to item [4] as the commercial negotiations were ongoing at the time of this request.
13. The Commissioner considers the scope of this case is to establish whether the council has provided all information, or given adequate refusal notice for items in scope of [1], [2] and [3]. Furthermore whether it correctly engaged the exception cited at regulation 12(5)(b) to withhold information in scope of item [2] and [3]. If it has, then she will consider where the balance of public interest lies. If she finds that the council cannot withhold [2] on the grounds of regulation 12(5)(b) she will go on to consider the case for withholding information on the grounds of regulation 12(5)(e).

Background

14. The complaint has been raised by Bryan Cave Leighton Paisner LLP ('BLCP') on behalf of AEW Europe LLP ('AEW'). BLCP are representing AEW in legal proceedings against the council.
15. The council advises "*that legal proceedings have been brought against the Council by AEW Europe LLP (AEW) challenging the procurement process (resulting in the award of a contract to redevelop the Leisure Park) to which these requests relate.*" The legal proceedings are taking place in the Technology and Construction Court ('the TCC').

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2260276/fer0722834.pdf>

16. Furthermore the council advised that some of the requested information is included in a disclosure process as part of these legal proceedings. *"Due to the sensitive nature of many of the documents relevant to the claim brought by AEW, the complainant, BCLP and their clients, AEW, agreed to provide confidentiality undertakings in order to form two confidentiality rings which have been approved by the Court. The confidentiality rings enable a controlled and confidential disclosure of sensitive documents as part of the legal proceedings."*
17. The council advises that there is an inner ring of disclosure where documents are shared confidentially between *"solicitors of the complainant, BCLP, and the barristers they have instructed for the claim only."* The outer ring of disclosure enables confidential disclosure between *"two in-house lawyers at AEW and two non-legal clients from AEW."*
18. The council advised the Commissioner which documents have been released within the confidential disclosure process.

Reasons for decision

Section 1 of the FOIA – General right of access to information held by public authorities

Regulation 5 – Duty to make environmental information available on request

19. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.
20. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

Request item [1]

21. In the response to the request the council provided the documents: "*Basingstoke Leisure Park Brochure (Invitation to Submit Outline Proposals*" and the "*Invitation to Submit Detail Proposals (ISDP) including Outline Heads of Terms*". It also provided a link to the Montagu Evans BLP marketing site, which was live at the time of the request, which the council states holds the full suite of procurement documents.
22. The complainant confirmed their position regarding [1] to the Commissioner: "*We have received from the Council various documents relating to the original procurement including the original contract notice, the invitation to submit development proposals, the detailed submissions brief...However, as the documents have not been provided to us in direct response to our specific request to the Council, we do not know if there are any other documents also falling within that description that have not yet been provided to us.*"
23. The council explained "*When carrying out a procurement the Council has a set procedure which it follows in order to ensure that it complies with the Public Contracts Regulations (now 2015, but at the time of request 2006) and all other relevant legislation and guidance as may be in force. As part of the procurement procedure the Council issued a notice in the Official Journal of the European Union which was publicly available. This notice gave the contact points from which the full suite of original procurement documents could be obtained in order that a person may submit a tender. Therefore, by nature of the procurement process only the documents that were available to the public in this way can be considered to be part of the "original procurement documents". It also follows that these documents have all been released into the public domain and cannot be considered to be withheld by the Council.*"
24. The council confirmed that "*there were no draft contracts or other documentation relevant to the scope and character of the development within the original procurement documents.*"
25. The council explained that all documents within the scope of the request have been released as part of the procurement exercise therefore it did not need to carry out further searches for other information held or deleted. However it had contacted the Procurement and Contract Manager at the time of the request who had provided the information released in response to [1]. It did not need to undertake further electronic or manual searches as the original procurement documents "*are held electronically on the Council's system and published as part of the Montague Evans data room.*" It confirmed that no information in scope of the request has been deleted.

26. The Commissioner reviewed the Montagu Evans BLP marketing site, and found that it holds the documents described by the council.
27. The Commissioner considers that the council has given a reasonable explanation regarding its position that no further information is held in scope of [1]. Furthermore she has not been provided with evidence to counter this position.
28. The Commissioner is therefore satisfied that, on the balance of probabilities, no other information is held within the scope of [1].

Request item [2]

29. The council advised there were two stages to the procurement exercise, stage 1 being the Invitation to Submit Outline Proposals ('ISOP') and stage 2 the Invitation to Submit Detailed Proposals ('ISDP'). Two bidders remained in the competition following stage 1, however only one, New River Retail ('NRR') submitted a response for stage 2. NRR were appointed as preferred bidder following the stage 2 evaluation therefore *"the Council does not consider the Stage 1 Evaluation Matrices to be within the scope of the claimant's request."*
30. The council confirmed that it only holds one stage 2 evaluation matrix, being for NRR, and that this was provided to the complainant as an outcome of the internal review.
31. Following the Commissioner's investigation the council have identified that the evaluation commentary, which supports the NRR stage 2 evaluation matrix, could also be considered in scope of the request. It cites exceptions at regulations 12(5)(b) and 12(5)(e) for withholding the evaluation commentary, which the Commissioner considers further on in this decision notice.
32. The council advises that it holds a further evaluation matrix, which was completed as the result of some revisions to the NRR proposals. The purpose of this evaluation was to ensure that the updated proposals still met the council's objectives for the project. The council states that it does not consider this evaluation to be in-scope as it was *"internal checking exercise only, and NRR had already been appointed preferred bidder at the conclusion of stage 2."*
33. The council advised the Commissioner that no further information is held, for the reasons explained above, nor has been deleted.
34. The Commissioner is not swayed by the council's argument that stage 1 evaluation matrices are out of scope of the request. She assumes that other bidders could have been excluded at this stage and therefore

considers that both stages of the procurement exercise contributed to the outcome of NRR being appointed preferred bidder.

35. The Commissioner finds that the council have breached regulation 5(1) of the EIR in relation to the stage 1 evaluation matrices. As such the council should disclose the stage 1 matrices.
36. The Commissioner accepts that the evaluation carried out on NRR's updated proposals is not caught within the scope of [2].
37. Other than the additional documents already identified by the council, and the stage 1 evaluations, the Commissioner has no evidence that further information is held in relation to [2].
38. The Commissioner is satisfied, on the balance of probabilities, that no other information is held within the scope of [2].

Request item [3]

39. The council's advises that *"BCLP's clients contend that the revised development proposal put forward by NRR constitutes a change to the project as originally advertised by the Council in breach of the procurement rules"*. However its states it is *"the Council's position, which will be reflected in its Defence to the Claim subsequently brought by BCLP's clients in the TCC proceedings, that there have been no changes to the project as advertised by the Council and therefore the contract awarded by the Council to NRR is within the scope of the project as originally advertised and within the procurement rules. Although there have been changes to the nature of the proposals put forward by NRR following their appointment as preferred bidder at the conclusion of Stage 2, those changes do not in the Council's view result in changes to the project as advertised by the Council and do not constitute a breach of the procurement rules."*
40. The council states that it interprets the request as regarding changes to the project as advertised by the council and not for *"information dealing with all changes in the project offered by NRR."* Therefore it concludes that no information is held.
41. In the Commissioner's view, the phrasing of [3] results in a narrow scope which is limited to documents *"specifically dealing with changes to the project as advertised."*
42. The Commissioner has considered the councils position that there had been no *"changes to the project as advertised"*. In the absence of evidence to the contrary, and in light of the narrow scope of [3], she

finds the council's reasoning that no information is held to be a plausible conclusion.

43. As such, the Commissioner finds, on the balance of probabilities, that no information is held in-scope of [3].

Regulation 12(5)(b) – course of justice

44. The council states that the exception applies to:

- *"The Evaluation Commentary, if the Commissioner considers this falls within the scope of request [2]"*

45. Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect:

- the course of justice;
- the ability of a person to receive a fair trial; and
- the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

46. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception;
- disclosure would have an adverse effect on one or more of the factors cited; and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

47. In this case the council confirmed that it is relying on the exception provided by the first limb of the regulation, namely, the course of justice.

48. The Commissioner's guidance on regulation 12(5)(b)² states that course of justice has a wide meaning and public authorities may wish to consider claiming this exception when they get requests for:
- court or tribunal records;
 - material covered by legal professional privilege ('LPP'); and
 - Information whose disclosure would prejudice investigations and proceedings of either a criminal or disciplinary nature.
49. For the exception to be engaged its disclosure must have an adverse effect on the course of justice. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test.
50. The term 'would have an adverse effect' is taken to mean that it is more probable than not that the adverse effect would happen.
51. The council explained that the pre-action protocol applicable to the legal proceedings had been initiated prior to the request therefore it was clear there was a *"very real risk of legal proceedings being brought against the Council in relation to the procurement of the Leisure Park by BCLP's clients AEW."*
52. The council is claiming that the disclosure of the Evaluation Commentary [2] would prejudice the TCC proceedings. The disclosure would adversely affect its ability to defend itself in legal proceedings and would circumvent the principles that apply to the disclosure of documents and the civil procedure rules the purpose of which is to:
- control the timing and method of disclosure of information to ensure it is fair to both parties and in-line with the timetable for the proceedings;
 - establish whether the requested information should be disclosed at all. *"As such the extent of the Council's obligations to disclose information would also have been the subject of arguments to be made to the Court."*

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

53. The council states that *"Early disclosure of documents, or disclosure of documents in an uncontrolled manner which did not respect the sensitivity of the contents, would seriously undermine the Council's ability to defend itself in the court proceedings as it would not have had the chance to fully assess any legal implications of such disclosure on its defence of the proceedings, putting it at a significant disadvantage in the preparation of its defence and providing the other party with a significant advantage in the preparation of its claim."*
54. The council confirmed that the Evaluation commentary [2] was subject to the disclosure process at the time of the Commissioners investigation. However it also explained that this can change at any time, as the position of all documents is not fixed and may change as required whilst the litigation proceeds.
55. The Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception.
56. The Commissioner has considered the council's arguments and the withheld information [2]. She is satisfied that the information is clearly relevant to the live legal proceedings and that uncontrolled disclosure would adversely affect the course of justice. It would disclose information in an uncontrolled way at a particularly sensitive time during the dispute putting the council at a disadvantage as well as circumventing legal process.
57. The Commissioner is therefore satisfied that the council is entitled to engage the exception at regulation 12(5)(b) in respect of the Evaluation commentary [2]. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest test

58. In common with all EIR exceptions, the exception at regulation 12(5)(b) is subject to a public interest test. Therefore, the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

Public interest arguments in favour of disclosing the requested information

59. The complainant put forward arguments to the Commissioner in support of the complaint, which could therefore apply to the public interest in the disclosure of [2]:

- *"It is AEW's view that the agreement signed is not that which was originally advertised and the Council has acted in breach of both procurement and state aid law;*
- *AEW should and could have influenced the direction of any new procurement to ensure the Council's own requirement of non-competition with the town centre was met and/or could have tendered for any such opportunity in a way which would have complimented the town centre offer;*
- *Public interest in the council being open and transparent about the terms on which it tendered a development opportunity."*

60. The council identified:

- *"It is accepted that there is a general public interest in the transparency of environmental information;*
- *In this case, there has been a significant public interest in the scheme, particularly as it relates to residents of the borough both in terms of provision of leisure and shopping facilities; the potential for increased income into the town and jobs whilst the scheme is in development and in the new development itself."*

Public interest arguments in favour of maintaining the exception

61. The council put forward arguments that:

- *"the public interest in maintaining this exception in the circumstances of this particular case is strong due to the fundamental importance of the general principle of upholding the administration of justice. In this case, the Council has since agreed to the limited disclosure of certain information covered by the 8 January 2018 request as part of the legal proceedings on the basis of the confidentiality undertakings provided by AEW in order to protect the sensitive content of the information from disclosure to the public at large.*
- *There are rules and procedures for standard disclosure in legal proceedings once the particulars of claim have been filed by a Claimant and the Respondent has filed their defence. It is not in the public interest to undermine or evade civil procedure rules and Court procedures by forcing one party to disclose information*

which may be relevant to the other party's claim in circumstances when (i) litigation is clearly contemplated and (ii) relevant disclosure will in any event be ordered by the Court seised of the litigation which will therefore take place in accordance with those rules in a manner which will ensure a level playing field is maintained."

Balance of the public interest arguments

62. In her guidance on regulation 12(5)(b), the Commissioner states: "*The public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test*".
63. The Commissioner accepts that there is always a general public interest in disclosure, deriving from the purpose of EIR. She also accepts that in this case transparency of the tendering process for the provision of leisure and shopping facilities will be of interest to both local residents and business owners.
64. In this respect the council states it "*has also ensured transparency, as far as it was able, at various stages in the progress of the procurement and NRR's proposals to ensure residents and elected Members were as informed as possible on the proposed scheme*"
65. In considering where the balance of the public interest lies in the circumstances of this case, the Commissioner has given due weight to the fact that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice.
66. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the council. However, no such arguments appear to be present.
67. The Commissioner is also mindful of the timing of the request in this case, noting that, at the time of the request, pre-action protocol applicable to the legal proceedings had been initiated.
68. Accordingly, the Commissioner finds that regulation 12(5)(b) applies in respect of the Evaluation commentary [2] and that the public interest favours withholding the information. As such the Commissioner has not needed to consider regulation 12(5)(e).

Procedural matters

69. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.
70. The request was made on the 8 January 2018 and council's initial response was provided on 6 February 2018 which is within the time limit however the council changed its response in the review dated 10 August 2018, and again in its response to the Commissioner.
71. The Commissioner therefore concludes that the council failed to issue an adequate refusal notice and thus breached Regulation 14 of the EIR.

Right of appeal

72. 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

73. 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.
74. 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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